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HANDBOOK

ON THE

LAW OF NEGLIGENCE

By MORTON BARROWS, A. B., LL. B.

OF THE ST. PAUL BAR

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PREFACE.

Perhaps no single subdivision of general law has, in the last decade, so largely engrossed the attention of our courts, both state and federal, as that of Negligence. The most common form in which litigation of this class has obtruded into the courts is that of personal injury cases, so called. It has spread through the country like an epidemic, but, unlike the ordinary epidemics of physical disease, it gives no sign of passing away, and fairly promises to become endemic and permanent. At least two results are already conspicuous: On the one hand, the increased precautions against physical injury and legal liability which are being taken by property owners and employers of labor; and, on the other, the more precise definition and exact enunciation by the courts of the involved law. The former appeals more directly to the laity; the latter, to the legal profession; but the two are inseparable, and form a potent factor for the public weal.

It is in these changed conditions—the enforced attitude of property holder and employer, the altered rights of citizen and laborer, and the recent adjustments of these complex relations by the courts—that the present work finds its raison d'être. It is not claimed for it that it is a treatise, or that it is an exhaustive consideration of the subject. The aim has been to fairly and impartially state the settled law, and to so place before the reader the mooted points and conflicting decisions that he may arrive at his own conclusions, irrespective of any expressed sentiment on the part of the author.

In general, the text is the author's expression of the gist of the law as found in the leading cases and decisions of the courts of last resort; its only claim to merit lying in its accuracy and simplicity.

In the preparation of the chapter devoted to "Death by Wrongful Act," extended use has been made of the excellent work on that subject by Mr. Francis B. Tiffany.

St. Paul, Minn., November 1, 1899.

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HANDBOOK

ON THE

LAW OF NEGLIGENCE.

CHAPTER I.

DEFINITION AND ESSENTIAL ELEMENTS.

All attempts to bind down and limit the subject of this work by terse definition have necessarily proved unsatisfactory. The most that can be realized by an effort in this direction is a clear and concise grouping into a statement of pertinent words which shall serve to direct attention to the essential elements of the conditions composing and embraced in the word "negligence." Anything which attempts to go beyond this ceases to be a definition, and becomes merely descriptive and analytical.[1]

[1] Among numerous definitions, we note the following: "Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property." Also, in same case: "Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." Brett, M. R., in Heaven v. Pender, 11 Q. B. Div. 506. "The omitting to do something that a reasonable man would do, or the

For mere purposes of convenience in outlining the scope of this work, and not as a solution of the difficulty, or even an improvement over a dozen other definitions, we define actionable negligence thus:

doing something which a reasonable man would not do; and an action may be brought if thereby mischief is caused to a third party, not intentionally." Alderson, B., in Blyth v. Waterworks Co., 25 Law J. Exch. 213. "Negligence, in its civil relations, is such an inadvertent imperfection, by a responsible human agent, in the discharge of a legal duty, as immediately produces, in an ordinary and natural sequence, a damage to another. The inadvertency, or want of due consideration of duty is the injuria, on which, when naturally followed by the damnum, the suit is based." Whart. Neg. § 3. "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done. The essence of the fault may lie in omission or commission." Swayne, J., in Baltimore & P. R. Co. v. Jones, 95 U. S. 439, at page 442. "Negligence constituting a cause of civil action is such an omission, by a responsible person, to use the degree of care, diligence, and skill which it was his legal duty to use for the protection of another person from injury, as, in a natural and continuous sequence, causes unintended damage to the latter." Shear. & R. Neg. § 3. "Negligence is any lack of carefulness in one's conduct, whether in doing or abstaining from doing, wherefrom, by reason of its not fulfilling the measure of the law's requirement in the particular circumstances, there comes to another a legal injury to which he did not himself contribute by his own want of carefulness or other wrong." Bish. Noncont. Law, § 436. "Some relation of duty, public or private, special or general, must exist, either by contract or as an implication of public policy, before one man becomes liable to another for the consequences of a careless act or omission on the part of the first man which causes injury to the second man; and when such duty does exist, and such careless act or omission occurs, causing an injury in direct and regular sequence, the careless act becomes, in the eyes of the law, actionable negligence, for which the party injured has a right of action against the person inflicting the injury." Pol. Torts, 352. "Negligence, in law, is a breach of duty, unintentional, and proximately producing injury to another possessing equal rights." Smith, Neg. 1. See, also, definitions in following cases: Texas & P. Ry. Co. v. Murphy, 46 Tex. 356; Baltimore & P. R. Co. v. Jones, 95 U. S. 442; Gardner v. Heartt, 3 Denio (N. Y.) 232, at page 236; Tonawanda R. Co. v. Munger, 5 Denio (N. Y.) 255; Brown v. Railway Co., 49 Mich. 153, 13 N. W. 494; Northern Cent. Ry. Co. v. State, 29 Md. 420; Philadelphia, W. & B. R. Co. v. Stinger, 78 Pa. St. 225; Barber v. Town of Essex, 27 Vt. 62; Blaine v. Railroad Co., 9 W. Va. 252; Fletcher v. Railroad Co., 1 Allen (Mass.) 9; Cayzer v. Taylor, 10 Gray (Mass.) 274; Frankford & B. Turnpike Co. v. Philadelphia & T. R. Co., 54 Pa. St. 345; Kelsey v. Barney, 12 N. Y. 425; Unger v. Railway Co., 51 N. Y. 497; Grant v. Moseley, 29 Ala. 302; Pennsylvania R. Co. v. Matthews,

DEFINITION.

1. The inadvertent failure to perform a noncontractual duty, to the logically consequent damage of a third person.

ESSENTIAL ELEMENTS.

2. The essential elements are at once discerned:

(a) A legal duty.

(b Failure in performance.

(c) Inadvertence.

(d) Damage.

It is, of course, assumed that the neglector is a legally responsible person, otherwise a legal duty could not be predicated of his conduct.

The Legal Duty.

The duty violated must be one recognized by law; that is, one which the law requires to be done or forborne, either towards the public or a particular person. With every duty there is, of course, a corresponding right to compel its enforcement. But, as used in the definition, the term "duty" must be greatly contracted in its application, for not every failure to perform a legal duty, although the other elements of negligence may be present, will constitute actionable negligence. E. g. it is the legal duty of the maker of a promissory note to pay the same at maturity. The matter may entirely escape his mind, and the nonpayment damage the holder much beyond the amount for which the note was made, yet no action for negligence would lie.

36 N. J. Law, 531; Bizzell v. Booker, 16 Ark. 308; Chicago, B. & Q. R. Co. v. Johnson, 103 Ill. 512, 521; Great Western R. Co. v. Haworth, 39 Ill. 346, 353; Carter v. Railroad Co., 19 S. C. 20, 24; Kerwhaker v. Railroad Co., 3 Ohio St. 172; Galloway v. Railway Co., 87 Iowa, 458, 54 N. W. 447; Texas & P. Ry. Co. v. Gorman, 2 Tex. Civ. App. 144, 21 S. W. 158; Moulder v. Railroad Co., 1 Ohio N. P. 361; Texas & P. Ry. Co. v. Curlin, 13 Tex. Civ. App. 505, 36 S. W. 1003; Missouri, K. & T. Ry. Co. of Texas v. Hannig, 91 Tex. 347, 43 S. W. 508; Irvin v. Railway Co. (Tex. Civ. App.) 42 S. W. 661; Missouri, K. & T. Ry. Co. of Texas v. Webb (Tex. Civ. App.) 49 S. W. 526; Vaughan v. Railroad Co., 5 Hurl. & N. 687.

The duty violated must be noncontractual between the parties, implied or expressly created by law. When the minds of two parties meet, and they mutually agree to govern their conduct in accordance with expressed stipulations, any breach of that agreement is referable for adjustment to the contract. But the affairs of mankind are so intricate, and human nature so selfish, the tendency to jostle and crowd so ingrained in every class of society and business, that law, by implication and statute, is compelled to direct and check the individual at every turn, and to impress on him that he is not absolutely unrestricted in the enjoyment of his property; that "sic utere tuo ut alienum non lædas."

The duty must be owing from the defendant to the plaintiff, otherwise there can be no negligence, so far as the plaintiff is concerned.[1] Moreover, it should be borne in mind that there can be no duty to do an act unless one has a right to do it,[2] and the duty must be owing to plaintiff in an individual capacity, and not merely as one of the general public.[3]

Same—Breach of Moral Duty Insufficient.

This excludes from actionable negligence all failures to observe the obligations imposed by charity, gratitude, generosity, and the kindred virtues. The moral law would obligate an attempt to rescue a person in a perilous position,—as a drowning child,—but the law of the land does not require it, no matter how little personal risk it might involve, provided that the person who declines to act is not responsible for the peril.

Failure in Performance.

The breach of duty may consist in the omission to perform a positive duty, or in the commission of an act which is forbidden. Austin

§§ 1–2. [1] Hofnagle v. Railroad Co., 55 N. Y. 608; Gross v. Railway Co., 73 Ill. App. 217.

[2] Carpenter v. City of Cohoes, 81 N. Y. 21; Veeder v. Village of Little Falls, 100 N. Y. 343, 3 N. E. 306 (city held not liable for not putting fences on highway belonging to state).

[3] Peck v. Village of Batavia, 32 Barb. 634 (action against city for negligence in failing to keep bridge in repair); City of Albany v. Cunliff, 2 N. Y. 165; Blagrave v. Waterworks Co., 1 Hurl. & N. 369 (defendant blocked highway, and compelled public to cross plaintiff's land in order to get by the obstruction).

says:[4] "The party who is negligent omits an act and breaks a positive duty; the party who is heedless does an act and breaks a negative duty." This distinction is metaphysical, and of no practical value. Failure in performance will be discussed at greater length hereafter. For the present analysis, it is sufficient to state that in general the breach of duty consists in the failure to use the kind of care usually exercised by competent, prudent persons, in sufficient numbers to form a class, in similar transactions.

Inadvertence.

The failure to perform the required duty must be inadvertent. This is implied in the word "negligence" itself. Austin distinguishes between "negligence" and "heedlessness," but admits that the words indicate precisely the same state of mind. "In either case the party is inadvertent. In the first case he does *not* an act which he was bound to do, because he adverts not to it; in the second case he *does* an act which he was bound to forbear, because he adverts not to certain of its probable consequences. Absence of a thought which one's duty would naturally suggest is the main ingredient in each of the complex notions which are styled 'negligence' and 'heedlessness.' * * * The party who is guilty of rashness *thinks* of the probable mischief, but in consequence of a misapprehension, begotten by insufficient advertence, he assumes that the mischief will not ensue in the given instance or case. * * *"[5] It is immaterial how we define and distinguish the various mental conditions implied by these different terms. Each carries the characteristics of inadvertence,—the failure to connect the act with the result; and the culpability of the defendant lies equally in each, being referable to his want of due consideration for his duty.

Same—"Heedlessness" and "Malice" Distinguished.

Although the term "willful negligence" is paradoxical, authorities are not entirely wanting who sanction its use.[6] It is probable, as

[4] Aust. Jur. (3d Ed.) 1440.

[5] Id.

[6] Peoria Bridge Ass'n v. Loomis, 20 Ill. 235, 71 Am. Dec. 263; Toledo, W. & W. Ry. Co. v. Beggs, 85 Ill. 80; Holmes v. Railway Co., 48 Mo. App. 79; Hancock v. Railroad Co. (Ind. App.) 51 N. E. 369; Jacksonville S. E. Ry. Co. v. Southworth, 135 Ill. 250, 25 N. E. 1093; Chicago & N. W. R. Co. v. Chapman, 30 Ill. App. 504; Chesapeake & O. Ry. Co. v. Yost (Ky.) 29 S. W.

suggested by Mr. Smith,[7] that in many instances "willful" is used to mean only "reckless," but the explanation, if true, in no degree excuses the use of the word when applied to negligence. Moreover, to say that cases of negligence, as they arise in practice, and as found in reports, are not determined by theoretical considerations,[8] is beside the issue. It is on the line of practical treatment that we insist the distinction should be drawn. It is true that in many cases it is immaterial, as to the justice of the verdict, whether the act complained of is really willful or merely inadvertent, but in very many more the question of intent is vital to the issue. "The distinction between 'negligence' and 'willful tort' is important to be observed, not only in order to avoid a confusion of principles, but it is necessary in determining the question of damages, since, in case of an injury by

326. In Cleveland, C., C. & I. Ry. Co. v. Asbury, 120 Ind. 289, 22 N. E. 140, the complaint alleged "wanton" and "willful" negligence, and "intention to injure" plaintiff, but the court held the gist of the action to be simple negligence, and sustained the complaint. Also, see Louisville & N. R. Co. v. Mitchell, 87 Ky. 327, 8 S. W. 706; Hays v. Railway Co., 70 Tex. 602, 606, 8 S. W. 491. Whitt. Smith, Neg. p. 3: "If an act be intentional, it becomes fraudulent and criminal, or it may be a trespass. * * * 'Intentional negligence,' a phrase sometimes used, seems to involve a contradiction in terms. So, also, the words 'willful negligence' are often used, where, if by 'willful' is meant 'intentional,' the same objection applies; but if by 'willful' only 'recklessness' is meant, the phrase 'willful negligence' seems unobjectionable." Actions for "willful" and "wanton" negligence are frequently brought. Kentucky Cent. R. Co. v. Gastineau's Adm'r, 83 Ky. 119. Willful neglect in this case is defined as an intentional failure to perform a manifest duty in which the public has an interest, or which is important to the person injured in either preventing or avoiding the injury. Newport News & Mississippi Val. Co. v. Dentzel's Adm'r, 91 Ky. 42, 14 S. W. 958. In some cases knowledge of probable consequences is held equivalent to willfulness, and a consciousness must exist that the conduct will almost surely result in an injury. Georgia Pac. Ry. Co. v. Lee, 92 Ala. 262, 9 South. 230; Richmond & D. R. Co. v. Vance, 93 Ala. 144, 9 South. 574. It has been held that to run a locomotive in the dark, along a frequented road, at a high and dangerous rate of speed, without a headlight, and without ringing the bell, is evidence sufficient to establish willful negligence. East St. Louis Connecting Ry. Co. v. O'Hara, 49 Ill. App. 282, affirmed in 150 Ill. 580, 37 N. E. 917. Again, in Chesapeake & O. Ry. Co. v. Yost (Ky.) 29 S. W. 326, it was said that the term "willful neglect" applied only to actions for loss of life involving punitive damages.

7 Whitt. Smith, Neg. p. 3.

8 Pigg. Torts, 208.

the former, damages can only be compensatory, while in the latter they may also be punitory, vindictive, or exemplary.[9] The distinction is also needful because of the defenses which may be set up. Contributory negligence of the plaintiff is no bar to an action for a willful tort, though it is a complete bar to an action for negligence."[10]

From a consideration of the cases it seems probable that the words "willful," "malicious," and others indicating a wrongful, deliberate intention, are often coupled with the word "negligence" by the courts, and thus used to designate what they would term "gross negligence"; the recovery being limited to the immediate or proximate results of the wrongful act. And again "gross negligence" is made sufficiently elastic to include acts mala in se, and thus support a verdict for remote damages, as for a willful tort. This inaccuracy is to be regretted, for its evil consequences are far-reaching. Decisions thus made are quoted as authorities, and serve to sustain recovery for simple negligence, where the cause was remote, and also to allow the wrongdoer to escape the just penalty for an act which is malum in se, and not "gross negligence."

In criminal as well as in civil actions the term "negligence" is made to include both "heedlessness" and "rashness," provided always that the element of evil design is not injected to change the mental condition of mere inadvertence into malicious intent.

This mental condition involving malice—the intent that harm should flow from the act or omission—was clearly recognized by the Roman law under the term "dolus." Theoretically, at least, the presence of malicious intent is fatal in an action for negligence. If the malice is pleaded, it must be shown. Proof of mere negligence will

[9] Walrath v. Redfield, 11 Barb. (N. Y.) 368; 1 Suth. Dam. 724; Day v. Woodworth, 13 How. 363. The recovery of punitive or vindictive damages is allowed only where the act causing the injury has been willfully done, or where the circumstances indicate that there was a deliberate, preconceived, or positive intention to injure, or show that reckless disregard of person or property which is equally culpable. Wallace v. Mayor, etc., 2 Hilt. (N. Y.) 440; Moody v. McDonald, 4 Cal. 297.

[10] Derby's Adm'r v. Kentucky Cent. R. Co. (Ky.) 4 S. W. 303; McMahon v. Davidson, 12 Minn. 357 (Gil. 232). In Carroll v. Railroad Co., 13 Minn. 30 (Gil. 18), McMillan, J., says: "It is a well-settled rule that, although the defendant may be guilty of negligence, unless there was some intentional wrong on his part, the plaintiff cannot recover for an injury to which he himself has contributed."

not sustain a verdict.[11] On the other hand, it not infrequently happens that under a complaint for negligence proper the evidence elicited shows clearly the willfulness of the act or omission. The development of this element at the trial cannot nonsuit the plaintiff. The greater includes the less. He has overproved his case, and it will not be allowed to react to the injury of his claim. But, on the other hand, the plaintiff should not, in such an event, be allowed to make use of this element of malice for the purpose of influencing the jury, and securing greater damages than should be awarded in strict conformity to the pleaded case.

It follows, as a corollary to what has just been said, that, if malice has not been specifically pleaded in the complaint, direct proof of such intent is inadmissible at the trial.[12]

Damage.

The damage must be a logical consequence; the injury complained of must follow the breach of duty in an ordinary and natural sequence.

Much of the confusion which exists in the discussion of principles, and many of the apparent conflicts in reported cases, arise from an inaccurate use of terms. The Latin language was peculiarly adapted to exact definition, and the Romans themselves were strict and uniform in their employment of legal terms. On the other hand, the English language is proverbially loose and inexact, and the employment of many of the Latin terms therefore becomes not only convenient, but in many cases absolutely essential to distinct expression in legal analysis. Unless, however, the original and precise meaning of terms thus incorporated is carefully preserved, confusion and misunderstanding inevitably result. For the double purpose, therefore,

[11] Indiana, B. & W. Ry. Co. v. Burdge, 94 Ind. 46; Hancock v. Railway Co. (Ind. App.) 51 N. E. 369; Pennsylvania Co. v. Smith, 98 Ind. 42. In this case the complaint alleged that: "* * * defendant's engineer on said train, in a willful, reckless, careless, and unlawful manner, let on such a volume of steam to the engine as caused said train to jump," etc. The court says: "The principal question arising on the motion for a new trial is, was the verdict sustained by sufficient evidence? A verdict cannot be disturbed where there is any competent evidence tending to support it. Under the allegations of the complaint here, there could be no recovery unless the injury was proved to have been willful. We think there was no evidence tending to show a willful injury."

[12] Pennsylvania Co. v. Smith, 98 Ind. 42.

of exactness and convenience, it is necessary to call attention to the distinction between the "injuria" and the "damnum," both of which must be present in every case of actionable negligence. These terms will be used frequently hereafter in their strict application.

Same—"Injuria" and "Damnum" Distinguished.

Injuria does not mean injury or mischief. In its derivative sense it means unlawfulness; in its legal adoption it embodies whatever is done contrary to law. Damnum is legal mischief flowing in a direct and natural sequence from the injuria. Theoretically, at least, every fracture of the law—injuria—must be productive of damnum or harm; but the converse, viz. that every damnum or harm is the result of injuria, is not true. Damnum may occur without injuria. Thus, the harm done another by the willful destruction of his property is damnum, and, in the abstract sense, a law is violated; but in the concrete act under consideration it may well be that the circumstances excused the performer,—as, in the event of a conflagration in a city, the blowing up of buildings to prevent the spread of the fire is upheld and sanctioned by law as a necessity to avert greater loss.[13]

PROXIMATE CAUSE.

3. Negligence being proved, the relation of cause and effect must be established, directly connecting the breach of duty with the injury to plaintiff.

4. A proximate cause may be defined as one which, operating in accordance with natural laws, in a continuous sequence, is the main factor in producing the event in question.

It has been sometimes said that a person is not liable for an injury which he cannot foresee as the result of his act,[1] but this is certainly not true. The case of Blyth v. Birmingham Waterworks [2] has been often cited as supporting this doctrine, but we are unable

[13] Respublica v. Sparhawk, 1 Dall. 357; Maleverer v. Spinke, 1 Dyer, 36; Smith v. City of Rochester, 76 N. Y. 506; Neuert v. City of Boston, 120 Mass. 338. And see post, p. 452.

§§ 3–4. [1] Whitt. Smith, Neg. p. 24.

[2] Law J. 11 Exch. 781.

so to interpret this decision. In the case of Smith v. London & S. W. R. Co.,[3] Channell, B., said: "Where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not; and this is what was meant by Bramwell, B., in his judgment in Blyth v. Birmingham Waterworks Co.; * * * but, where it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not." In the case of Milwaukee & St. P. Ry. Co. v. Kellogg[4] the court say: "It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a 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." In this and many other decisions,[5] which may be regarded as leading, it will

[3] L. R. 6 C. P. 21.

[4] 94 U. S. 469, 475.

[5] Hoag v. Railroad Co., 85 Pa. St. 293: "A man's responsibility for his negligence and that of his servants must end somewhere. There is a possibility of carrying an admittedly correct principle too far. * * * The true rule is that the injury must be the natural and probable consequence of the negligence; such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act." See, also, Pol. Torts, 36, 37; Pittsburgh Southern Ry. Co. v. Taylor, 104 Pa. St. 306; Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, Transp. & Mfg. Co., 27 Fla. 1, 157, 9 South. 661; Deisenrieter v. Malting Co., 97 Wis. 279, 72 N. W. 735; Schneider v. Railway Co., 99 Wis. 378, 75 N. W. 169; Motey v. Granite Co., 20 C. C. A. 366, 74 Fed. 155. In McGrew v. Stone, 53 Pa. St. 436, the language of the court is still stronger: "Within the probable range of ordinary circumspection." In Milwaukee & St. P. Ry. Co. v. Kellogg, 94 U. S. 469, plaintiff's property, a sawmill, was destroyed by fire alleged to have been negligently caused by defendant in the operation of its steamboat. The testimony tended to show that defendants' steamboat set fire to defendants' elevator, and that the fire was thence communicated to plaintiff's mill. At the time of the fire a strong wind was blowing from the elevator towards the mill, which was 538 feet distant, and towards plaintiff's lumber, the nearest pile of which was 388 feet distant. The supreme court held that it was not error on the part of the trial court to refuse to charge as follows: "If they believed the sparks from the Jennie Brown set fire to the

be observed that the language is, "ought to have been foreseen." This theory is substantially sustained by a long line of decisions, in which the courts seemingly hold that the result must be so intimately connected with the cause, in a direct and natural sequence of events, that a man of ordinary prudence and intelligence would actually have foreseen some injurious result, although not necessarily the one that did ensue.[6]

elevator through the negligence of the defendants, and the distance of the elevator from the nearest lumber pile was three hundred and eighty-eight feet, and from the mill five hundred and thirty-eight feet, then the proximate cause of the burning of the mill and lumber was the burning of the elevator, and the injury was too remote from the negligence to afford a ground for a recovery." The court then goes on to say: "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments,—as an article at the end of a chain may be moved by a force applied to the other end, the force being the proximate cause of the movement; or as in the oft-cited case of the squib thrown in the market place. The question always is, was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"

[6] Louisville & N. R. Co. v. Guthrie, 10 Lea (Tenn.) 432; West Mahanoy Tp. v. Watson, 112 Pa. St. 574, 3 Atl. 866; Wabash, St. L. & P. Ry. Co. v. Locke, 112 Ind. 404, 14 N. E. 391; McClary v. Railroad Co., 3 Neb. 44; Atkinson v. Transportation Co., 60 Wis. 141, 18 N. W. 764; Toledo, W. & W. Ry. Co. v. Muthersbaugh, 71 Ill. 572; Tutein v. Hurley, 98 Mass. 211; Lane v. Atlantic Works, 111 Mass. 136; Hill v. Winsor, 118 Mass. 251; Campbell v. City of Stillwater, 32 Minn. 308, 20 N. W. 320; McDonald v. Snelling, 14 Allen (Mass.) 290; Scheffer v. Railroad Co., 105 U. S. 249; Pittsburgh Southern Ry. Co. v. Taylor, 104 Pa. St. 306; Ward v. Weeks, 7 Bing. 211 (slander); Greenland v. Chaplin, 5 Exch. 243; Clark v. Chambers, 3 Q. B. Div. 327; Illidge v. Goodwin, 5 Car. & P. 190; Coley v. City of Statesville, 121 N. C. 301, 28 S. E. 482. In Glover v. Railroad Co., L. R. 3 Q. B. 25, a counter, which had been left for some time on the sidewalk, unexpectedly fell, and killed a child. There was no doubt that the child's death was the proximate and direct result of defendant's action in leaving the counter where he did, but it was decided that he had not been negligent in so doing, and therefore no recovery could be had for the injury. Pol. Torts, pp. 36, 37: "It follows that if, in a particular case, the harm complained of is not such as a reasonable man in the

Test of Negligence must not be Used as Test of Proximate Cause.

In attempting to distinguish between the decisions that follow the doctrine laid down in Smith v. London & S. W. R. Co. and those that adopt the principle enunciated in Milwaukee & St. P. R. Co. v. Kellogg it should be observed that in many of the latter class there was no direct evidence of negligence or breach of duty on the part of defendant, but, instead of subjecting the original act of the defendant to the test of proper care, they apply this same test to the result of his act, in order to determine the relation of cause and effect. The argument shapes itself something like this: The injury could not have been foreseen by the use of proper care; therefore the lack of proper care cannot be its proximate cause. The inquiry should be conducted something as follows: Was proper care observed in the circumstances? And in determining this question reference must be had to possible injurious results happening to any one. If answered in the affirmative, the case falls to the ground, for there can be no recovery. If answered in the negative, it must then be asked, does the injury complained of fall within the class of results contemplated as possible in testing the degree of care required of the defendant? and, lastly, is the particular injury a regular and natural consequence of defendant's negligence?

It must be kept in mind that a breach of duty is essential to a recovery in an action for negligence. Harm may result directly from a nonnegligent act; there may be damnum without injuria.[7] A person, in a careful and prudent manner, attempts to separate two dogs which are fighting, and accidentally injures plaintiff.[8] Here the de-

defendant's place should have foreseen as likely to happen, there is no wrong and no liability." In attempting to distinguish between these cases and those which follow the rule laid down in Smith v. Railroad Co., viz.: "Where there is evidence of negligence, the person guilty of it is equally liable for the consequences, whether he could have foreseen them or not,"—it should be observed that in many of the preceding and similar cases there was no evidence of negligence other than the fact that the injury complained of resulted, more or less remotely, from defendant's act. In other words, the question to be determined in many of these cases is, was defendant guilty of any negligence at all? and not, was the injury the proximate result of defendant's act? See City of Chicago v. Starr, 42 Ill. 174.

[7] See ante, p. 9.

[8] Brown v. Kendall, 6 Cush. (Mass.) 292.

fendant's act was unquestionably the proximate cause of the injury, but it is equally unquestionable that no one in defendant's position could have foreseen the possibility of injury resulting to any one, and, if he used the proper degree of care in attempting to separate the dogs, there can be no liability. The difficulty experienced in laying down a general rule to cover every case has led some of the ablest judges to decline to state a fixed rule.[9] Notwithstanding these authorities, the tendency of the courts would seem to be that, negligence being established, the person guilty of it is liable for its consequences, whether they be such as he could or ought to have foreseen or not.[10]

[9] Page v. Bucksport, 64 Me. 51; Willey v. Inhabitants of Belfast, 61 Me. 569. Fleming v. Beck, 48 Pa. St. 309 (Agnew, J.): "In strict logic it may be said that he who is the cause of loss should be answerable for all the losses which flow from his causation. But in the practical workings of society the law finds, in this as in a great variety of other matters, that the rule of logic is impracticable and unjust. The general conduct and the reflections of mankind are not founded upon nice casuistry. Things are thought and acted upon rather in a general way than upon long, laborious, extended, and trained investigation. Among the masses of mankind, conclusions are generally the results of hasty and partial reflection. Their undertakings, therefore, must be construed in view of these facts; otherwise, they would often be run into a chain of consequences wholly foreign to their intentions. In the ordinary callings and business of life, failures are frequent. Few, indeed, always come up to a proper standard of performance, whether in relation to time, quality, degree, or kind. To visit upon them all the consequences of failure would set society upon edge, and fill the courts with useless and injurious litigation. It is impossible to compensate for all losses, and the law therefore aims at a just discrimination, which will impose upon the party causing them the proportion of them that a proper view of his acts and the attending circumstances would dictate."

[10] Smith v. Railroad Co., L. R. 6 C. P. 14. "The word 'proximately' is to be distinguished from the word 'culpably.' An act, to be culpable,—that is, to be a breach of legal duty,—must, as we have seen, be such as a reasonably careful man would foresee would be productive of injury, and the person is not liable for an injury he could not foresee; but a breach of duty, to be proximately producing injury, must be such that, whether defendant could foresee the injury to be probable or not, the breach of duty is in fact the probable cause of the injury." Smith, Neg. *16. Louisville, N. A. & C. R. Co. v. Nitsche, 126 Ind. 229, 26 N. E. 51, 45 Am. & Eng. R. Cas. 532 (Elliott, J.): "The wrong of the appellant put in motion the destructive agency, and the result is directly attributable to that wrong. In this instance cause and effect are interlinked. There is no break. The chain is perfect and complete."

The apparent severity of this rule is modified when it is considered that the establishment of negligence is a condition precedent to its enforcement, and in determining this question of negligence the test may be applied whether the occurrence of some such injury as that suffered by plaintiff, if seasonably suggested, would not have been recognized by defendant as a possible consequence of his act. In theory, at least, there is no escape from the conclusion that there is no limit to the liability of a person for the direct, natural results of his negligence. Consider the case of a fire set by defendant's locomotive. Concede that it occurred by reason of a defective spark

Baltimore City Pass. Ry. Co. v. Kemp, 61 Md. 74, 619, 18 Am. & Eng. R. Cas. 220; Terre Haute & I. R. Co. v. Buck, 96 Ind. 346, 18 Am. & Eng. R. Cas. 234; Liming v. Railroad Co., 81 Iowa, 246, 47 N. W. 67; Hess v. Mining Co., 178 Pa. St. 239, 35 Atl. 990; Rosenbaum v. Shoffner, 98 Tenn. 624, 40 S. W. 1086; International & G. N. R. Co. v. McIver (Tex. Civ. App.) 40 S. W. 438; Webster v. Symes, 109 Mich. 1, 66 N. W. 580. In Lowery v. Railway Co., 99 N. Y. 158, 1 N. E. 608, fire fell from defendant's locomotive upon a horse attached to a wagon, and also on the driver's hand. The horse ran away. The driver tried to stop him, and, failing, turned him onto the curb. The horse crossed the curb, and injured plaintiff. The court said: "* * * If he made a mistake of judgment, the defendant was not relieved of liability. We think that the damage sustained by the plaintiff was not too remote, and that the wrongful act of the defendant in allowing the coals to escape from the locomotive, thus causing the horse to become frightened and run, was the proximate cause of the injury, and that the running away of the horse and the collision with the plaintiff were the natural and probable consequences of the negligence of the defendant." In this case the court attempts to distinguish it from Ryan v. Railroad Co., 35 N. Y. 210, but it would appear that the Ryan Case is overruled both by this and Webb v. Railroad Co., 49 N. Y. 420. An instruction which attempts to define the character and degree of negligence which would authorize a recovery for an injury, but which omits the essential qualification that the negligence upon which a recovery must be based is such as contributed to the injury, and such alone, is erroneous. Chicago & N. W. Ry. Co. v. Carroll, 12 Ill. App. 643. In Ehrgott v. Mayor, etc., 96 N. Y. 264, Earl, J., emphatically refuses to recognize any limit of liability imposed by inability to foresee the injurious consequences. After a vigorous summary, he concludes as follows: "The true rule, broadly stated, is that a wrongdoer is liable for the damages which he causes by his misconduct. * * * The best statement of this rule is that a wrongdoer is responsible for the natural and proximate consequences of his misconduct, and what are such consequences must generally be left for the determination of the jury." But see Cook v. Railway Co., 97 Wis. 624, 74 N. W. 361.

arrester, and that the conditions prevailing were a high wind, a drouth, and unlimited prairies, continuously covered with a heavy growth of dead, dry grass. A falling spark sets fire to a tie, is communicated to weeds growing on the roadbed, spreads to the prairie grass, which in turn sets fire to A.'s house, situated 100 feet from the track. Unquestionably defendant is liable to A.[11] No new element is introduced by the supposition that A.'s house is removed 1 mile or 50 miles further out into the prairie grass. The determining conditions are unchanged by increasing the distance, and the defendant must still be held liable. Nor is the situation in any respect altered by apportioning the title to the intervening 50 miles among 50 or 100 owners.[12] In discussing the causal connection in such cases, Dr. Wharton says:[13] "Of course, we will all hold that in such case the liability must stop somewhere. The only rule to which we can resort is that just noticed,—that causal connection ceases where there is interposed between the negligence and the damage an object which, if due care had been taken, would have prevented the damage." It would seem to us that in this solution the learned doctor has not more than barely escaped a petitio principii. The only limitation of liability in cases like this, where the causal connection is not broken, must be placed by the good sense of the jury, under proper instructions from the court.

Where defendant's steamboat negligently set fire to accumulated shavings and sawdust on the shore, which in turn set fire to a planing mill, burned nearly 100 intervening houses, and finally destroyed plaintiff's building, at a distance of nearly a mile from the starting point, defendant's negligence was held to be the proximate cause of

[11] Webb v. Railroad Co., 49 N. Y. 420; Haverly v. Railroad Co., 135 Pa. St. 50, 19 Atl. 1013, 26 Wkly. Notes Cas. 321.

[12] Cincinnati, N. O. & T. P. R. Co. v. Barker, 94 Ky. 71, 21 S. W. 347. If the fire spreads from the matter first ignited, the intervention of considerable space, or of various physical objects, or a diversity of ownerships, does not preclude recovery, or affect the company's liability for its first negligent act. Chicago, St. L. & P. R. Co. v. Williams, 131 Ind. 30, 30 N. E. 696; Union Pac. Ry. Co. v. McCollum, 2 Kan. App. 319, 43 Pac. 97; Chicago, R. I. & P. Ry. Co. v. McBride, 54 Kan. 172, 37 Pac. 978; Chicago & E. R. Co. v. Luddington, 10 Ind. App. 636, 38 N. E. 342; Cincinnati, N. O. & T. P. Ry. Co. v. Barker, 94 Ky. 71, 21 S. W. 347.

[13] Smith, Neg. §§ 149, 150.

the injury to plaintiff. The case follows Milwaukee & St. P. Ry. Co. v. Kellogg,[14] although it is an extension of the principle therein decided. In rendering its decision the court says: "In our opinion, upon the evidence in this case, it was for the jury, and not the court, to say whether the negligence of the defendant was the proximate cause of the burning of the Atkinson house. * * * The force of the wind at the time, the dryness of the season, and the combustible nature of the buildings intervening between the place where the fire was kindled and the place where the plaintiff's house stood, were all facts to be considered in determining whether there was a reasonable probability that the fire would extend so far; and the jury must pass upon these facts as bearing upon the question of reasonable probability." [15] The court then cites with approval the language of Dixon, J., in Kellogg v. Chicago & N. W. Ry. Co.,[16] as follows: "It will be observed that the rule, as we find it laid down, and as we believe it to be, is not that the injury sustained must be the necessary or unavoidable result of the wrongful act, but that it shall be the natural and probable consequence of it, or one likely to ensue from it."

In Milwaukee & St. P. Ry. Co. v. Kellogg [17] the United States supreme court approve the language of the circuit court in instructing the jury as follows: "The question always is, was there an unbroken connection between the wrongful act and the injury,—a con-

[14] 94 U. S. 469.

[15] Atkinson v. Transportation Co., 60 Wis. 141, 18 N. W. 764; Green Ridge R. Co. v. Brinkman, 64 Md. 52, 20 Atl. 1024; Gram v. Railroad Co., 1 N. D. 252, 46 N. W. 972; Potter v. Gas Co., 183 Pa. St. 575, 39 Atl. 7; Denver, T. & G. R. Co. v. Robbins, 2 Colo. App. 313, 30 Pac. 261. But see Pennsylvania Co. v. Whitlock, 99 Ind. 16; Louisville, N. A. & C. Ry. Co. v. Nitsche, 126 Ind. 229, 26 N. E. 51.

[16] 26 Wis. 223, at page 281.

[17] 94 U. S. 469, repudiating the doctrine of Ryan v. Railroad Co., 35 N. Y. 210, and Pennsylvania R. Co. v. Kerr, 62 Pa. St. 353. But in a subsequent case—Scheffer v. Railroad Co., 105 U. S. 249—it was held that the suicide of deceased "was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train." In this case the injuries sustained by deceased, through defendant's negligence, produced insanity leading to suicide. The ruling in Kellogg v. Railway Co. is, however, fully approved.

tinuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a 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. * * * We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. * * * In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time."

EFFICIENT, INTERVENING, OR CO-OPERATING CAUSE—DEFINITION.

5. Where an independent, efficient, wrongful cause intervenes between the original wrongful act and the injury ultimately suffered, the former, and not the latter, is deemed the proximate cause of the injury.

Intervening Cause.

An efficient, intervening cause is a new proximate cause, which breaks the connection with the original cause, and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original action, and rendering its effect in the chain of causation remote.[1]

§ 5. [1] Louisville & N. R. Co. v. Kelsey, 89 Ala. 287, 7 South. 648; Pennsylvania Co. v. Whitlock, 99 Ind. 16; Read v. Nichols, 118 N. Y. 224, 23 N. E.

It is immaterial how many new elements or forces have been introduced; if the original cause remains active, the liability for its result is not shifted.[2] Thus, where a horse is left unhitched in the street,

468; Fairbanks v. Kerr, 70 Pa. St. 86; Scheffer v. Railroad Co., 105 U. S. 249; Agnew v. Corunna, 55 Mich. 428, 21 N. W. 873; Smith v. Sherwood Tp., 62 Mich. 159, 28 N. W. 806; Milwaukee & St. P. Ry. Co. v. Kellogg, 94 U. S. 469; Wellman v. Borough of Susquehanna Depot, 167 Pa. St. 239, 31 Atl. 566; St. Joseph & G. I. R. Co. v. Hedge, 44 Neb. 448, 62 N. W. 891; Texas & P. Ry. Co. v. Woods, 8 Tex. Civ. App. 462, 28 S. W. 416; Pollard v. Railroad Co., 87 Me. 51, 32 Atl. 735; City of Peoria v. Adams, 72 Ill. App. 662; Willis v. Armstrong Co., 183 Pa. St. 184, 38 Atl. 621; Childrey v. City of Huntington, 34 W. Va. 457, 12 S. E. 536; Schwartz v. Shull (W. Va.) 31 S. E. 914; St. Louis, I. M. & S. Ry. Co. v. Maddry, 57 Ark. 306, 21 S. W. 472; Read v. Nichols, 118 N. Y. 224, 23 N. E. 468. In Beall v. Athens Tp., 81 Mich. 536, 45 N. W. 1014, a horse driven by plaintiff shied at a log of wood, and, being struck with the whip, tipped the buggy over, causing the injuries complained of. The court says: "The important question in the case is whether the narrowness of the highway and the neglect to place railings or barriers along it primarily caused the accident. The township is only liable where the neglect complained of was the proximate cause of the injury. If such neglect was the secondary or remote cause, the township is not liable. The testimony shows conclusively, and without contradiction, that the primary cause of the accident arose from the horse taking fright at a log at the side of the road, and the act of the driver in striking the horse a blow with his whip." The trial court instructed the jury: "So it makes no difference what the horse got frightened at, if the negligence of the township is the cause of the accident not being prevented." This was held error, for the reason that it loses sight of the distinction between proximate and remote cause, the appellate court saying: "An injury caused by negligence and an accident not being prevented by negligence are very distinct in operation and effect."

[2] Scott v. Shepherd, 2 W. Bl. 892, 3 Wils. 403 (squib case); City of Atchison v. King, 9 Kan. 550; Murdock v. Inhabitants of Warwick, 4 Gray (Mass.) 178; Lane v. Atlantic Works, 111 Mass. 136; Lake v. Milliken, 62 Me. 240; Marble v. City of Worcester, 4 Gray (Mass.) 395; McMahon v. Davidson, 12 Minn. 357 (Gil. 232); Nagel v. Railway Co., 75 Mo. 653; Benjamin v. Railway Co., 133 Mo. 274, 34 S. W. 590; Willis v. Publishing Co. (R. I.) 38 Atl. 947; Jensen v. The Joseph B. Thomas, 81 Fed. 578; Gould v. Schermer, 101 Iowa, 582, 70 N. W. 697; Union Pac. Ry. Co. v. Callaghan, 6 C. C. A. 205, 56 Fed. 988; Mexican Nat. Ry. Co. v. Mussette, 86 Tex. 708, 26 S. W. 1075; Stanton v. Railroad Co., 91 Ala. 382, 8 South. 798; Murdock v. Walker, 43 Ill. App. 590; Gibney v. State, 137 N. Y. 1, 33 N. E. 142; Howe v. Ohmart, 7 Ind. App. 32, 33 N. E. 466; East Tennessee, V. & G. Ry. Co. v. Hesters, 90 Ga. 11, 15 S. E. 828; Same v. Hall, 90 Ga. 17, 16 S. E. 91; Johnson v. Telephone Exch. Co., 48 Minn. 433, 51 N. W. 225; Chicago & N. W. Ry. Co. v. Prescott,

and unattended, and is maliciously frightened by a stranger, and runs away. But for the intervening act he would not have run away, and the injury would not have occurred; yet it was the negligence of the driver in the first instance which made the runaway possible. This negligence has not been superseded or obliterated, and the driver is responsible for the injuries resulting.[3] If, however, the intervening, responsible cause be of such a nature that it would be unreasonable to expect a prudent man to anticipate its happening, he will not be responsible if damage results solely from the intervention.[4] The intervening cause may be culpable, intentional, or merely negligent.[5]

Co-operating Cause.

It is the universal rule that where an intelligent, wrongful cause co-operates or concurs with the act complained of to produce the injury, no matter what the degree of its causation may be, it in no way relieves the defendant from legal responsibility.[6] Thus, where de-

8 C. C. A. 109, 59 Fed. 237; Cairncross v. Village of Pewaukee, 86 Wis. 181, 56 N. W. 648; Union Pac. Ry. Co. v. Callaghan, 6 C. C. A. 205, 56 Fed. 988; Elder v. Coal Co., 157 Pa. St. 490, 27 Atl. 545, 33 Wkly. Notes Cas. 333; City of Albany v. Watervliet Turnpike & Railroad Co., 76 Hun, 136, 27 N. Y. Supp. 848; Mexican Nat. Ry. Co. v. Mussette, 86 Tex. 708, 26 S. W. 1075; Berg v. Railway Co., 70 Minn. 272, 73 N. W. 648; Meade v. Railway Co., 68 Mo. App. 92; Gardner v. Friederich, 25 App. Div. 521, 49 N. Y. Supp. 1077; Murdock v. Walker, 43 Ill. App. 590.

[3] McCahill v. Kipp, 2 E. D. Smith (N. Y.) 413.

[4] Parker v. City of Cohoes, 10 Hun, 531 (excavation properly guarded, and barriers removed in the night by third party); Carter v. Towne, 103 Mass. 507; Davidson v. Nichols, 11 Allen (Mass.) 514.

[5] Pennsylvania Co. v. Whitlock, 99 Ind. 16; Otten v. Cohen (City Ct. N. Y.) 1 N. Y. Supp. 430; Scheffer v. Railroad Co., 105 U. S. 249; Kitteringham v. Railway Co., 62 Iowa, 285, 17 N. W. 585; McClary v. Railroad Co., 3 Neb. 44; Louisville & N. R. Co. v. Guthrie, 10 Lea (Tenn.) 432; West Mahonoy Tp. v. Watson, 116 Pa. St. 344, 9 Atl. 430.

[6] Martin v. Iron Works, 31 Minn. 407, 18 N. W. 109; Atkinson v. Transportation Co., 60 Wis. 141, 18 N. W. 764; Eaton v. Railroad Co., 11 Allen (Mass.) 500; Delaware, L. & W. R. Co. v. Salmon, 39 N. J. Law, 299; Hunt v. Railroad Co., 14 Mo. App. 160; Liming v. Railroad Co., 81 Iowa, 246, 47 N. W. 66; Johnson v. Telephone Exch. Co., 48 Minn. 433, 51 N. W. 225; Wilder v. Stanley, 65 Vt. 145, 26 Atl. 189; McKenna v. Baessler, 86 Iowa, 197, 53 N. W. 103; Board of Com'rs of Boone Co. v. Mutchler, 137 Ind. 140, 36 N. E. 534; Postal Tel. Cable Co. v. Zopfi, 93 Tenn. 369, 24 S. W. 633; Id., 19 C. C. A. 605, 73 Fed. 609; Jung v. Starin, 12 Misc. Rep. 362, 33 N. Y. Supp.

fendant negligently piled a quantity of smokestacks and other material near the track of a railroad company, and, a train coming along, one of the cars caught one of the stacks, pushed it against a tower, in which plaintiff was stationed in his employment of signaling trains, and he was injured, the defendant was held liable, although the railroad company may also have been negligent in running its trains; the danger of contact with the pile of smokestacks being evident.[7] The court, in its opinion, says: "If piling the material near the track was a negligent act, it was negligence not only as to the railroad company, whose property and trains might be endangered thereby, but also as to all persons who might probably be put in danger from its probable consequences. * * * It was for the jury to say whether an ordinarily prudent person would have foreseen that so piling the material made liable to happen the very things that did happen, to wit, that a passing train should catch or push or carry the material against the tower, so as to endanger any one stationed in it."[8] In a recent Wisconsin case,[9] however, where two fires united, either one of which would have destroyed plaintiff's property, a novel doctrine is laid down: "When a cause set in motion by negligence reaches to the result complained of in a line of responsible causation, and another cause, having no responsible origin, reaches it at the same time, so that what then takes place would happen as the effect of either cause, entirely regardless of the other, then the consequence cannot be said with any degree of certainty to relate to negligence as its antecedent." But the court concludes that, if each fire had been caused by a responsible person, the liability would have been joint and several, "because, whether the occurrence be intentional, actual, or constructive, each wrongdoer in effect adopts the conduct of his coactor, and for the further reason that it is impossible to apportion the

650; Chicago, R. I. & P. Ry. Co. v. Sutton, 11 C. C. A. 251, 63 Fed. 394; South Bend Mfg. Co. v. Liphart, 12 Ind. App. 185, 39 N. E. 908; Waller v. Railway Co., 59 Mo. App. 410, 1 Mo. App. Rep'r, 56; McClellan v. Railway Co., 58 Minn. 104, 59 N. W. 978; Gould v. Schermer, 101 Iowa, 582, 70 N. W. 697; Connelly v. Rist, 20 Misc. Rep. 31, 45 N. Y. Supp. 321.

[7] Martin v. Iron Works, 31 Minn. 407, 18 N. W. 109.

[8] Martin v. Iron Works, 31 Minn. 407, 18 N. W. 109.

[9] Cook v. Railway Co., 97 Wis. 624, 74 N. W. 561; Marvin v. Railway Co., 79 Wis. 140, 47 N. W. 1123; Pierce v. Michel, 1 Mo. App. Rep'r, 74; Stone v. Railroad Co., 171 Mass. 536, 51 N. E. 1.

damage, or to say that either perpetrated any distinct injury that can be separated from the whole."

Distinction between Cause and Condition.

Cause implies a responsible human agent, capable of making a deliberate choice. Take away this power of volition to influence his own conduct, and he becomes a mere automaton, another form of matter, a natural force or a condition.[10] It follows that, if choice and volition cannot be exercised by such an agent, neither blame nor civil liability should attach to his acts. Such irresponsible agents are: Insane persons, infants,[11] or those under duress.[12] They may be regarded as conditions only, or as states of nature; and a mere condition cannot divert or relieve a rational agent from responsibility.[13]

"*Inevitable Accident.*"—"*Act of God.*"

"Inevitable accident" and "act of God" introduce no new elements into the consideration of this branch of the subject. They are merely convenient "catch-words" for designating a class of cases in which the conditions indicated by these phrases are factors, more or less potent, in determining liability. They are generally used of extraordinary exhibitions of natural forces,—extraordinary either in point of the time of their occurrence or their severity; as of snow, rain, wind, thunder and lightning. It is sometimes said that the term "act of God," in legal phraseology, emphasizes the occurrence as opposed to human will; but we think this idea is misleading, and tends to convey the impression that when, in this class of cases, a man is released from responsibility, it is because his will and efforts must necessarily be unavailing when opposed to the Deity. All natural phenomena but emphasize the laws which they exemplify, and the observation of these laws in daily life is essential to the discharge of the most or-

[10] Whart. Neg. § 87.

[11] Coombs v. Cordage Co., 102 Mass. 572; Chicago & A. R. Co. v. Gregory, 58 Ill. 226.

[12] Johnson v. Railroad Co., 70 Pa. St. 357; Scott v. Hunter, 46 Pa. St. 192.

[13] Salisbury v. Herchenroder, 106 Mass. 458; Woodward v. Aborn, 35 Me. 271; Jensen v. The Joseph B. Thomas, 81 Fed. 578; McFarlane v. Town of Sullivan, 99 Wis. 361, 74 N. W. 559; City of Atchison v. King, 9 Kan. 550 (sidewalk defective, and coated with ice; the condition concurs with the negligence to produce injury, but the persons responsible for the condition of the road are liable); Dickinson v. Boyle, 17 Pick. (Mass.) 78.

dinary duties. A man is presumed to intend the natural consequences of his acts, and "natural," in this sense, includes the operation of cosmic law. But our knowledge of certain natural laws—as those controlling meteorological conditions—is at present limited, and our responsibility should cease when our well-considered acts conduce to injury through a manifestation of natural law which is so unusual as to lie practically outside the pale of experience. It is in this sense only that a so-called "act of God" is of importance in determining the question of liability.

Where defendant negligently left a wire connecting plaintiff's building with another, which stood on elevated land, and on which was a pole about 25 feet high, and plaintiff's building was burned by reason of the lightning striking the pole, and being thence conducted along the wire, the court said: "The further argument is made that the stroke of lightning was the 'act of God,' for which no one is responsible. Certainly a stroke of lightning is an 'act of God'; but that is not the question here presented, or, rather, another element—i. e. the negligence of man—is added to the question, which materially alters its scope. If I, owning a high mast or building, which I know is so situated as to be likely to be struck by lightning, construct an attractive path for the lightning to my neighbor's roof, so that his house is destroyed by a bolt which strikes my mast or building, shall I escape liability for my negligent or wrongful act by pleading that the lightning was the act of God? Certainly not. I invited the stroke of one of the most destructive powers of nature, and negligently turned its course to my neighbor's property. * * * The lightning stroke is in no greater degree the act of God than the usual freshets occurring in a river."[14] It follows that a natural occurrence, extraordinary either in point of season or severity, is available for purposes of defense in an action for negligence only in so far as its unusual character may serve to negative any presumption of negligence in the conduct of the defendant.

For purposes of convenience the following propositions may be formulated:

When an act, either negligent or nonnegligent, is followed by, but not connected with, an extraordinary natural occurrence or accident,

[14] Jackson v. Telephone Co., 88 Wis. 243, 60 N. W. 430.

which alone produces injury, the occurrence becomes the proximate cause, and, of course, no liability results to the original actor.[15]

When a negligent or wrongful act is followed by an extraordinary natural occurrence, which connects the act with consequent injury, the wrongdoer is still liable; and this is true even if the original negligent act, without the concurrence of the natural phenomenon, would not in itself have produced harm.[16]

[15] Wald v. Railroad Co., 162 Ill. 545, 44 N. E. 888 (Johnstown flood); International & G. N. R. Co. v. Hynes, 3 Tex. Civ. App. 20, 21 S. W. 622; Black v. Railroad Co., 30 Neb. 197, 46 N. W. 428; Blythe v. Railway Co., 15 Colo. 333, 25 Pac. 702; Smith v. Railway Co., 91 Ala. 455, 8 South. 754; Norfolk & W. R. Co. v. Marshall's Adm'r, 90 Va. 836, 20 S. E. 823. Horse takes fright, and runs away, and injury is caused by contact with defect in highway or bridge; town not liable. Davis v. Inhabitants of Dudley, 4 Allen (Mass.) 557, and Moulton v. Inhabitants of Sandford, 51 Me. 127. In Baltimore & O. R. Co. v. Sulphur Springs Independent School Dist., 96 Pa. St. 65, a defective culvert, not sufficient to carry off water in a flood. Green, J.: "If the act of God in this particular case was of such an overwhelming and destructive character as, by its own force, and independently of the particular negligence alleged or shown, produced the injury, there would be no liability, though there was some negligence in the maintenance of the particular structure." Nitro-Phosphate & O. C. Manure Co. v. London & St. K. Docks Co., 9 Ch. Div. 503; River Wear Com'rs v. Adamson, 2 App. Cas. 743; Blyth v. Waterworks Co., 11 Exch. 781. Withers v. Railway Co., 3 Hurl. & N. 969: Held, that the company was not bound to have constructed their embankment so as to meet such extraordinary floods. International & G. N. R. Co. v. Halloren, 53 Tex. 46; Salisbury v. Herchenroder, 106 Mass. 458. But it is not error to refuse to charge that defendant was not liable if his sign, whose fall injured plaintiff, fell by the act of God, the strongest testimony in support of that hypothesis being that it fell on a windy day in March. St. Louis, I. M. & S. Ry. Co. v. Hopkins, 54 Ark. 209, 15 S. W. 610. Where a building fell during a violent storm that wrecked other neighboring buildings, and there was evidence tending to show that building was unsafe, held, that fall of building would be primarily attributed to storm, and burden rested on plaintiff to show unfitness of building. Turner v. Haar, 114 Mo. 335, 21 S. W. 737.

[16] Palmer v. Inhabitants of Andover, 2 Cush. (Mass.) 600; Savannah, F. & W. Ry. Co. v. Commercial Guano Co., 103 Ga. 590, 30 S. E. 555; Richmond & D. R. Co. v. White, 88 Ga. 805, 15 S. E. 802; Adams Exp. Co. v. Jackson, 92 Tenn. 326, 21 S. W. 666; Lang v. Railroad Co., 154 Pa. St. 342, 26 Atl. 370; Gleeson v. Railway Co., 140 U. S. 435, 11 Sup. Ct. 859; Detzur v. Brewing Co. (Mich.) 77 N. W. 948; Tyler v. Ricamore, 87 Va. 466, 12 S. E. 799; Salisbury v. Herchenroder, 106 Mass. 458 (swinging sign, contrary to ordinance, blown down by severe gale); Woodward v. Aborn, 35 Me. 271; Lords

When an act is followed by and connected with an extraordinary natural occurrence, which alone produces injury, the character, unseasonableness, and degree of severity of the phenomenon may be considered in determining whether the original act was negligent or not.[17] A person's legal duty does not obligate him to govern his conduct with a view to guarding against every possible contingency. He must use the reasonable care of an ordinarily prudent person in similar circumstances, the circumstances being essential to the determination of the requisite degree of care. Thus, although water con-

Bailiff-Jurats of Romney Marsh v. Trinity House, L. R. 5 Exch. 204; Davis v. Garrett, 6 Bing. 716; Dickinson v. Boyle, 17 Pick. (Mass.) 78. Where the fall of a railroad bridge is caused by an act of God,—as a cloudburst,—an employé cannot hold the company liable unless its negligence, to an extent amounting to want of ordinary care, contributed to the disaster. Rodgers v. Railroad Co., 67 Cal. 607, 8 Pac. 377. But where extraordinary occurrence concurs with negligent delay of defendant, authorities do not agree as to liability. The following are against liability: Morrison v. Davis, 20 Pa. St. 171; Denny v. Railroad Co., 13 Gray (Mass.) 481; Daniels v. Ballantine, 23 Ohio St. 532; Dubuque Wood & Coal Ass'n v. City and County of Dubuque, 30 Iowa, 176 (compare this case with Scott v. Hunter, 46 Pa. St. 192, and Dickinson v. Boyle, 17 Pick. [Mass.] 78); McClary v. Railroad Co., 3 Neb. 44; Memphis & C. R. Co. v. Reeves, 10 Wall. 176; Hoadley v. Transportation Co., 115 Mass. 304. The following hold defendant liable where negligent delay concurs with extraordinary occurrence to produce injury: Republican Val. R. Co. v. Fink, 18 Neb. 89, 24 N. W. 691 (in this case an improperly constructed embankment gave way in an unusual flood); Condict v. Railway Co., 54 N. Y. 500; Michaels v. Railroad Co., 30 N. Y. 564. Where a wire was negligently placed, and attracted lightning, setting fire to a house, "act of God" was held no defense. Jackson v. Telephone Co., 88 Wis. 243, 60 N. W. 430. In Austin v. Steamboat Co., 43 N. Y. 75, the court says: "A party cannot avail himself of the defense of 'inevitable accident,' who, by his own negligence, gets into a position which renders the accident inevitable." Titcomb v. Railroad Co., 12 Allen (Mass.) 254. And where a load of cotton was delayed in railroad yard half an hour, when a break in machinery caused fire and loss of cotton, it was held that the breakage of machinery, coupled with the delay, constituted the proximate cause. Deming v. Storage Co., 90 Tenn. 306, 17 S. W. 89.

[17] Where an unusual frost burst water pipes laid according to law. Blyth v. Waterworks Co., 11 Exch. 781. Fall of a railroad bridge, caused by a cloudburst. Rodgers v. Railroad Co., 67 Cal. 607, 8 Pac. 377; Withers v. Railroad Co., 3 Hurl. & N. 969 (in this case the court held "the company was not bound to have a line constructed so as to meet such extraordinary floods"); City of Clay Centre v. Jevons, 2 Kan. App. 568, 44 Pac. 745; Kincaid v. Railway Co., 1 Mo. App. Rep'r, 543, 62 Mo. App. 365.

fined in a large body by a dam becomes a very dangerous instrumentality, requiring the exercise of a very high degree of care, reasonable prudence does not demand that the dam shall be so constructed as to be absolutely safe, and to withstand the pressure of an unprecedented volume of water, caused by an extraordinary flood.[18] But the unusual character, unseasonableness, and severity of the flood are proper matters for consideration in determining whether the dam was constructed with reasonable care and skill.[19]

Concurring Negligence.

If the concurrent negligence of two or more persons results in injury to a third, he may maintain an action for damage against either or all.[20] A common illustration of this principle is found in the frequent suits brought against municipal corporations for damages caused by defects in the highway, which defective conditions were brought about by the acts of third persons.[21]

In all cases where the negligence of two or more persons concurs to

[18] Withers v. Railroad Co., 3 Hurl. & N. 969.

[19] Id.

[20] Eaton v. Railroad Co., 11 Allen (Mass.) 500; Lockhart v. Lichtenthaler, 46 Pa. St. 151; Congreve v. Morgan, 18 N. Y. 84; Ricker v. Freeman, 50 N. H. 420; Wheeler v. City of Worcester, 10 Allen (Mass.) 591; Chapman v. Railroad Co., 19 N. Y. 341; Barrett v. Railroad Co., 45 N. Y. 628; McMahon v. Davidson, 12 Minn. 357 (Gil. 232); Griggs v. Fleckenstein, 14 Minn. 81 (Gil. 62); Lynch v. Nurdin, 1 Q. B. 29; Illidge v. Goodwin, 5 Car. & P. 190; McCahill v. Kipp, 2 E. D. Smith (N. Y.) 413; South Bend Mfg. Co. v. Liphart, 12 Ind. App. 185, 39 N. E. 908; Quill v. Telephone Co., 13 Misc. Rep. 435, 34 N. Y. Supp. 470; Waller v. Railway Co., 59 Mo. App. 410; McClellan v. Railroad Co., 58 Minn. 104, 59 N. W. 978; Lake Shore & M. S. Ry. Co. v. McIntosh, 140 Ind. 261, 38 N. E. 476; Connelly v. Rist, 20 Misc. Rep. 31, 45 N. Y. Supp. 321; Jung v. Starin, 12 Misc. Rep. 362, 33 N. Y. Supp. 650; Chicago, R. I. & P. Ry. Co. v. Sutton, 11 C. C. A. 251. 63 Fed. 394; Galveston, H. & S. A. Ry. Co. v. Croskell, 6 Tex. Civ. App. 160, 25 S. W. 486; Wolff Mfg. Co. v. Wilson, 46 Ill. App. 381; Wilder v. Stanley, 65 Vt. 145, 26 Atl. 189; Kansas City, M. & B. R. Co. v. Burton, 97 Ala. 240, 12 South. 88; Gardner v. Friederich, 25 App. Div. 521, 49 N. Y. Supp. 1077; Pratt v. Railway Co., 107 Iowa, 287, 77 N. W. 1064. And see ante, "Co-operating Cause," p. 19.

[21] Norristown v. Moyer, 67 Pa. St. 355; City of Lowell v. Spaulding, 4 Cush. (Mass.) 277; Mayor, etc., of Baltimore v. Pendleton, 15 Md. 12; Willard v. Newbury, 22 Vt. 458; Hammond v. Town of Mukwa, 40 Wis. 35; Veazie v. Railroad Co., 49 Me. 119; Wellcome v. Inhabitants of Leeds, 51 Me. 313; Currier v. Inhabitants of Lowell, 16 Pick. (Mass.) 170; Prentiss v. Bos-

produce the injury complained of, the law disregards the relative importance of the different acts as affecting the result,[22] although, if the injuries resulting from the distinct acts of negligence are separable, the damage may be apportioned correspondingly.[23] Thus, where the steamboat of defendant negligently set fire to piles of shavings which had been allowed to accumulate about the planing mill of B., from which the fire spread to the planing mill, and thence, after destroying many intervening houses, to the property of plaintiff, situate nearly a mile distant from the planing mill, it appeared that the owner of the planing mill had been negligent in allowing the shavings and sawdust to accumulate about his mill, and it was claimed by defendant that this negligence of the mill owner was such an intervening cause between the negligence of defendant and the final destruction of plaintiff's house that its destruction must be, in law, attributed to such intervening cause. In disposing of this point the court says: "Whether we consider the negligence of the owners of the planing mill as an interposition before or concurrently with the negligence of the defendant in producing the damage, it is no defense to the plaintiff's action. * * * In one sense the negligence of the owner of the planing mill was concurrent with the negligence of the defendant. The negligence of the owner of the mill was a continuing negligence; it was present and acting at the time of the negligence of the defendant; it aided in kindling the fire and spreading it to the mill, and from that to the surrounding buildings."[24]

ton, 112 Mass. 43; Elliot v. Concord, 27 N. H. 204; Town of Centerville v. Woods, 57 Ind. 192; Thuringer v. Railroad Co., 82 Hun, 33, 31 N. Y. Supp. 419.

[22] Hunt v. Railroad Co., 14 Mo. App. 160; Eaton v. Railroad Co., 11 Allen (Mass.) 500; Atkinson v. Transportation Co., 60 Wis. 141, 18 N. W. 764; Martin v. Iron Works, 31 Minn. 407, 18 N. W. 109; Delaware, L. & W. R. Co. v. Salmon, 39 N. J. Law, 299; Chicago, R. I. & P. Ry. Co. v. Sutton, 11 C. C. A. 251, 63 Fed. 394; Galveston, H. & S. A. Ry. Co. v. Croskell, 6 Tex. Civ. App. 160, 25 S. W. 486.

[23] Nitro-Phosphate & O. C. Manure Co. v. London & St. K. Docks Co., 9 Ch. Div. 503. In this case the apportionment was made where the injury was caused in part by negligence of defendant and in part by act of God.

[24] Atkinson v. Transportation Co., 60 Wis. 141, 18 N. W. 764. And see generally on same point: Bartlett v. Gaslight Co., 117 Mass. 533; Ricker v. Freeman, 50 N. H. 420; Lake v. Milliken, 62 Me. 240; Small v. Railroad Co., 55 Iowa, 582, 18 N. W. 437; Griggs v. Fleckenstein, 14 Minn. 81 (Gil. 62); Pastene v. Adams, 49 Cal. 87; Lane v. Atlantic Works, 107 Mass. 104; Pow-

Degrees of Care.

Under the Roman law, negligence or "culpa" was divided into three distinct classes: "Culpa levis," "culpa," and "culpa lata"; and these three terms were respectively co-ordinated with the duty whose breach was under consideration. If the duty demanded was of an imperative nature, its breach was determined by an act or omission involving only slight negligence, or culpa levis. If of an ordinary kind, demanding only normal or average prudence, very slight negligence was insufficient to establish liability. The act or omission must involve more than culpa levis; it must involve culpa; while a breach of duty of the lightest nature must be attended with culpa lata, or a flagrant disregard of the rights of the aggrieved party.

For the purpose of further classifying the kinds of duty whose breach and attendant negligence was under consideration, the duties were divided into three groups: When the transaction was for the benefit of (1) the performer, (2) of both parties, and (3) for the performee only. Under the first division, where the transaction was carrried on for the benefit of the performer, the other party being only in the capacity of an auxiliary, and not sharing in the anticipated profit or advantage, the policy of their law decreed that the performer should take the greatest possible care not to injure the other party, and was accordingly held accountable for culpa levis. Under the second division, where both parties were equally interested in the prosecution of the work, and would share in the result, it was considered that the performer had discharged his duty if he used ordinary care, and was, therefore, held responsible for culpa only. In the third division, where the work was for the exclusive benefit of the third party, its prosecution promising no advantage to the performer, slight care was held to satisfy the requirements of the

ell v. Deveney, 3 Cush. (Mass.) 300; Weick v. Lander, 75 Ill. 93; Delaware, L. & W. R. Co. v. Salmon, 39 N. J. Law, 309; Crandall v. Transportation Co., 16 Fed. 75; Stetler v. Railway Co., 46 Wis. 497, 1 N. W. 112; Oil City Gas Co. v. Robinson, 99 Pa. St. 1; Lynch v. Nurdin, 1 Q. B. 29; Pierce v. Michel, 1 Mo. App. Rep'r, 74; Benzing v. Steinway, 101 N. Y. 547, 5 N. E. 449; Phillips v. Railroad Co., 127 N. Y. 657, 27 N. E. 978; St. Louis Bridge Co. v. Miller, 138 Ill. 465, 28 N. E. 1091; Rylands v. Fletcher, L. R. 3 H. L. 330; Child v. Hearn, L. R. 9 Exch. 183; Illidge v. Goodwin, 5 Car. & P. 190; Davis v. Garrett, 6 Bing. 716; Greenland v. Chaplin, 5 Exch. 243.

relation, and the beneficiary was required to show gross negligence, or culpa lata, to entitle him to recover.

The most noted jurists of both ancient and modern times have devoted much time and ability to theoretical discussions of the degrees of care, or its co-ordinate, negligence, recognized by courts of law. Of all recent discussions of the doctrine of degrees of care as associated with negligence that of Dr. Wharton is easily the most scholarly and exhaustive, and to this eminent writer is certainly due the credit of clearing up much of the uncertainty, and removing many of the errors, that have hung about the modern acceptation of the old Roman doctrine.[25]

It is not within the scope of this work to devote time and space to the consideration of theories, however interesting, except in so far as such consideration may seem necessary to a clear understanding of the principles involved as they are found in the practical treatment of cases of negligence by our courts to-day. It seems, however, that we could not properly proceed to the practical consideration of the subject without calling attention to one of the conclusions reached by Dr. Wharton, and in which we have the temerity to differ from that learned jurist. He concludes, after an exhaustive discussion of the matter, involving deep research, that under the Aquilian law but two degrees of care or negligence were recognized, and that the conditions existing to-day are not so altered as to require the addition and recognition of a third degree by our courts. The two degrees of care which he recognizes are: (1) The degree of care to be required of one who is not, and does not profess to be, a good man of business, or an expert in the affairs under consideration; (2) the degree of care or prudence to be exercised by and required of the man who actually has, or professes to have, expert knowledge of the particular kind of business involved. For purposes of distinction he would term the degree of care for which the first class should be held responsible "slight care"; that for which the second class should be held responsible "ordinary care." By this system of grouping he would not hold any person or class of persons responsible for the exercise of extreme, or even great, care, his test of degree in the highest class being the kind of care used by an expert in that particular kind of business; and

[25] Whart. Neg. § 27 et seq.

this, in turn, would be measured by what is customary among his compeers in the same avocation or trade. With all due deference to the ability of this writer, it seems to us that the insufficiency of this limited and exclusive division must become apparent in considering the development of the law of negligence within the present century in one line of cases,—that of the liability of common carriers for injuries inflicted on passengers.

It may be taken as the settled law of this country, at least, that a common carrier of persons is responsible for an injury arising through any flaw or defect in the appliances used, whose existence could have been foreseen or detected by any known test.[26] In other words, the settled law requires the utmost possible degree of care known to human skill and intelligence. To this, in defense of Dr. Wharton's division, it may be replied that this extreme degree of care is nothing more than "ordinary" and "usual" among experts engaged in constructing and operating railroads and steamboats. But it is not necessary to go back to any remote period in the history of this class of decisions to ascertain that it is the decisions of the courts themselves that have raised the degree of skill and care to its present supreme elevation, and that the courts, in making these same decisions, were urged by consideration for the safety of the public to go far beyond what was then customary among experts in this line of business. Inventions to prevent and tests to disclose latent defects in castings were in existence, and their employment was required by the courts, long before they were in such general use as to authorize its description by the word "customary." This point is strongly and tersely stated by one of the ablest works on this subject:[27] "The modern demand for the exercise of what is often called 'the utmost care' is largely due to the essentially modern regard for human life and the development of applied science. It is only within a very recent period that life has been considered more sacred than property, and, side by side

[26] Carroll v. Railroad Co., 58 N. Y. 126; Ingalls v. Bills, 9 Metc. (Mass.) 1; Caldwell v. Steamboat Co., 47 N. Y. 282; Meier v. Railroad Co., 64 Pa. St. 225; Hegeman v. Railroad Corp., 13 N. Y. 9; Pennsylvania Co. v. Roy, 102 U. S. 451; Palmer v. Canal Co., 120 N. Y. 170, 24 N. E. 302; Texas & P. Ry. Co. v. Hamilton, 66 Tex. 92, 17 S. W. 406; Louisville, N. A. & C. Ry. Co. v. Snyder, 117 Ind. 435, 20 N. E. 284.

[27] Shear. & R. Neg. (4th Ed.) § 46.

with the growth of the feeling, there has been a wonderful extension of human powers by means of new inventions. In ancient times it would have seemed preposterous to claim a greater degree of care for the preservation of the life of a slave than for the statue of an emperor, and it would have seemed the height of tyranny to hold any man of business to a degree of care which no one in that business had ever displayed, and to require him to do that which every one in the business believed to be impossible. But in our own time legislatures have absolutely forbidden gas companies to cast their refuse into rivers, although these companies unanimously declared with entire sincerity that they could not conduct their business at all in any other way. So legislatures have compelled manufacturers to consume their own smoke, although none of them knew how to do it. And the result in these and other cases has fully vindicated the wisdom of the stern legislation. When the factories were compelled to consume their own smoke, their owners paid inventors to devise a method of doing so. When gas companies were threatened with ruin if they could not dispose of their refuse, they paid the cost of experiments which resulted in the invention of aniline colors, and increased the wealth of the gas companies themselves, while putting an end to an intolerable nuisance, which they had always declared to be unavoidable. In the light of such experiences the courts are justified in holding those who take charge of the lives of human beings to any degree of care which is not incompatible with the transaction of business, especially when its practicability has been demonstrated by its adoption in that business by the most careful class of persons." [28]

It must appear on the most casual consideration that in determining the liability of carriers for injuries to passengers the courts have required a degree of care certainly not usual among experts in the carrying business, and in many instances without precedent.[29]

It appears, then, that at least three distinct degrees of care must be recognized, viz.:

[28] Fleet v. Hollenkemp, 13 B. Mon. (Ky.) 219. "Extraordinary diligence is required as to passengers, and the company is responsible for the utmost care and watchfulness, and answerable for the smallest negligence." Sandham v. Railroad Co., 38 Iowa, at page 90; McGrew v. Stone, 53 Pa. St. 436.

[29] Cf. "Carriers of Passengers," post, pp. 175–213.

Same—Slight Care.

Such as is required in the transaction of daily duties by the average person, and when the obligor has not assumed unusual responsibilities by voluntary action,[30]—as by the purchase of a dangerous animal, the damming up of water, or the confinement of steam, or the use of fire. Within this class would fall the degree of care required of a person driving on the public road and observing the law of the road, excavating on his own premises,[31] owning a ruinous and deserted house,[32]—or of a bailee when the bailment is for the sole benefit of the bailor.[33]

Same—Ordinary Care.

The care proportionate to the responsibility assumed,—as carrying a loaded gun;[34] where a bailment is for the mutual advantage of the parties,—as the hirer of a horse, who is liable for ordinary care and skill in driving him,[35] or one hired to drive a horse.[36] The degree of care requisite in operating trains within municipal limits to avoid injury to persons at highway crossings falls within this class. Statutory signals should be given; gates operated, if required; engineers and trainmen at their posts, closely observant of the track and crossings; the regulation rate of speed observed; and in fact every precaution taken commensurate with the liability to injure members of the public incident to running a train of cars through a city or village.[37] In the construction of a dam

[30] Earing v. Lansingh, 7 Wend. (N. Y.) 185; Daniels v. Clegg, 28 Mich. 32.

[31] Gillespie v. McGowan, 100 Pa. St. 144; Lorenzo v. Wirth, 170 Mass. 596, 49 N. E. 1010; Ratte v. Dawson, 50 Minn. 450, 52 N. W. 965; Ennis v. Myers, 29 App. Div. 382, 51 N. Y. Supp. 550; Dobbins v. Railway Co., 91 Tex. 60, 41 S. W. 62; Gorr v. Mittlestaedt, 96 Wis. 296, 71 N. W. 656.

[32] Lary v. Railroad Co., 78 Ind. 323.

[33] Coggs v. Bernard, 2 Ld. Raym. 909; Whitney v. Lee, 8 Metc. (Mass.) 91; Spooner v. Mattoon, 40 Vt. 300.

[34] Tally v. Ayres, 3 Sneed (Tenn.) 677.

[35] Mooers v. Larry, 15 Gray (Mass.) 451; Purnell v. Minor, 49 Neb. 555, 68 N. W. 942.

[36] Newton v. Pope, 1 Cow. (N. Y.) 109.

[37] Frick v. Railway Co., 75 Mo. 595; Illinois Cent. R. Co. v. McCalip (Miss.) 25 South. 166; Baker v. Railroad Co. (Mo. Sup.) 48 S. W. 838; San Antonio & A. P. Ry. Co. v. Peterson (Tex. Civ. App.) 49 S. W. 924; Lake Shore & M. S. Ry. Co. v. Boyts, 16 Ind. App. 640, 45 N. E. 812; Stevens v. Railway Co., 67 Mo. App. 356; Washington S. Ry. Co. v. Lacey, 94 Va. 460, 26 S. E.

or reservoir the work should be done in such a manner as a discreet and prudent man understanding the circumstances and the liability to cause damage to adjacent lands would have performed it, and it is not necessary that it should be built in the strongest and most skillful way.[38]

Same—Great Care.

That degree of attention and prudence exercised by the class of persons possessing the highest qualifications of skill and diligence in the line of business under consideration. It is not the care bestowed on the matter in hand by the most skilled member of the craft or occupation, but by the class composed of the most skilled members. In this age of wonderful scientific progress and invention it would be unreasonable that liability should attach for failure to employ some newly-discovered device or process scarcely past the experimental stage, and whose efficacy and practicability had been determined and adopted by only one person. How general the use must be in order to establish a class must be determined by the circumstances of each case, the nature of the business under discussion, and the number of persons engaged in its prosecution. To illustrate: A practical test for discovering flaws in iron castings would be of such general and wide-spread utility,

834; Cookson v. Railway Co., 179 Pa. St. 184, 36 Atl. 194; Iron Mountain R. Co. v. Dies, 98 Tenn. 655, 41 S. W. 860; Walter v. Railroad Co., 6 App. D. C. 20; Pinney v. Railway Co., 71 Mo. App. 577; Cleveland, C., C. & St. L. Ry. Co. v. Doerr, 41 Ill. App. 530; Johnson v. Railway Co., 2 Tex. Civ. App. 139, 21 S. W. 274; Alabama G. S. R. Co. v. Anderson, 109 Ala. 299, 19 South. 516; Chicago, M. & St. P. Ry. Co. v. Walsh, 157 Ill. 672, 41 N. E. 900; Denver & R. G. R. Co. v. Ryan, 17 Colo. 98, 28 Pac. 79.

[38] Hoffman v. Water Co., 10 Cal. 413; Wolf v. Water Co., Id. 541. See generally, as defining "ordinary care," Chicago City Ry. Co. v. Dinsmore, 162 Ill. 658, 44 N. E. 887; Paris, M. & S. P. Ry. Co. v. Nesbitt (Tex. Civ. App.) 38 S. W. 243; Graham v. Town of Oxford, 105 Iowa, 705, 75 N. W. 473; New Orleans & N. E. R. Co. v. McEwen & Murray, 49 La. Ann. 1184, 22 South. 675; Brown v. Bank (N. H.) 39 Atl. 336; Beck v. Hood, 185 Pa. St. 32, 39 Atl. 842; Houston & T. C. R. Co. v. Sgalinski (Tex. Civ. App.) 46 S. W. 113; Hennesey v. Railroad Co., 99 Wis. 109, 74 N. W. 554; Baltimore & O. S. W. Ry. Co. v. Faith, 175 Ill. 58, 51 N. E. 807; Waco Artesian Water Co. v. Cauble (Tex. Civ. App.) 47 S. W. 538; Chicago, St. P. & K. C. R. Co. v. Ryan, 62 Ill. App. 264; Bertha Zinc Co. v. Martin's Adm'r, 93 Va. 791, 22 S. E. 869; Olwell v. Railway Co., 92 Wis. 330, 66 N. W. 362.

and the opportunity for its employment so unlimited, that its adoption by a comparatively large number of founders would be essential to the establishment of a class within our definition. On the other hand, locomotion by balloons is unusual, and the adoption by three, or even two, aeronauts of a new invention for steering them, might properly be held to be usage by a class.

Test of Requisite Care.

It follows, then, that to determine the degree of care requisite in each case the criterion must be the kind of care usually exercised by competent, prudent persons in similar transactions, in sufficient numbers to establish a class.

No Degrees of Negligence.

It follows, as a corollary of what has been said, regarding the degrees of care required by law, that theoretically there can be no degrees of negligence. Failure to observe the kind of care requisite in any set of circumstances is negligence for which, other conditions being present, recovery may be had according to the extent of the injury suffered; conversely, any case of alleged negligence is directly referable for test to the kind of duty violated, and the degree of care lacking in the violation. As a matter of custom,—a habit not easily thrown off,—it is probable that the terms "slight negligence," "ordinary negligence," and "gross negligence" will continue to stand on the lucus a non principle, for something which they do not represent, until such time as the courts shall break away from the meaningless and misleading phraseology.

CHAPTER II.

CONTRIBUTORY NEGLIGENCE.

DEFINITION.

6. Contributory negligence is such negligence on the part of the plaintiff as to proximately cause the injury complained of, superseding the prior wrongful conduct of the defendant, and rendering him incapable of averting its consequences.

The intervening or concurrent negligent act of any third party, which in any degree assists or promotes the happening of the injury,

is, properly speaking, contributory to such result; but the term "contributory negligence" has, by common consent and usage, been limited in its application to the negligent acts of the person who seeks to recover damages for the injury.

GENERAL RULE.

7. Plaintiff cannot maintain an action for injuries caused by the negligence of defendant, if his own negligence contributed in any degree to produce the result complained of, unless

(a) The defendant, having knowledge of plaintiff's negligence, fails to use ordinary care to avert the consequences, or unless

(b) The contributory negligence of plaintiff is caused by sudden peril and terror in the situation wherein he has been placed by defendant's negligence.

The most satisfactory reason for this doctrine seems to be that the causal connection between defendant's negligent act and the injury is broken by the intervention of plaintiff's independent volition.[1]

Willful Injury.

In considering the doctrine of contributory negligence, it should be borne in mind that it has no application in cases of willful injury, but is confined strictly to negligence under the definition. Contributory negligence is not a defense in an action for a willful tort.[2] But,

§ 7. [1] Tuff v. Warman, 5 C. B. (N. S.) 573; Witherley v. Canal Co., 12 C. B. (N. S.) 2, 8; Ellis v. Railroad Co., 2 Hurl. & N. 424; Martin v. Railroad Co., 16 C. B. 179; Bridge v. Railroad Co., 3 Mees. & W. 244. Approved in Davies v. Mann, 10 Mees. & W. 546. Cited and explained in Dowell v. Navigation Co., 5 El. & Bl. 195; Holden v. Coke Co., 3 C. B. 1; Baltimore & P. R. Co. v. Jones, 95 U. S. 439; Van Lien v. Manufacturing Co., 14 Abb. Prac. (N. S.) 74; Ince v. Ferry Co., 106 Mass. 149.

[2] Wallace v. Express Co., 134 Mass. 95; Steinmetz v. Kelly, 72 Ind. 442; Birge v. Gardner, 19 Conn. 507; Williams v. Railroad Co., 2 Mich. 259; Cincinnati, H. & D. R. Co. v. Waterson, 4 Ohio St. 425; Bunting v. Railroad Co., 16 Nev. 277; Tonawanda R. Co. v. Munger, 5 Denio (N. Y.) 255; Sanford v. Railroad Co., 23 N. Y. 343. Where defendant's act was wanton and reckless, failure of plaintiff to use ordinary care will not defeat recovery. Central Railroad & Banking Co. v. Newman, 94 Ga. 560, 21 S. E. 219; Kansas City,

if the action is founded on inadvertent misfeasance or nonfeasance, contributory negligence will prevent recovery, regardless of the degree of negligence involved in defendant's conduct.[3]

PROXIMATE CAUSE.

8. To establish the defense of contributory negligence, the causal connection between plaintiff's negligence and injury must be shown.

It is not enough that plaintiff's conduct is marked by the absence of even the slightest care. If it does not contribute to produce the injury, it is immaterial.[1]

What has been already said regarding proximate cause is equally applicable where the negligence in question is contributory.[2] The limitation imposed by the word "contributory," however, indicates that the negligence of plaintiff need not—in fact must not—be the sole cause.

Courts have said that the negligence of plaintiff must "substantially" contribute to the injury,[3] must be an "efficient" or "essential"

M. & B. R. Co. v. Lackey, 114 Ala. 152, 21 South. 444; Lake Shore & M. S. Ry. Co. v. Bodemer, 139 Ill. 596, 29 N. E. 692; Louisville Safety-Vault & Trust Co. v. Louisville & N. R. Co. (Ky.) 17 S. W. 567.

[3] Catawissa R. Co. v. Armstrong, 49 Pa. St. 186; Grippen v. Railroad Co., 40 N. Y. 34; Cunningham v. Lyness, 22 Wis. 236; Mangam v. Railroad Co., 36 Barb. 230; Carroll v. Railroad Co., 13 Minn. 30 (Gil. 18); Griggs v. Fleckenstein, 14 Minn. 81 (Gil. 62); Neal v. Gillett, 23 Conn. 437; Rowen v. Railroad Co., 59 Conn. 364, 21 Atl. 1073; Ruter v. Foy, 46 Iowa, 132; Carrington v. Railroad Co., 88 Ala. 472, 6 South. 910; Florida Southern Ry. Co. v. Hirst, 30 Fla. 1, 11 South. 506; International & G. N. R. Co. v. Kuehn, 11 Tex. Civ. App. 21, 31 S. W. 322.

§ 8. [1] Tendency to disease, increasing damages, defendant still liable. McNamara v. Village of Clintonville, 62 Wis. 207, 22 N. W. 472. Ox negligently killed by defendant, value of hide and meat, which plaintiff might have used, may be deducted from the damages. Memphis & C. R. Co. v. Hembree, 84 Ala. 182, 4 South. 392; Georgia Pac. R. Co. v. Fullerton, 79 Ala. 298. The vital point is, did the negligence of plaintiff contribute to the happening of the injury, not to its increase? Sills v. Brown, 9 Car. & P. 601, 606; Stebbins v. Railroad Co., 54 Vt. 464.

[2] See ante, pp. 9–17.

[3] Daley v. Railroad Co., 26 Conn. 591; Montgomery Gaslight Co. v. Montgomery & E. Ry. Co., 86 Ala. 372, 5 South. 735; West v. Martin, 31 Mo. 375.

cause;[4] that, although plaintiff was negligent, if ordinary care on his part would have availed nothing against defendant's wrong conduct, he may still recover.[5] But to attempt to define the essential degree of intimacy between plaintiff's negligence and injury is unprofitable and dangerous. In Monongahela City v. Fischer[6] the court says: "The doctrine of this court has always been that, if the negligence of the party contributed in any degree to the injury, he cannot recover." And it is now well settled that, if the negligence of plaintiff contributed in any degree to cause the injury complained of, he cannot recover,[7] unless it further appears that the defendant might, by the exercise of reasonable care and prudence, have avoided

[4] Sullivan's Adm'r v. Bridge Co., 9 Bush (Ky.) 81.

[5] Village of Orleans v. Perry, 24 Neb. 831, 40 N. W. 417; Radley v. Railroad Co., L. R. 9 Exch. 71.

[6] 111 Pa. St. 9, 2 Atl. 87. See, also, Oil City Fuel-Supply Co. v. Boundy, 122 Pa. St. 449, 15 Atl. 865; Mattimore v. City of Erie, 144 Pa. St. 14, 22 Atl. 817; Banning v. Railroad Co., 89 Iowa, 74, 56 N. W. 277; Kennard v. Burton, 25 Me. 39.

[7] Crandall v. Transportation Co., 11 Biss. 516, 16 Fed. 75; Munger v. Railroad Co., 4 N. Y. 349; Willard v. Pinard, 44 Vt. 34; Oil City Fuel-Supply Co. v. Boundy, 122 Pa. St. 449, 15 Atl. 865; Monongahela City v. Fischer, 111 Pa. St. 9, 2 Atl. 87; Murphy v. Deane, 101 Mass. 455; Coombs v. Purrington, 42 Me. 332; Hearne v. Railroad Co., 50 Cal. 482; Flemming v. Railroad Co., 49 Cal. 253; Cremer v. Town of Portland, 36 Wis. 92; Laicher v. Railroad Co., 28 La. Ann. 320; Broadwell v. Swigert, 7 B. Mon. (Ky.) 39; Catawissa R. Co. v. Armstrong, 49 Pa. St. 186; Stiles v. Geesey, 71 Pa. St. 439; Claus v. Steamship Co., 32 C. C. A. 282, 89 Fed. 646; Maxwell v. Railway Co., 1 Marv. 199, 40 Atl. 945; United States Exp. Co. v. McCluskey, 77 Ill. App. 56; Guthrie v. Railway Co., 51 Neb. 746, 71 N. W. 722; Briscoe v. Railway Co., 103 Ga. 224, 28 S. E. 638; South Chicago City Ry. Co. v. Adamson, 69 Ill. App. 110; Atwood v. Railway Co., 91 Me. 399, 40 Atl. 67; O'Connor v. Ditch Co., 17 Nev. 245, 30 Pac. 882; Jones v. Railroad Co., 107 Ala. 400, 18 South. 30; Payne v. Railroad Co., 129 Mo. 405, 31 S. W. 885; Lack v. Seward, 4 Car. & P. 106; Luxford v. Large, 5 Car. & P. 421; Woolf v. Beard, 8 Car. & P. 373; Vennall v. Garner, 1 Cromp. & M. 21; Dowell v. Navigation Co., 5 El. & Bl. 195. And this is true although the original negligence of defendant involved the violation of an ordinance or statute. Payne v. Railroad Co., 129 Mo. 405, 31 S. W. 885. But see Alaska Treadwell Gold-Min. Co. v. Whelan, 12 C. C. A. 225, 64 Fed. 462, where it was held that gross negligence of defendant may excuse slight contributory negligence in the plaintiff. Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. 653.

the consequences of the injured party's negligence.[8] In the language of Lamar, J., if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured, an action for the injury cannot be maintained unless it further appears that the defendant might, by the exercise of ordinary care and prudence, have avoided the consequences of the injured party's negligence.[9]

DEGREE OF CARE.

9. The plaintiff is obligated to that degree of care which an ordinarily prudent person of similar intelligence would exercise in the circumstances.

In determining whether the conduct of plaintiff was negligent in the circumstances, the test is similar to that applied to the conduct of the defendant in determining his primary liability, although in the case of the former the law does not exact so high a degree of diligence and care. It is certain that the plaintiff must use at least ordinary care to avoid the injurious consequences of defendant's misconduct.[1] It is impossible to define the duty of plaintiff by any lesser

[8] Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679; Clark v. Railroad Co., 109 N. C. 430, 14 S. E. 43; Spencer v. Railroad Co., 29 Iowa, 55; Newport News & M. V. Co. v. Howe, 3 C. C. A. 121, 52 Fed. 363; Morris v. Railroad Co., 45 Iowa, 29; Deeds v. Railroad Co., 69 Iowa, 164, 28 N. W. 488; Czezewzka v. Railway Co., 121 Mo. 201, 25 S. W. 911; McKean v. Railroad Co., 55 Iowa, 192, 7 N. W. 505; O'Rourke v. Railroad Co., 44 Iowa, 526; Denver & B. P. Rapid-Transit Co. v. Dwyer, 20 Colo. 132, 36 Pac. 1106; Nashua Iron & Steel Co. v. Worcester & N. R. Co., 62 N. H. 159; Indiana Stone Co. v. Stewart, 7 Ind. App. 563, 34 N. E. 1019; Tobin v. Cable Co. (Cal.) 34 Pac. 124. Also cf. Holmes v. Railway Co., 97 Cal. 161, 31 Pac. 834, with Overby v. Railway Co., 37 W. Va. 524, 16 S. E. 813; Pierce v. Steamship Co., 153 Mass. 87, 26 N. E. 415; Evarts v. Railroad Co., 56 Minn. 141, 57 N. W. 459; Keefe v. Railroad Co., 92 Iowa, 182, 60 N. W. 503; Little v. Railway Co., 88 Wis. 402, 60 N. W. 705; Texas & P. Ry. Co. v. Lively, 14 Tex. Civ. App. 554, 38 S. W. 370; Baltimore City Pass. Ry. Co. v. Cooney, 87 Md. 261, 39 Atl. 859; Thompson v. Rapid-Transit Co., 16 Utah, 281, 52 Pac. 92; Omaha St. Ry. Co. v. Martin, 48 Neb. 65, 66 N. W. 1007; Styles v. Railroad Co., 118 N. C. 1084, 24 S. E. 740.

[9] Grand Trunk R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679.

§ 9. [1] In Patrick v. Pote, 117 Mass. 297, Devens, J., says: "The plaintiff, in order to show that he was in the exercise of due care, must prove that he

latitude than that measured by this word "ordinary" in its common significance. Very slight care may not be, and generally is not, sufficient to exempt him from the charge of contributory negligence; neither is his failure to exercise unusual care a defense to his claim for damages.[2]

No rule sufficiently elastic to meet the requirements of the varying circumstances which influence the conduct of those menaced by sudden danger can be formulated. The "prudent man," so often set up as a model and standard of comparison, is phlegmatic, conservative, and far-sighted; but he acquires these and other excellent attributes in circumstances which admit of mature deliberation. What his conduct would be if the opportunity for such deliberation were lacking, is purely a matter of conjecture. All definitions of ordinary or proper care, as affecting contributory negligence, are misleading and unsatisfactory. The proper degree must be determined in the light of the circumstances as disclosed by the evidence in each case; the fact whether the right degree has been used being usually for the jury, under the general instructions of the court.[3]

had acted as men of ordinary prudence, exercising this faculty, and possessed of sufficient sense and capacity to act intelligently, would have acted under similar circumstances." Munger v. Railroad Co., 4 N. Y. 349; Priest v. Nichols, 116 Mass. 401; Railroad Co. v. Jones, 95 U. S. 439; Peverly v. City of Boston, 136 Mass. 366; Garmon v. Inhabitants of Bangor, 38 Me. 443; Brown v. Railway Co., 22 Minn. 165; Salem-Bedford Stone Co. v. O'Brien, 12 Ind. App. 217, 40 N. E. 430; Chicago & E. I. R. Co. v. Roberts, 44 Ill. App. 179; Mattimore v. City of Erie, 144 Pa. St. 14, 22 Atl. 817.

[2] Lyons v. Railroad Co., 57 N. Y. 489; Mark v. Bridge Co., 103 N. Y. 28, 8 N. E. 243; Chicago & N. Ry. Co. v. Donahue, 75 Ill. 106; Newbold v. Mead, 57 Pa. St. 487; Davies v. Mann, 10 Mees. & W. 546; Quirk v. Elevator Co., 126 Mo. 279, 28 S. W. 1080. In Chase v. Railroad Co., 24 Barb. (N. Y.) 273, it was held that "ordinary" care and "reasonable" care were not synonymous, and that "reasonable care" was required. The same degree of diligence is not required of a person about to cross a public street to avoid contact with vehicles as would be required at a railroad crossing. Eaton v. Cripps, 94 Iowa, 176, 62 N. W. 687; St. Louis S. W. Ry. Co. v. Rice, 9 Tex. Civ. App. 509, 29 S. W. 525.

[3] McGrath v. Railroad Co., 59 N. Y. 468. In Otis v. Town of Janesville, 47 Wis. 422, 2 N. W. 783, the court, after charging that "slight negligence" would not prevent recovery, but that a "want of ordinary care" would do so if it contributed in any "material degree" to produce the injury, refused to charge that a "slight want of ordinary care," in consequence of which the

SAME—TERROR CAUSED BY REAL OR FANCIED PERIL.

10. When a person, by reason of terror, caused by real or fancied peril produced by the negligence of defendant, fails to use ordinary care to avoid the danger, and thereby suffers injury, it cannot be said that, as a matter of law, he is guilty of contributory negligence.

This proposition illustrates the futility of attempting to fix a universal standard by which the conduct of plaintiff may be invariably measured. Where the circumstances are extraordinary, it would be unjust to measure the conduct of the plaintiff by that of the prudent man unruffled by emergency. "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences." [1] And so if a person, reasonably apprehending danger, leaves a position of safety, and is thereby hurt, he may still maintain his action.[2] Neither is it contributory negligence in a per-

injury occurred, would have that effect. Held, that the instruction should have been given. In Randall v. Telegraph Co., 54 Wis. 140, 11 N. W. 419, this decision is affirmed, "however gross defendant's negligence may have been." Chicago & G. T. Ry. Co. v. Kinnare, 76 Ill. App. 394; Manning v. Railway Co., 166 Mass. 230, 44 N. E. 135; Harmon v. Railroad Co., 7 Mackey, 255; Apsey v. Railroad Co., 83 Mich. 440, 47 N. W. 513; Eichel v. Senhenn, 2 Ind. App. 208, 28 N. E. 193; Central R. Co. v. Hubbard, 86 Ga. 623, 12 S. E. 1020.

§ 10. [1] Lord Ellenborough, in Jones v. Boyce, 1 Starkie, 493. See, also, Walters v. Light Co. (Colo. App.) 54 Pac. 960; Hefferman v. Alfred Barber's Son, 36 App. Div. 163, 55 N. Y. Supp. 418; Heath v. Railway Co., 90 Hun, 560, 36 N. Y. Supp. 22; Kreider v. Turnpike Co., 162 Pa. St. 537, 29 Atl. 721; Dunham Towing & Wrecking Co. v. Dandelin, 143 Ill. 409, 32 N. E. 258; Gibbons v. Railway Co., 155 Pa. St. 279, 26 Atl. 417.

[2] Lincoln Rapid-Transit Co. v. Nichols, 37 Neb. 332, 55 N. W. 872, where one is placed by the negligence of another in a situation of sudden peril, his attempt to escape danger, even by doing an act which is also dangerous, and from which injury results, is not contributory negligence, such as will prevent him from recovering for the injury, if the attempt be such as a person acting with ordinary prudence might, under the circumstances, make. South Covington & C. St. Ry. Co. v. Ware, 84 Ky. 267, 1 S. W. 493; Brown v. Railway Co., 54 Wis. 342, 11 N. W. 356; Gumz v. Railway Co., 52 Wis. 672, 10 N. W. 11; Turner v. Buchanan, 82 Ind. 147; Iron R. Co. v. Mowery, 36 Ohio

son rightfully on a railroad track, in terror at the sudden appearance of a train, to jump in front of it.[3] Cases are numerous where passengers on railway trains and street cars, apprehending collision or other disaster, are injured by jumping off, when they would have been unhurt had they kept their seats.[4] In these and similar cases the question whether the injured exercised due caution is a proper one for the jury.[5]

SAME—KNOWLEDGE OF DANGER.

11. Knowledge by plaintiff, either actual or implied by law, of the danger to which defendant has exposed him, is a prerequisite to the defense of contributory negligence.

Theoretically, at least, the duties of defendant and plaintiff are reciprocal, and a breach by the former does not release the latter from his obligation to use ordinary care to avoid its injurious con-

St. 418; Wilson v. Railroad Co., 26 Minn. 278, 3 N. W. 333; Roll v. Railway Co., 15 Hun, 496. "If he makes such a choice as a person of ordinary care, placed in the same situation, might make." Twomley v. Railroad Co., 69 N. Y. 158. Also see Com. v. Boston & M. R. R., 129 Mass. 500; Pennsylvania Co. v. Roney, 89 Ind. 453; Linnehan v. Sampson, 126 Mass. 506; Pennsylvania R. Co. v. Snyder, 55 Ohio St. 342, 45 N. E. 559; Missouri, K. & T. Ry. Co. of Texas v. Rogers, 91 Tex. 52, 40 S. W. 956.

[3] Indianapolis, B. & W. Ry. Co. v. Carr, 35 Ind. 510; Coulter v. Express Co., 56 N. Y. 585.

[4] Buel v. Railroad Co., 31 N. Y. 314; Dyer v. Railway Co., 71 N. Y. 228; Mobile & M. R. Co. v. Ashcraft, 48 Ala. 15; Georgia Railroad & Banking Co. v. Rhodes, 56 Ga. 645; Cuyler v. Decker, 20 Hun, 173; Chitty v. Railway Co. (Mo. Sup.) 49 S. W. 868; Washington & G. R. Co. v. Hickey, 5 App. D. C. 436; Houston, E. & W. T. Ry. Co. v. Norris (Tex. Civ. App.) 41 S. W. 708; Wade v. Power Co., 51 S. C. 296, 29 S. E. 233; Nicholsburg v. Railroad Co., 11 Misc. Rep. 432, 32 N. Y. Supp. 130; Killien v. Hyde, 63 Fed. 172.

[5] Instruction as to contributory negligence was modified by adding that if, through defendant's negligence, injured was placed in a position of peril and confronted with sudden danger, then the law did not require of him the same degree of care and caution that it does of a person who has ample opportunities for full exercise of his judgment. Dunham Towing & Wrecking Co. v. Dandelin, 143 Ill. 409, 32 N. E. 258; Lincoln Rapid-Transit Co. v. Nichols, 37 Neb. 332, 55 N. W. 872; Cook v. Railroad Co. (Ala.) 12 Reporter, 356; Chicago, B. & Q. R. Co. v. Gunderson, 74 Ill. App. 356.

sequences;[1] but it is evident that this duty which rests on plaintiff cannot arise until he has knowledge of the danger to which he has been exposed.[2]

The question of knowledge is generally one of mixed law and fact, to be determined by the jury under proper instructions from the court;[3] but the danger may be so patent, or the circumstances of such a nature, as to admit of but one finding, in which case it is improper to submit the question to the jury.[4]

§ 11. [1] Tucker v. Duncan, 9 Fed. 867.

[2] Wall v. Town of Highland, 72 Wis. 435, 39 N. W. 560; Moomey v. Peak, 57 Mich. 259, 23 N. W. 804; Jeffrey v. Railroad Co., 56 Iowa, 546, 9 N. W. 884; Langan v. Railway Co., 72 Mo. 392; Dush v. Fitzhugh, 2 Lea, 307; Fowler v. Railroad Co., 18 W. Va. 579; Gray v. Scott, 66 Pa. St. 345; Thirteenth & F. St. Pass. Ry. Co. v. Boudrou, 92 Pa. St. 475; Pennsylvania Tel. Co. v. Varnau (Pa.) 15 Atl. 624; Citizens' St. R. Co. v. Sutton, 148 Ind. 169, 46 N. E. 462; Hallyburton v. Association, 119 N. C. 526, 26 S. E. 114; Macon & I. S. St. Ry. Co. v. Holmes, 103 Ga. 655, 30 S. E. 563; City of Peoria v. Adams, 72 Ill. App. 662; Cochran v. Railroad Co., 184 Pa. St. 565, 39 Atl. 296; Stone v. Hunt, 114 Mo. 66, 21 S. W. 454; Brannock v. Elmore, 114 Mo. 55, 21 S. W. 451; Thayer v. Railroad Co., 93 Mich. 150, 53 N. W. 216; Cannon v. Lewis, 18 Mont. 402, 45 Pac. 572; St. Louis & S. F. Ry. Co. v. Traweek, 84 Tex. 65, 19 S. W. 370; Platt v. Railway Co., 84 Iowa, 694, 51 N. W. 254; Giraudi v. Improvement Co., 107 Cal. 120, 40 Pac. 108; Davis v. Railroad Co., 105 Cal. 131, 38 Pac. 647; Rowell v. Railroad Co., 64 Conn. 376, 30 Atl. 131. A saloon keeper is not presumed to know that sewer gas, when mixed in proper proportions with common air, will explode. Kibele v. City of Philadelphia, 105 Pa. St. 41. One injured by an electric wire cannot be presumed, in the absence of evidence, to have had knowledge that moisture destroyed the insulation of such a wire. Giraudi v. Improvement Co., 107 Cal. 120, 40 Pac. 108.

[3] Hathaway v. Railroad Co., 29 Fed. 489; Philbrick v. City of Niles, 25 Fed. 265; Hendricken v. Meadows, 154 Mass. 599, 28 N. E. 1054; Jennings v. Van Schaick, 108 N. Y. 530, 15 N. E. 424.

[4] Knowledge implied by law from the circumstances, as in Schofield v. Railway Co., 8 Fed. 488; Patterson v. Hemenway, 148 Mass. 94, 19 N. E. 15, citing Taylor v. Manufacturing Co., 140 Mass. 150, 3 N. E. 21; Messenger v. Dennie, 141 Mass. 335, 5 N. E. 283; and Taylor v. Manufacturing Co., 143 Mass. 470, 10 N. E. 308. Knowledge presumed not to exist in the circumstances. Kibele v. City of Philadelphia, 105 Pa. St. 41; Giraudi v. Improvement Co., 107 Cal. 120, 40 Pac. 108.

ASSUMPTION OF RISK.

12. When a person exposes himself or his property to a danger of which he has knowledge, he is presumed to assume whatever risks are reasonably incident to his conduct.

As where plaintiff, knowing a bridge to be out of repair and unsafe, although in public use, attempted, with the greatest care and caution, to drive over it, and was injured, the court held that he had assumed the risk, and was guilty of contributory negligence.[1]

An apparent exception to this rule exists in cases where a person knowingly encounters danger for the purpose of saving his own property, which has been placed in peril by the defendant; or endangers his own life in attempting to rescue another from imminent peril. In this class of cases, however, the courts hold that it is the right, and even the duty, of one to endeavor, in such circumstances, to protect his own property, and to save life, if it may be attempted without a reckless exposure to danger.[2]

§ 12. [1] Morrison v. Shelby Co., 116 Ind. 431, 19 N. E. 316. Plaintiff stood for an hour and a half within two feet of an unguarded trench, dug by defendant, looking at election returns, when a sudden surging of the crowd pushed him into the trench, and he was injured. Held, that he had voluntarily exposed himself to the danger. Roe v. Crimmins, 10 Misc. Rep. 711, 31 N. Y. Supp. 807; Walker v. Lumber Co., 86 Me. 191, 29 Atl. 979; Moore v. Railway Co., 126 Mo. 265, 29 S. W. 9; Whalen v. Light Co., 151 N. Y. 70, 45 N. E. 363; Berg v. Railway Co., 70 Minn. 272, 73 N. W. 648; West Chicago St. R. Co. v. Schenker, 78 Ill. App. 592; Bunnell v. Bridge Co., 66 Conn. 24, 33 Atl. 533; Larkin v. Railroad Co., 166 Mass. 110, 44 N. E. 122; Culbertson v. Railroad Co., 88 Wis. 567, 60 N. W. 998; Downes v. Bridge Co. (Sup.) 58 N. Y. Supp. 628.

[2] In Rexter v. Starin, 73 N. Y. 601, the plaintiff's boat being fastened to the pier, and plaintiff in another boat alongside, defendant's boat approached in such a manner as to make a collision imminent. Plaintiff jumped onto his own boat to do what he could to avert the collision, and was injured, by being struck by a piece of timber that was torn off in the collision. Defendant claimed that it was contributory negligence for him to put himself in the way of a danger that was imminent and evident. The court held, however, that it was plaintiff's right and duty to look to the safety of his boat, and it was for the jury to determine whether his act was that of a reasonable man, under

Absent-mindedness or failure to remember is no excuse. If the plaintiff at any time had knowledge of the defective or dangerous conditions, it is sufficient to charge him with the assumption of the risk. This is frequently illustrated in cases of injury at railroad crossings, where persons, familiar with the locality, fail to look out for or observe approaching trains.[3] In view of what has already been said, it is hardly necessary to add that such knowledge in itself does not constitute contributory negligence, for, as has been seen, one may lawfully expose himself to danger in certain circumstances, or, exposing himself negligently, may suffer from a cause which he could not reasonably anticipate.

SAME—ANTICIPATION OF NEGLIGENCE.

13. A person is obligated to anticipate only such danger or negligence as is to be reasonably apprehended in the circumstances.

A long line of decisions support the general proposition that, as every one is presumed to act with due care and observance of the law, negligence cannot be imputed to one who fails to anticipate that another will do an unlawful act, or be remiss in his duty.[1] But every-

the circumstances. Wasmer v. Railroad Co., 80 N. Y. 212. But a person must not be reckless in his exposure to danger, even in an effort to save his own property negligently imperiled by another. Hay v. Railroad Co., 37 U. C. Q. B. 456. It is not contributory negligence per se for a stranger to go on premises where a fire is raging, which endangers life or safety, if he does so in good faith, for the purpose of saving life or property. Henry v. Railroad Co., 67 Fed. 426.

[3] Baltimore & O. R. Co. v. Whitacre, 35 Ohio St. 627. See, also, Bruker v. Town of Covington, 69 Ind. 33; Bassett v. Fish, 75 N. Y. 303; Weed v. Village of Ballston Spa, 76 N. Y. 329; Salem-Bedford Stone Co. v. O'Brien, 12 Ind. App. 217, 40 N. E. 430. Where the plaintiff knew of the obstructions, but thought they had been removed, Mahon v. Burns, 13 Misc. Rep. 19, 34 N. Y. Supp. 91.

§ 13. [1] Nolan v. Railroad Co., 53 Conn. 461, 4 Atl. 106; Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 26 Fed. 896; Maloy v. Railway Co., 84 Mo. 270; Sickles v. Ice Co., 80 Hun, 213, 30 N. Y. Supp. 100. A traveler crossing the track may presume that the train will not run at a speed prohibited by ordinance, Hart v. Devereux, 41 Ohio St. 565; and that the statutory warning will not be omitted, Missouri Pac. Ry. Co. v. Stevens, 35 Kan. 622, 12 Pac. 25;

day experience shows that such a presumption is incompatible with ordinary care and prudence, and it is well settled that the intervening negligence of a third person does not relieve the first wrongdoer from liability if such intervening act was one which would ordinarily be expected to flow from his negligence.[2]

Although there is but little authority to support the position, it is difficult to understand why the standard of ordinary care, when applied to the conduct of the plaintiff, should not include the probabilities and considerations which actually shape the conduct of the typically prudent man. Presumptions in questions of evidence are one thing, and presumptions in the conduct of every-day business are another. Every man is presumed innocent until proved guilty; but the prudent man keeps his money in the bank, and locks his doors at night.[3]

LEGAL STATUS OF PLAINTIFF AS AFFECTING HIS CONTRIBUTORY NEGLIGENCE.

14. The legal status of plaintiff at the time of the injury does not conclude the question of his contributory negligence, although it may place on him the burden of showing that his conduct, if illegal, did not influence the result complained of.

As the degree of care required to relieve a person of the charge of negligence varies according to the duty which he must discharge, so does the measure of diligence to avoid harm, exacted from the plaintiff, increase or diminish in proportion to the duty which is owed him by the defendant. It may be put in this way: The degree of care required of plaintiff to rebut the charge of contributory negligence is inversely as the duty owed him by the defendant. This proposition is, of course, of no practical value further than to direct atten-

and need not anticipate a negligent act, O'Connor v. Railway Co., 94 Mo. 150, 7 S. W. 106. Also see cases collected, Beach, Contrib. Neg. p. 52.

[2] Henry v. Dennis, 93 Ind. 452 (a case said to be wrongly decided). Pastene v. Adams, 49 Cal. 87; Griggs v. Fleckenstein, 14 Minn. 81 (Gil. 62); Lane v. Atlantic Works, 111 Mass. 136; Weick v. Lander, 75 Ill. 93.

[3] Texas & St. L. R. Co. v. Young, 60 Tex. 201; Beach, Contrib. Neg. p. 51.

tion to the shifting nature of the relation which exists between the reciprocal duties of plaintiff and defendant in actionable negligence.

It is true that even slight negligence will defeat plaintiff's right to recover, but, in determining if he has been guilty of any negligence, the degree of care which he has exercised must be examined in the light of the circumstances.

The relationship of the parties as affecting the degree of requisite care will be considered later, but the legal status of the plaintiff at the time the injury occurred is often significant in determining whether he has used that ordinary care which is suited to the occasion.

Illegality of Plaintiff's Conduct.

The fact that at the time of the injury plaintiff was engaged in an illegal act is not contributory negligence per se. It is undoubtedly proper matter for consideration as tending to show want of ordinary care, but its effect may be rebutted by showing that the illegal act was merely collateral, and did not influence the result of defendant's negligence. Thus when, at the time of the accident, plaintiff was violating a statute regulating speed, it was held that this fact merely placed on him the burden of showing that the violation of the statute in no way contributed to the collision.[1] And in general it may be said of the violation of a statute, whether by plaintiff or defendant, that it is merely evidence of want of ordinary care.[2] The law on this

§ 14. [1] Minerly v. Ferry Co., 56 Hun, 113, 9 N. Y. Supp. 104; Piollet v. Simmers, 106 Pa. St. 95; Philadelphia, W. & B. R. Co. v. Philadelphia & H. de G. Steam Towboat Co., 23 How. 209; Spofford v. Harlow, 3 Allen (Mass.) 176; Baker v. Portland, 58 Me. 199. In the latter case the plaintiff was driving at a rate of speed on the streets in violation of a city ordinance, and the court says: "While it might subject the offender to a penalty, it will not excuse the town for a neglect to make its ways safe and convenient for travelers, if the commission of the plaintiff's offense did not in any degree contribute to produce the injury of which he complains." Norris v. Litchfield, 35 N. H. 271, 277. But compare Toledo, W. & W. Ry. Co. v. Brooks, 81 Ill. 245, and Chicago & A. R. Co. v. Michie, 83 Ill. 427. See, also, Needham v. Railroad Co., 37 Cal. 409.

[2] Clark v. Railroad Co., 64 N. H. 323, 10 Atl. 676; Briggs v. Railroad Co., 72 N. Y. 26; Augusta & S. R. Co. v. McElmurry, 24 Ga. 75; Hanlon v. Railroad Co., 129 Mass. 310; Philadelphia, W. & B. R. Co. v. Kerr, 25 Md. 521; Knupfle v. Ice Co., 84 N. Y. 488 (reversing 23 Hun, 159); Vincett v. Cook, 4 Hun (N. Y.) 318. Welch v. Wesson, 6 Gray (Mass.) 505: One of two persons en-

point is thus stated by Bell, J., in a New Hampshire case:[3] "As a general principle, it seems to us wholly immaterial whether, in the abstract, the plaintiff was a wrongdoer, or a trespasser, or was acting in violation of the law. For his wrong or trespass he is answerable in damages, and he may be punishable for his violation of law; but his rights as to other persons and as to other transactions are not affected by that circumstance. A traveler may be traveling on a turnpike without payment of toll; he may be riding on a day when riding is forbidden, or with a speed forbidden by law; * * * and in none of these cases is his right of action for any injury he may sustain from the negligent conduct of another in any way affected by

gaged in trotting their horses against each other may maintain an action against the other for willfully running him down, although they were trotting for money, contrary to law. "We presume it may be assumed as an undisputed principle of law that no action will lie to recover a demand or a supposed claim for damages if, to establish it, the plaintiff requires aid from an illegal transaction, or is under the necessity of showing and depending in any degree upon an illegal agreement, to which he himself had been a party." Merrick, J. He further says, in effect: The plaintiff presented a case with no taint of illegality, which, if undisputed, entitled him to recover. The defendant then invoked the aid of an illegal agreement and conduct, in which both parties equally participated, and from such a source neither party should be permitted to derive a benefit. In Steele v. Burkhardt, 104 Mass. 59, plaintiff had placed his horse and wagon at right angles to the sidewalk while unloading goods, contrary to a city ordinance, and defendant negligently drove his horse against that of plaintiff, when, by exercising reasonable care, he might have passed safely. The court said that the violation of the ordinance was admissible to show negligence in respect to keeping the ordinance, but did not necessarily show negligence that contributed to the injury. So, also, in Jones v. Inhabitants of Andover, 10 Allen (Mass.) 18, 20; Bigelow, C. J., says: "So, in case of collision of two vehicles on a highway, evidence that the plaintiff was traveling on the left side of the road, in violation of the statute, when he met the defendant, would be admissible to show negligence." But see, also, Wallace v. Express Co., 134 Mass. 95, where it was held that if a person sailing for pleasure on the Lord's Day, in violation of a statute, is injured by being negligently run into by a steamboat, his unlawful act necessarily contributes to the injury, but otherwise if the act of those in charge of the steamboat was wanton and malicious. There is very little authority to support this proposition, and the fact that three of the justices, including Holmes, now chief justice, dissented, is significant.

[3] Norris v. Litchfield, 35 N. H. 271, 277.

these circumstances. He is none the less entitled to recover, unless it appears that his negligence or his fault has directly contributed to his damage."

Nor, on the other hand, is contributory negligence any the less available as a defense by reason of the fact that the defendant has failed to perform a duty imposed by statute.[4] But when the illegal act in any manner contributes to produce the injury it constitutes the defense of contributory negligence to the same extent only as though it were not tainted with illegality.

Conversely, the fact that defendant's negligence involves a breach of statute or an ordinance does not in any degree relieve plaintiff from the charge of contributory negligence; as where one carelessly walks into an elevator opening, left unguarded contrary to statute.[5]

SAME—PLAINTIFF AS TRESPASSER OR LICENSEE.

15. The bare fact that plaintiff was committing a trespass when injured will not prevent his recovery for defendant's negligence.

As Trespasser.

Negligence is a breach of duty, and the duties owed to an actual trespasser are few and slight. The law does not impose upon any one the duty to anticipate a trespass, and guard against possible injury to a wrongdoer;[1] but it will not excuse a willful or wanton in-

[4] Anderson v. Lumber Co., 67 Minn. 79, 69 N. W. 630; Knisley v. Pratt, 148 N. Y. 372, 42 N. E. 986; O'Maley v. Gaslight Co., 158 Mass. 135, 32 N. E. 1119.

[5] McRickard v. Flint, 114 N. Y. 222, 21 N. E. 153; and see cases collected in Beach, Contrib. Neg. (2d Ed.) p. 67. Also Trask v. Shotwell, 41 Minn. 66, 42 N. W. 699; Beehler v. Daniels, 19 R. I. 49, 31 Atl. 582; South Bend Iron Works v. Larger, 11 Ind. App. 367, 39 N. E. 209.

§ 15. [1] Trask v. Shotwell, 41 Minn. 66, 42 N. W. 699: Elevator in shipping room. Plaintiff's intestate came for goods, and was told to call at door of shipping room, but to wait outside. He went into the room, and was killed by falling down an elevator shaft, left unguarded, contrary to statute. Held no recovery. In Larmore v. Iron Co., 101 N. Y. 391, 4 N. E. 752, plaintiff went onto premises without invitation to seek employment, and while passing along was injured by operation of a machine not obviously dangerous, although the defect might have been discovered by the exercise of reasonable care. No recovery. Followed in Sterger v. Vansicklen, 132 N. Y. 499, 30 N. E.

jury inflicted on him. But where plaintiff relies upon the violation of some statute or ordinance enacted for the protection of those rightfully upon certain premises, he must show that at the time of the injury he belonged to the class intended to be benefited by the statute or ordinance, and if it appears that he was at that time a trespasser he cannot complain of the violation. Thus, where a statute required railroad companies to block all frogs in their yards, and plaintiff's decedent, a trespasser in defendant's yards, was killed by reason of catching his foot in an unblocked frog, no other negligence on the part of defendant being shown, no recovery was allowed; the court observing: "A violation of a statutory duty can be made the foundation of an action only by a person belonging to the class intended to be protected by such regulation, and all statutes requiring the owner or occupant of premises to adopt certain precautions to render them safe are designed for the protection, not of the wrongdoers or trespassers, but of those who are rightfully upon them. Hence it is held universally, except, perhaps, in Tennessee, that in case of noncompliance with such a statute the injured person, in order to recover, must have been rightfully in the place, and free from contrib-

987; distinguished in Byrne v. Railroad Co., 104 N. Y. 362, 10 N. E. 539; Miller v. Woodhead, 104 N. Y. 471, 11 N. E. 57; cited in Splittdorf v. State, 108 N. Y. 205, 15 N. E. 322; Cusick v. Adams, 115 N. Y. 55, 21 N. E. 673; Larkin v. O'Neill, 119 N. Y. 221, 23 N. E. 563. See, also, Redigan v. Railroad Co., 155 Mass. 44, 28 N. E. 1133, where owner of private way failed to put up sign. Stevens v. Nichols, 155 Mass. 472, 29 N. E. 1150; Reardon v. Thompson, 149 Mass. 267, 21 N. E. 369; Omaha & R. V. R. Co. v. Martin, 14 Neb. 295, 15 N. W. 696; Blatt v. McBarron, 161 Mass. 21, 36 N. E. 468; Mergenthaler v. Kirby, 79 Md. 182, 28 Atl. 1065; Fredericks v. Railroad Co., 46 La. Ann. 1180, 15 South. 413; Berlin Mills Co. v. Croteau, 32 C. C. A. 126, 88 Fed. 860; Biggs v. Wire Co. (Kan. Sup.) 56 Pac. 4; Ritz v. City of Wheeling (W. Va.) 31 S. E. 993; Peters v. Bowman, 115 Cal. 345, 47 Pac. 113, 598; Butz v. Cavanaugh, 137 Mo. 503, 38 S. W. 1104; Missouri, K. & T. Ry. Co. of Texas v. Dobbins (Tex. Civ. App.) 40 S. W. 861; Dublin Cotton-Oil Co. v. Jarrard (Tex. Civ. App.) 40 S. W. 531; Reeves v. French (Ky.) 45 S. W. 771; Anderson v. Railway Co., 19 Wash. 340, 53 Pac. 345; Hector Min. Co. v. Robertson, 22 Colo. 491, 45 Pac. 406; Hutson v. King, 95 Ga. 271, 22 S. E. 615; Magner v. Baptist Church, 174 Pa. St. 84, 34 Atl. 456; Lowe v. Salt Lake City, 13 Utah, 91, 44 Pac. 1050; Dicken v. Coal Co., 41 W. Va. 511, 23 S. E. 582; Pelton v. Schmidt, 104 Mich. 345, 62 N. W. 552; Barney v. Railroad Co., 126 Mo. 372, 28 S. W. 1069; Walsh v. Railroad Co., 145 N. Y. 301, 39 N. E. 1068; Elliott v. Carlson, 54 Ill. App. 470.

utory negligence. Such statutes were never designed to abrogate the ordinary rules that, to recover, the neglected duty must have been due to the party injured, and that he himself must have been free from contributory negligence." [2]

As Licensee.

But where the circumstances are such as to create or imply a license or invitation to go upon premises, the owner is bound to exercise ordinary care for his safety.[3] And in some cases it would seem to be sufficient if the owner exercised but slight care.[4] The weight of authorities seems to support the proposition that, if the owner is ignorant of the danger, or it is patent, the licensee or invited person cannot recover.[5]

[2] Akers v. Railway Co., 58 Minn. 540, 60 N. W. 669.

[3] Campbell v. Boyd, 88 N. C. 129; Hooker v. Railway Co., 76 Wis. 542, 44 N. W. 1085; Brezee v. Powers, 80 Mich. 172, 45 N. W. 130; Toomey v. Sanborn, 146 Mass. 28, 14 N. E. 921; Emery v. Exposition, 56 Minn. 460, 57 N. W. 1132; Davis v. Ferris, 29 App. Div. 623, 53 N. Y. Supp. 571; Brehmer v. Lyman (Vt.) 42 Atl. 613; Kinney v. Onsted, 113 Mich. 96, 71 N. W. 482; McGovern v. Oil Co., 11 App. Div. 588, 42 N. Y. Supp. 595; Richmond & M. Ry. Co. v. Moore's Adm'r, 94 Va. 493, 27 S. E. 70; Barman v. Spencer (Ind. Sup.) 49 N. E. 9; Anderson & Nelson Distilling Co. v. Hair (Ky.) 44 S. W. 658; Doherty v. McLean, 171 Mass. 399, 50 N. E. 938; Wilson v. Olano, 28 App. Div Supp. 448, 51 N. Y. Supp. 109; Smith v. Day, 86 Fed. 62; Blackstone v. Foundry Co., 170 Mass. 321, 49 N. E. 635; Fitzpatrick v. Manufacturing Co. (N. J. Sup.) 39 Atl. 675; Clarkin v. Biwabik-Bessemer Co., 65 Minn. 483. 67 N. W. 1020; Lowe v. Salt Lake City, 13 Utah, 91, 44 Pac. 1050; Hart v. Park Club, 54 Ill. App. 480; Peake v. Buell, 90 Wis. 508, 63 N. W. 1053; Pelton v. Schmidt, 104 Mich. 345, 62 N. W. 552.

[4] Woodruff v. Bowen, 136 Ind. 431, 34 N. E. 1113; Beehler v. Daniels, 18 R. I. 563, 29 Atl. 6; Walsh v. Railroad Co., 145 N. Y. 301, 39 N. E. 1068; Plummer v. Dill, 156 Mass. 426, 31 N. E. 128; Faris v. Hoberg, 134 Ind. 269. 33 N. E. 1028; Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182; Akers v. Railroad Co., 58 Minn. 540, 60 N. W. 669; Stevens v. Nichols, 155 Mass. 472, 29 N. E. 1150.

[5] Campbell v. Boyd, 88 N. C. 129; Cusick v. Adams, 115 N. Y. 55, 21 N. E. 673; Eisenberg v. Railway Co., 33 Mo. App. 85. See, also, Shir. Lead. Cas. (3d Ed.) p. 276: "A licensee can only maintain an action against his licensor when the danger through which he has sustained hurt was of a latent character, which the licensor knew of and the licensee did not." And it is frequently said that the owner of premises is liable to a licensee for something in the nature of a trap or a concealed danger only. Southcote v. Stanley,

THE RELATIVE TIME OF PLAINTIFF'S NEGLIGENCE AS AFFECTING HIS RIGHT TO RECOVER.

16. Referring to defendant's negligence, the relative time of the negligence of plaintiff as happening before, at the time of, or subsequent to that of defendant, is immaterial.

Plaintiff negligently walks on the railroad tracks of defendant, who discovers him in time to prevent injury by the exercise of ordinary care. Failing in this, defendant is liable to plaintiff, although the latter is, at best, but a mere licensee, for injuries thus caused.[1] A person may be induced by defendant's conduct to assume the risk,[2] or he may assume some risks with the reasonable expectation that those having knowledge of his position will use ordinary care to avoid inflicting injury on him;[3] and if, having this knowledge, they fail to use the proper degree of care, and plaintiff is consequently

1 Hurl. & N. 247; White v. France, 2 C. P. Div. 308; Bolch v. Smith, 7 Hurl. & N. 736; Pickard v. Smith, 10 C. B. (N. S.) 470.

§ 16. [1] Lay v. Railroad Co., 106 N. C. 404, 11 S. E. 412; Houston & T. C. Ry. Co. v. Carson, 66 Tex. 345, 1 S. W. 107; Wooster v. Railway Co., 74 Iowa, 593, 38 N. W. 425; Kansas Pac. Ry. Co. v. Cranmer, 4 Colo. 524; Kelly v. Transit Co., 95 Mo. 279, 8 S. W. 420; Austin v. Steamboat Co., 43 N. Y. 75; Baltimore & O. R. Co. v. Kean, 65 Md. 394, 5 Atl. 325; Button v. Railroad Co., 18 N. Y. 248; Cleveland, C. C. & I. R. Co. v. Elliott, 28 Ohio St. 340; Doggett v. Railroad Co., 78 N. C. 305; Needham v. Railroad Co., 37 Cal. 409; Chicago & A. R. Co. v. Anderson, 166 Ill. 572, 46 N. E. 1125; Embry v. Railroad Co. (Ky.) 36 S. W. 1123; St. Louis S. W. Ry. Co. v. Bishop, 14 Tex. Civ. App. 504, 37 S. W. 764; Lindsay v. Railroad Co., 68 Vt. 556, 35 Atl. 513; Blankenship v. Railroad Co., 94 Va. 449, 27 S. E. 20; Gunn v. Railroad Co., 42 W. Va. 676, 26 S. E. 546; Thomas v. Railway Co., 103 Iowa, 649, 72 N. W. 783; Willis v. Railroad Co., 122 N. C. 905, 29 S. E. 941.

[2] Dewire v. Bailey, 131 Mass. 169; Looney v. McLean, 129 Mass. 33.

[3] Gothard v. Railroad Co., 67 Ala. 114; Zimmerman v. Railroad Co., 71 Mo. 476; Trow v. Railroad Co., 24 Vt. 487; Wright v. Brown, 4 Ind. 95; Baltimore & O. R. Co. v. State, 33 Md. 542; Baltimore & O. R. Co. v. Mulligan, 45 Md. 486; Mississippi Cent. R. Co. v. Mason, 51 Miss. 234; Johnson v. Railroad Co., 27 La. Ann. 53; Isbell v. Railroad Co., 27 Conn. 393; Underwood v. Waldron, 33 Mich. 232; O'Rourke v. Railroad Co., 44 Iowa, 526; Illinois Cent. R. Co. v. Hoffman, 67 Ill. 287; Lane v. Atlantic Works, 107 Mass. 104; Tuff v. Warman, 2 C. B. (N. S.) 740.

injured, their breach of duty becomes the proximate cause of the injury, and they are liable.[4] When plaintiff was riding in a phaeton, and, in attempting to cross the tracks of defendant, the view being unobstructed, was struck by a car, and injured, the court said: "If the motorman so saw the plaintiff in such danger and unconscious of her peril, and might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence, but failed to do so, then such failure was something more than a want of ordinary care on his part, and amounted to wanton or reckless conduct." [5]

If the negligence of plaintiff is contemporaneous with that of defendant, and the mutual negligent acts combine to produce the harm, it is evident that there can be no recovery.[6] It was so held where plaintiff, in the employment of a third person, was engaged, under the direction of a servant of defendant, in withdrawing from a rock an unexploded charge of powder. The two men, working together, employed a dangerous method of performing the work, and plaintiff was injured by an explosion.[7] If the acts of negligence are not con-

[4] Gothard v. Railroad Co., 67 Ala. 114; Shear. & R. Neg. (4th Ed.) § 99; Little v. Railway Co., 88 Wis. 402, 60 N. W. 705; Baltimore & O. R. Co. v. Hellenthal, 88 Fed. 116, 31 C. C. A. 414; Higgins v. Railway Co., 1 Marv. 352, 41 Atl. 86; Maxwell v. Railway Co., 1 Marv. 199, 40 Atl. 945; Krenzer v. Railway Co., 151 Ind. 587, 52 N. E. 220; Texas & P. Ry. Co. v. Lively, 14 Tex. Civ. App. 554, 38 S. W. 370; Baltimore City Pass. Ry. Co. v. Cooney, 87 Md. 261, 39 Atl. 859; McKeon v. Railway Co., 20 App. Div. 601, 47 N. Y. Supp. 374; Thompson v. Rapid-Transit Co., 16 Utah, 281, 52 Pac. 92; Omaha St. Ry. Co. v. Martin, 48 Neb. 65, 66 N. W. 1007; Styles v. Railroad Co., 118 N. C. 1084, 24 S. E. 740; Hall v. Railway Co., 13 Utah, 243, 44 Pac. 1046; McGuire v. Railroad Co., 46 La. Ann. 1543, 16 South. 457; Moore v. Railway Co., 126 Mo. 265, 29 S. W. 9; Little v. Railway Co., 88 Wis. 402, 60 N. W. 705; Keefe v. Railway Co., 92 Iowa, 182, 60 N. W. 503.

[5] Little v. Railway Co., 88 Wis. 402, 60 N. W. 705; and see Carroll v. Railroad Co., 13 Minn. 30 (Gil. 18); Griggs v. Fleckenstein, 14 Minn. 81 (Gil. 62).

[6] Stucke v. Railroad Co., 9 Wis. 202; Straus v. Railroad Co., 75 Mo. 185; Haley v. Railroad Co., 21 Iowa, 15; Needham v. Railroad Co., 37 Cal. 409; Reynolds v. Hindman, 32 Iowa, 146; Northern Cent. Ry. Co. v. State, 29 Md. 420; Connor v. Traction Co., 173 Pa. St. 602, 34 Atl. 238; Central Railroad & Banking Co. v. Newman, 94 Ga. 560, 21 S. E. 219; King v. Railway Co. (Minn.) 79 N. W. 611.

[7] Corneilson v. Railway Co., 50 Minn. 23, 52 N. W. 224.

temporaneous, the liability must be referred to the author of the act which was the proximate cause of the injury.

Lastly, when the negligence of plaintiff is subsequent to that of defendant, the ordinary, typical case exists where the plaintiff, having knowledge of defendant's prior negligence, is bound to use ordinary care, in the circumstances, to avoid its probable consequences. If he fails to use such ordinary care, and the failure is the proximate cause of his injury, he cannot recover. Thus, if a person, with full and present knowledge of the defective condition of a sidewalk, and of the risks incident to its use, voluntarily attempts to travel upon it, when the defect could easily have been avoided by going around it, he is not in the exercise of reasonable care, but must be presumed to have taken his chances, and, if injury results, he cannot recover against the city.[8]

It is therefore immaterial at what time the negligence of plaintiff operated,—whether it was prior to, contemporaneous with, or subsequent to defendant's negligence. If it was the proximate cause of his injury, he cannot recover. The principle has been tersely put in the following language: "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it." [9]

SAME—PLAINTIFF'S NEGLIGENCE AFTER THE ACCIDENT

17. Plaintiff's negligence occurring after the accident, and thereby increasing the damage, is not a defense to his right of action, but is a bar to recovery of the excess of damages thus produced.

In other words, plaintiff being without fault in causing the legal injury, defendant is liable for so much of the damage only as proximately resulted from his own negligence.[1]

[8] Wright v. City of St. Cloud, 54 Minn. 94, 55 N. W. 819.

[9] 2 Quart. Law Rev. (1886) p. 507.

§ 17. [1] Thomas v. Kenyon, 1 Daly (N. Y.) 132; Gould v. McKenna, 86 Pa. St. 297; Secord v. Railway Co., 5 McCrary, 515, 18 Fed. 221; Tift v. Jones, 52 Ga. 538; Sherman v. Iron-Works Co., 2 Allen (Mass.) 524; Hunt v. Gaslight Co., 1 Allen (Mass.) 343; Wright v. Telegraph Co., 20 Iowa, 195; Chase v. Railroad Co., 24 Barb. (N. Y.) 273; Hamilton v. McPherson, 28 N. Y. 72;

It is immaterial that the injury was aggravated by subsequent maltreatment of physician, or by lack of judgment on the part of the plaintiff, provided that good faith and ordinary prudence in the circumstances are shown.[2]

The above rule has, of course, no application except in those cases where a distinct division and apportionment of the injury or damages can be made.

CONTRIBUTORY NEGLIGENCE OF THIRD PERSONS.

18. The negligent act of a stranger, contributing to produce the injury complained of, is no defense to the action;[1] but in certain circumstances the plaintiff may be so identified with a third person, either by express contract or by implication of law, as to be chargeable with his misconduct, and make his negligence his own.

Milton v. Steamboat Co., 37 N. Y. 210; Greenland v. Chaplin, 5 Exch. 243. Can recover up to excess caused by his own negligence. Stebbins v. Railroad Co., 54 Vt. 464; Miller v. Mariner's Church, 7 Me. 51; State v. Powell, 44 Mo. 436; Douglass v. Stephens, 18 Mo. 362; Illinois Cent. R. Co. v. Finnigan, 21 Ill. 646; Worth v. Edmonds, 52 Barb. (N. Y.) 40. Where there are two or more injuries, to one of which only plaintiff has contributed, he can recover for the other. Northern Cent. Ry. Co. v. State, 29 Md. 420. Plaintiff, being injured on a railway, died from gross negligence of employés. It was held immaterial whether he contributed to the original injury. If his death resulted from defendant's negligence, his representatives could recover.

[2] Lyons v. Railroad Co., 57 N. Y. 489; Hope v. Railroad Co., 40 Hun (N. Y.) 438; Ehrgott v. Mayor, etc., 96 N. Y. 264; Lawrence v. Railroad Co., 29 Conn. 390; Stover v. Inhabitants of Bluehill, 51 Me. 439; Simpson v. City of Keokuk, 34 Iowa, 568; Sauter v. Railroad Co., 66 N. Y. 50; Vandenburgh v. Truax, 4 Denio (N. Y.) 464; Pollett v. Long, 56 N. Y. 200; Standard Oil Co. v. Bowker, 141 Ind. 12, 40 N. E. 128; Strudgeon v. Village of Sand Beach, 107 Mich. 496, 65 N. W. 616; Bradford City v. Downs, 126 Pa. St. 622, 17 Atl. 884.

§§ 18–20. [1] Webster v. Railroad Co., 38 N. Y. 260; Barrett v. Railroad Co., 45 N. Y. 628; Arctic Fire Ins. Co. v. Austin, 69 N. Y. 470; Paulmier v. Railroad Co., 34 N. J. Law, 151. And see Sullivan v. Railroad Co., 30 Pa. St. 234; Gee v. Railroad Co., L. R. 8 Q. B. 161, 174; Harrison v. Railroad Co., 3 Hurl. & C. 231; Burrows v. Coke Co., L. R. 5 Exch. Cas. 67; Warren v. Railroad Co., 8 Allen (Mass.) 227; Eaton v. Railroad Co., 11 Allen (Mass.) 505; Ingalls v. Bills, 9 Metc. (Mass.) 1; McElroy v. Railroad Corp., 4 Cush. (Mass.) 400; Cayzer v. Taylor, 10 Gray (Mass.) 274; Churchill v. Holt, 127 Mass. 165.

19. To make the misconduct of a third party a defense to the action,—to make it contributory negligence, within the definition,—it must be shown that between the plaintiff and the person contributing to cause the injury there existed such a relation or connection as to make the former legally responsible for the negligent act of the latter.

Such identification or relationship may exist between

(a) Master and servant or principal and agent.

(1) Shipper and carrier of goods.

(b) Guardians and persons non sui juris.

(1) Children.

(2) Lunatics, idiots, etc.

SAME—MASTER AND SERVANT OR PRINCIPAL AND AGENT.

20. When the relation and circumstances are such that the master would be responsible for the negligent acts of his servant in an action for injuries caused thereby, such negligence may be imputed to the master as contributing to the injury complained of by him.

Thus, where the servant, being in charge of plaintiff's team, negligently left the horses unhitched, and engaged in a boisterous altercation with the defendant, at which the horses took fright, and ran away, and were injured, in this case the court says: "But if Reddick [the servant] was guilty of such negligence in the care of the team as would preclude him, if he had been its owner, from maintaining an action against Reasor [the defendant], this negligence must be equally fatal in an action brought by this plaintiff, who confided the team to Reddick's [his servant's] care." [2] It is apparent that if the horses, in

[2] Puterbaugh v. Reasor, 9 Ohio St. 484; and nearly identical, Page v. Hodge, 63 N. H. 610, 4 Atl. 805. Also, Toledo & W. Ry. Co. v. Goddard, 25 Ind. 185; Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274; Louisville, N. A. & C. Ry. Co. v. Stommel, 126 Ind. 35, 25 N. E. 863; Welty v. Railroad Co., 105 Ind. 55, 4 N. E. 410; Abbitt v. Railway Co., 150 Ind. 498, 50 N. E. 729; Nesbit v. Town of Garner, 75 Iowa, 314, 39 N. W. 516; City of Joliet v.

running away, had injured a traveler, he could have maintained his action against the master, who was responsible for his servant's negligence.

But where the contributory negligence is based upon knowledge of the existence of danger, the negligence of the agent cannot be imputed to the principal, unless the failure to communicate the knowledge is in itself negligence on the part of the agent.[3] So, also, the knowledge of the principal is not imputed to the agent unless it appears that, in the circumstances, ordinary care and prudence would have permitted and required that he should inform the agent, in order that he might avoid the injury; as, where an obstacle is negligently left in the road and the principal, having knowledge of it, but no reasonable cause to apprehend danger, fails to warn his agent, who, without personal fault, drives his principal's wagon against it.[4] But where the negligence of the master contributes with that of a third person, to the injury of his servant, it cannot be imputed to the servant in an action against such third party.[5] Nor can the contributory negligence of a co-employé be imputed to the plaintiff in a suit against the principal.[6]

21. SHIPPER AND CARRIER OF GOODS—By weight of authority, the shipper of goods is so identified with the common carrier that he cannot recover in an action against a third person for injuries to the goods, to which the negligence of the carrier contributed.

The doctrine of identification reached its extreme limit in the famous, but now exploded, case of Thorogood v. Bryan,[1] wherein it

Seward, 86 Ill. 402; Minster v. Railway Co., 53 Mo. App. 276; Bronson v. Railroad Co., 24 App. Div. 262, 48 N. Y. Supp. 257.

[3] Weisser's Adm'rs v. Denison, 10 N. Y. 68; Board of Com'rs of Boone Co. v. Mutchler, 137 Ind. 140, 36 N. E. 534; Fuller v. Benett, 2 Hare, 402.

[4] Garmon v. Bangor, 38 Me. 443.

[5] Galveston, H. & S. A. Ry. Co. v. Garteiser, 9 Tex. Civ. App. 456, 29 S. W. 939, where a railroad contractor negligently failed to send out a flagman, and his employé was injured.

[6] Poor v. Sears, 154 Mass. 539, 28 N. E. 1046; Seaman v. Koehler, 122 N. Y. 646, 25 N. E. 353; Abbitt v. Railroad Co. (Ind. Sup.) 40 N. E. 40; McCormack v. Railroad Co., 18 App. Div. 333, 46 N. Y. Supp. 230.

§ 21. [1] 8 C. B. 115.

was held that a passenger in a public conveyance was so identified with the vehicle, although having no authority over the driver, as to be chargeable with any negligence of the proprietors which contributed with the negligence of a stranger to injure the passenger. Although this decision is no longer followed in either the English or American courts,[2] with possibly one or two exceptions in the latter, the case stands to-day as a monument to the absurdity of a doctrine founded on the shadow of a principle and carried to such an extreme as to be purely scholastic and eminently unjust.

But long prior to the decision in Thorogood v. Bryan, it was well settled in England that as between the common carrier of goods and the shipper, there was such privity of negligence as would prevent the latter from recovering against a third person for injuries to which the negligence of the former contributed.[3]

The contract of agency between the shipper and the carrier is perfect. The carrier's care and control of the goods is absolute. The

[2] The Bernina, 12 Prob. Div. 58, affirmed in 13 App. Cas. 1; Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391. In Chapman v. Railroad Co., 19 N. Y. 341, Johnson, C. J., says: "He was a passenger on the Harlem cars, conducting himself as he lawfully ought, having no control over the train or its management; on the contrary, bound to submit to the regulations of the company and the directions of their officers. To say that he is chargeable with negligence because they have been guilty is plainly not founded on any fact of conduct on his part, but is mere fiction." Webster v. Railroad Co., 38 N. Y. 260; Colegrove v. Railroad Co., 6 Duer, 382, affirmed in 20 N. Y. 492; Barrett v. Railroad Co., 45 N. Y. 628; Busch v. Railroad Co., 29 Hun (N. Y.) 112; Harvey v. Railroad Co., 23 N. Y. Wkly. Dig. 198; Bennett v. Transportation Co., 36 N. J. Law, 225; New York, L. E. & W. R. Co. v. Steinbrenner, 47 N. J. Law, 161; Transfer Co. v. Kelly, 36 Ohio St. 86; Town of Albion v. Hetrick, 90 Ind. 545; Wabash, St. L. & P. R. Co. v. Shacklet, 105 Ill. 364; Cuddy v. Horn, 46 Mich. 596, 10 N. W. 32; Malmsten v. Railroad Co., 49 Mich. 94, 13 N. W. 373; Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274; Louisville, C. & L. R. Co. v. Case's Adm'r, 9 Bush (Ky.) 728; Danville, L. & N. Turnpike Co. v. Stewart, 2 Metc. (Ky.) 119; Philadelphia, W. & B. R. Co. v. Hogeland, 66 Md. 149, 7 Atl. 105; McMahon v. Davidson, 12 Minn. 357 (Gil. 232); Follman v. City of Mankato, 35 Minn. 522, 29 N. W. 317; Hillman v. Newington, 57 Cal. 56; Tompkins v. Railroad Co., 66 Cal. 163, 4 Pac. 1165; Roach v. Railroad Co., 93 Ga. 785, 21 S. E. 67; Gulf, C. & S. F. Ry. Co. v. Pendry, 87 Tex. 553, 29 S. W. 1038.

[3] Vanderplank v. Miller, 1 Moody & M. 169; Arctic Fire Ins. Co. v. Austin, 69 N. Y. 470.

owner himself could not exercise any greater authority than that of the agent in possession. The representation is complete, and the contributory negligence of the carrier should be imputed to the owner of the goods to the extent of depriving him of any remedy against a third party for a loss to which the wrongful act of his agent has contributed.[4]

22. PASSENGER AND COMMON CARRIER—By weight of authority, in the carriage of passengers, the negligence of the carrier contributing with that of a third person to injure plaintiff is not a defense in an action by the latter against the third person.

23. Although the passenger is not so identified with the carrier that the latter's negligence is ipso facto imputed to him, he is, nevertheless, bound to exercise ordinary care and prudence.

CONVERSELY—If the negligence of the occupant of a vehicle contributes with that of the driver and a third person, the former cannot recover against the latter.[1]

The relation of passenger and carrier stands on a different basis, and requires further consideration. The carrier of passengers is not an insurer of their safe transportation. He has but a partial and incomplete control over them, and is in no sense their representative. The contract is one of limited agency only, and, the conduct of the carrier being beyond the influence and direction of the passenger, there is no assignable reason why he should be responsible for it. While, therefore, there is some lack of uniformity in the decisions, it is believed that the weight of authority, and certainly that of reason,

[4] Arctic Fire Ins. Co. v. Austin, 69 N. Y. 470; Duggins v. Watson, 15 Ark. 118; Broadwell v. Swigert, 7 B. Mon. (Ky.) 39. See cases reviewed in Simpson v. Hand, 6 Whart. (Pa.) 311.

§§ 22–23. [1] Beach, Contrib. Neg. (2d Ed.) § 115. If the occupant voluntarily rides with driver, not a common carrier, over ground obviously dangerous, he cannot recover against the township. Crescent Tp. v. Anderson, 114 Pa. St. 643, 8 Atl. 379. Riding with back towards driver in approaching well-known railroad crossing, and failure to look and listen or take any precautions, is contributory negligence. Dean v. Railroad Co., 129 Pa. St. 514, 18 Atl. 718.

sustains the proposition that in the carriage of passengers the negligence of the carrier, contributing with that of a third person to injure plaintiff, is not a defense in an action against the third person.[2]

When the injury by a third person is inflicted on a passenger in a railroad car, the question of actual negligent conduct on his part is seldom raised, by reason of his entire lack of control over the management of the train. When, however, the conveyance is a carriage or similar vehicle, the circumstances may be such that he is able and bound to exercise some discretion regarding its management. In such cases he is held to the use of such ordinary care and prudence as the circumstances may demand.[3] But where one travels in a vehicle over which he has no control, no relationship of principal and agent exists between him and the owner or driver, and, although he so travels voluntarily, he is not responsible for the negligence of the driver when he himself is not chargeable with negligence.[4] Other-

[2] Chapman v. Railroad Co., 19 N. Y. 341. Vide language of court in this case, section 21, note 2, supra. Danville, L. & N. Turnpike Co. v. Stewart, 2 Metc. (Ky.) 119; Gulf, C. & S. F. Ry. Co. v. Pendry, 87 Tex. 553, 29 S. W. 1038. See, also, Beach, Contrib. Neg. (2d Ed.) § 114.

[3] Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391; Haff v. Railway Co., 14 Fed. 558; The Washington and The Gregory, 9 Wall. 513; Gray v. Railroad Co., 24 Fed. 168; Masterson v. Railroad Co., 84 N. Y. 247; Robinson v. Railroad Co., 66 N. Y. 11; Dyer v. Railroad Co., 71 N. Y. 228; Smith v. Railroad Co., 38 Hun (N. Y.) 33; Harris v. Uebelhoer, 75 N. Y. 169; Meenagh v. Buckmaster, 26 App. Div. 451, 50 N. Y. Supp. 85. But the extreme of this rule was held in Brannen v. Gravel-Road Co., 115 Ind. 115, 17 N. E. 202, where it was said that, unless plaintiff showed that he was not negligent in trying to stop the intoxicated driver, he could not recover. See, however, Town of Knightstown v. Musgrove, 116 Ind. 121, 18 N. E. 452, which distinguishes the former case.

[4] Little v. Hackett, supra; Haff v. Railway Co., supra; Masterson v. Railroad Co., supra; Dyer v. Railroad Co., supra; Smith v. Railroad Co., supra; Harris v. Uebelhoer, supra; Bennett v. Railroad Co., 133 N. Y. 563, 30 N. E. 1149; Alabama & V. Ry. Co. v. Davis, 69 Miss. 444, 13 South. 693; Baltimore & O. R. Co. v. State, 79 Md. 335, 29 Atl. 518, following Philadelphia, W. & B. R. Co. v. Hogeland, 66 Md. 149, 7 Atl. 105; Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350; Randolph v. O'Riordon, 155 Mass. 331, 29 N. E. 583; Pyle v. Clark, 25 C. C. A. 190, 79 Fed. 744; Lake Shore & M. S. Ry. Co. v. Boyts, 16 Ind. App. 640, 45 N. E. 812; Missouri, K. & T. Ry. Co. of Texas v. Rogers, 91 Tex. 52, 40 S. W. 956; Harper v. Railroad Co., 22 App. Div. 273, 47 N. Y. Supp. 933; Baltimore & O. R. Co. v. Adams, 10 App. D. C. 97; Bryant v. Rail-

wise, however, if the carrier or driver was in fact the agent of the plaintiff,[5] or was incited or encouraged by him in his negligent acts.[6]

24. NEGLIGENCE OF HUSBAND IMPUTED TO WIFE—

In general, in an action by or for the wife, the contributory negligence of the husband is not chargeable to her, unless she knowingly adopted or concurred in his negligent act.

road Co. (Tex. Civ. App.) 46 S. W. 82; Ritger v. City of Milwaukee, 99 Wis. 190, 74 N. W. 815; Robinson v. Navigation Co., 20 C. C. A. 86, 73 Fed. 883; Weldon v. Railroad Co., 3 App. Div. 370, 38 N. Y. Supp. 206; Ouverson v. City of Grafton, 5 N. D. 281, 65 N. W. 676; Cincinnati St. Ry. Co. v. Wright, 54 Ohio St. 181, 43 N. E. 688; Texas & P. Ry. Co. v. Curlin, 13 Tex. Civ. App. 505, 36 S. W. 1003; Roach v. Railroad Co., 93 Ga. 785, 21 S. E. 67; Gulf, C. & S. F. Ry. Co. v. Pendry, 87 Tex. 553, 29 S. W. 1038; Union Pac. R. Co. v. Lapsley's Adm'r, 2 C. C. A. 149, 51 Fed. 174, following Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391; Missouri Pac. Ry. Co. v. Texas Pac. Ry. Co., 41 Fed. 316; Whelan v. Railroad Co., 38 Fed. 15. But in Whittaker v. City of Helena, 14 Mont. 124, 35 Pac. 904, and Otis v. Town of Janesville, 47 Wis. 422, 2 N. W. 783, it was held that the driver's negligence was imputed to a voluntary passenger, and the latter could not recover damages against the city for injuries caused by city's negligence, where the negligence of the driver contributed to the injury. And in New York, where plaintiff occupied seat with driver and had equal knowledge and opportunity to discover the danger, the driver's negligence was imputed to him; but this is clearly within our rule. Brickell v. Railroad Co., 120 N. Y. 290, 24 N. E. 449. In Indiana the inclination is clearly towards imputing the driver's negligence to the passenger. Brannen v. Gravel Rd. Co., 115 Ind. 115, 17 N. E. 202; Town of Knightstown v. Musgrove, 116 Ind. 121, 18 N. E. 452. Also in Iowa, Slater v. Railway Co., 71 Iowa, 209, 32 N. W. 264; but overruled in Nesbit v. Town of Garner, 75 Iowa, 314, 39 N. W. 516.

[5] In Brickell v. Railroad Co., 120 N. Y. 290, 24 N. E. 449, the court says: "The rule that the driver's negligence may not be imputed to the plaintiff should have no application to this case. Such rule is only applicable to cases where the relation of master and servant or principal and agent does not exist, or where the passenger is seated away from the driver, or is separated from the driver by an inclosure, and is without opportunity to discover danger and inform the driver of it. It is no less the duty of the passenger where he has the opportunity to do so than of the driver to learn of danger, and avoid it, if practicable." Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274; Eaton v. Railroad Co., 11 Allen (Mass.) 500; Stevens v. Armstrong, 6 N. Y. 435; Omaha & R. V. Ry. Co. v. Talbot, 48 Neb. 627, 67 N. W. 599.

[6] Stafford v. City of Oskaloosa, 57 Iowa, 749, 11 N. W. 668.

There is an apparent conflict of authority as to the effect of the husband's contributory negligence on the wife's right of action against a third person. Where the rights of the wife are still limited by the rules of the common law, it is apprehended that the contributory negligence of the husband would bar the wife's recovery to the same extent which it would bar his own in an action to recover for loss of services.[1] But in those states where the wife can bring such an action in her own name, and recover damages for her separate use, it seems that the husband's negligence is not chargeable to her unless she knowingly adopts or concurs in his negligent conduct,[2] or makes him her agent.[3]

IMPUTED NEGLIGENCE.

25. The negligence of a third person may prevent a recovery by the plaintiff when the relation is such that, in law, the negligent conduct of the former is imputed to the latter.

§ 24. [1] McFadden v. Railway Co., 87 Cal. 464, 25 Pac. 681; Borough of Nanticoke v. Warne, 106 Pa. St. 373; Shear. & R. Neg. (4th Ed.) § 67; Honey v. Railway Co., 59 Fed. 423.

[2] Yahn v. City of Ottumwa, 60 Iowa, 429, 15 N. W. 257; Nesbit v. Town of Garner, 75 Iowa, 314, 39 N. W. 516; Peck v. Railroad Co., 50 Conn. 379. In Sheffield v. Telephone Co., 36 Fed. 164, and Shaw v. Craft, 37 Fed. 317, the United States court holds that the husband's "contributory" negligence will not defeat the wife's recovery if defendant's negligence "directly" contributed to the injury. But see Honey v. Railway Co., 59 Fed. 423, where it is held that to render the contributory negligence of a wife, regarded as the agent or servant of her husband, imputable to him, the circumstances must be such that he would be liable for her negligent act if it had resulted in injury to a third person. Flori v. City of St. Louis, 3 Mo. App. 231; Hedges v. City of Kansas, 18 Mo. App. 62; Platz v. City of Cohoes, 24 Hun (N. Y.) 101, affirmed in 89 N. Y. 219; Street v. Inhabitants of Holyoke, 105 Mass. 82; Louisville, N. A. & C. Ry. Co. v. Creek, 130 Ind. 139, 29 N. E. 481; Lake Shore & M. S. Ry. Co. v. McIntosh, 140 Ind. 261, 38 N. E. 476; Galveston, H. & S. A. Ry. Co. v. Kutac, 78 Tex. 473, 13 S. W. 327; Reading Tp. v. Telfer, 57 Kan. 798, 48 Pac. 134; Munger v. City of Sedalia, 66 Mo. App. 629; Finley v. Railway Co., 71 Minn. 471, 74 N. W. 174. In Carlisle v. Town of Sheldon, 38 Vt. 440, the court follows the reasoning in Thorogood v. Bryan, and imputes the husband's negligence to the wife, ipsa relatione.

[3] Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350; Honey v. Railway Co., 59 Fed. 423. See section 24, note 2, supra.

26. In an action by the parent in his own behalf for injuries to his minor child, the contributory negligence of the parent or of the infant is a good defense.

27. In an action in behalf of the child for injuries suffered by him

(a) The failure on his part to exercise the degree of care reasonably to be expected in the circumstances of children of his age, if it contributes to the injury, is a defense.

(b) If the negligence of the parent contributes to the injury, the weight of authority and reason is opposed to imputing his negligence to the infant.

When the action is for the benefit of the parent, it is founded on the quasi relation of master and servant, the damnum being the technical loss of service. In theory, therefore, this class of actions does not properly fall under this subdivision. It is, however, considered at this time for the purpose of emphasizing the danger of confusing it with those cases where the personal rights of the infant constitute the issue. When the parent is the beneficiary of the action, the ordinary rules of contributory negligence apply to his conduct,[1] and, if the contributory negligence of the child is such as would bar an

§§ 25–27. [1] Glassey v. Railroad Co., 57 Pa. St. 172; Bellefontaine Ry. Co. v. Snyder, 24 Ohio St. 670; Bellefontaine & I. R. Co. v. Same, 18 Ohio St. 399. In the last two cases the actions were on the same state of facts, for the benefit of the parent and child, respectively. In the former the contributory negligence of the parent was held a bar, and in the latter was held no defense. Pittsburg, A. & M. Ry. Co. v. Pearson, 72 Pa. St. 169; Philadelphia & R. R. Co. v. Long, 75 Pa. St. 257; Isabel v. Railroad Co., 60 Mo. 475; Daley v. Railroad Co., 26 Conn. 591; Albertson v. Railroad Co., 48 Iowa, 292; Pittsburgh, Ft. W. & C. Ry. Co. v. Vining's Adm'r, 27 Ind. 513; City of Chicago v. Major, 18 Ill. 349; Louisville & P. Canal Co. v. Murphy, 9 Bush (Ky.) 522; Williams v. Railroad Co., 60 Tex. 205; Baltimore & O. R. Co. v. State, 30 Md. 47; Walters v. Railroad Co., 41 Iowa, 71; Bamberger v. Railway Co., 95 Tenn. 18, 31 S. W. 163; Spokane & P. Ry. Co. v. Holt (Idaho) 40 Pac. 56; City of Pekin v. McMahon, 154 Ill. 141, 39 N. E. 484; Newdoll v. Young, 80 Hun, 364, 30 N. Y. Supp. 84; Chicago City Ry. Co. v. Wilcox, 138 Ill. 370, 27 N. E. 899. But see Wright v. Railroad Co., 4 Allen (Mass.) 283.

action for his own benefit, it will likewise bar the action of the parent.[2]

Degree of Care Required of the Parent.

In examining the conduct of the parent to determine whether he has been negligent in the care of the child, reference must be had not only to the age of the child, and the circumstances attending the accident, but to the parent's station and occupation in life, and his general ability to place safeguards about his children.[3] To constitute a defense to his action, it must appear that the parent was actually in fault,[4] and that the fault clearly contributed to the injury.[5] To al-

[2] Kennard v. Burton, 25 Me. 39; Burke v. Railroad Co., 49 Barb. (N. Y.) 529; Honegsberger v. Railroad Co., 2 Abb. Dec. (N. Y.) 378; Fitzgerald v. Railway Co., 29 Minn. 336, 13 N. W. 168; Gilligan v. Railroad Co., 1 E. D. Smith (N. Y.) 453; Chicago & G. E. Ry. Co. v. Harney, 28 Ind. 28; St. Louis & S. F. Ry. Co. v. Christian, 8 Tex. Civ. App. 246, 27 S. W. 932. Per contra, Ihl v. Railroad Co., 47 N. Y. 317.

[3] In Kay v. Railroad Co., 65 Pa. St. 277, Agnew, J., says: "But here a mother toiling for daily bread, and having done the best she could, in the midst of her necessary employment, loses sight of her child for an instant, and it strays upon the track, with no means to provide a servant for her child. Why should the necessities of her position in life attach to the child, and cover it with blame? When injured by positive negligence, why should it be without redress?" Philadelphia & R. R. Co. v. Long, 75 Pa. St. 257; Pittsburg, A. & M. Ry. Co. v. Pearson, 72 Pa. St. 169; Isabel v. Railroad Co., 60 Mo. 475; Frick v. Railway Co., 75 Mo. 542; O'Flaherty v. Railroad Co., 45 Mo. 70; Walters v. Railroad Co., 41 Iowa, 71; Hoppe v. Railway Co., 61 Wis. 357, 21 N. W. 227; Hewitt v. Railway Co., 167 Mass. 483, 46 N. E. 106.

[4] McKenna v. Bedstead Co., 12 Misc. Rep. 485, 33 N. Y. Supp. 684, where a child two years old ran into the street without the knowledge of the mother, who was engaged in her household duties; and in Hedin v. Railway Co., 26 Or. 155, 37 Pac. 540, where a child three years old was sent out to play under the care of a nine year old brother, and was injured while crossing the street alone,—the question of the contributory negligence of the parent was held properly submitted to the jury. See, also, cases cited in section 27, note 3, supra. Gunn v. Railroad Co., 37 W. Va. 421, 16 S. E. 628; Alabama G. S. R. Co. v. Dobbs, 101 Ala. 219, 12 South. 770; Weitzman v. Railroad Co., 33 App. Div. 585, 53 N. Y. Supp. 905; Wise v. Morgan (Tenn. Sup.) 48 S. W. 971; Trow v. Thomas, 70 Vt. 580, 41 Atl. 652; Ploof v. Traction Co., 70 Vt. 509, 41 Atl. 1017.

[5] The causal connection between plaintiff's negligence and the injury must always be shown. See ante, section 8, note 1, and cases cited.

low a child to go unattended on the street is not negligence per se,[6] and the test of conduct would seem to be whether the parent took that degree of care of his child which a reasonably prudent parent of the same class and means would ordinarily use in similar circumstances.[7]

Negligence of child.

In applying the rules of contributory negligence to the conduct of very small children, a problem full of difficulties is presented. To require of a mere infant any degree of judgment or discretion in avoiding danger is manifestly absurd; and, on the other hand, to hold a third person solely responsible for an injury to which the negligence of the parent has contributed at least equally with his own, is an apparent injustice. Yet decisions are not lacking where the merest babies have been held, in law, bound to exercise the same judgment and care in avoiding danger which would be required of an adult; and the extreme doctrine of imputed negligence, first enunciated in the celebrated case of Hartfield v. Roper,[8] is to-day followed in many of our state courts, although its rigor has been somewhat modified. The theory of this case is concisely stated by Mason, J., in the later case of Mangam v. Brooklyn R. Co.:[9] "An infant, in its first years, is not sui juris. It belongs to another, to whom discretion in the care of its person is exclusively confided. The custody of the infant of tender years is confided by law to its parents, or those standing in loco parentis, and, not having that discretion necessary for personal protection, the parent is held, in law, to exercise it for him, and in cases of personal injuries received from the negligence of others the law imputes to the infant the negligence of the parents. The infant

[6] Riley v. Transit Co., 10 Utah, 428, 37 Pac. 681; McVee v. City of Watertown, 92 Hun, 306, 36 N. Y. Supp. 870; Bergen County Traction Co. v. Heitman's Adm'r (N. J. Err. & App.) 40 Atl. 651; Ehrmann v. Railroad Co., 23 App. Div. 21, 48 N. Y. Supp. 379; Karahuta v. Traction Co., 6 Pa. Super. Ct. 319.

[7] Philadelphia & R. R. Co. v. Long, 75 Pa. St. 257; Ihl v. Railroad Co., 47 N. Y. 317; Chicago & A. R. Co. v. Gregory, 58 Ill. 226; Karr v. Parks, 40 Cal. 188; Metcalfe v. Railway Co., 12 App. Div. 147, 42 N. Y. Supp. 661; Gunn v. Railroad Co., 42 W. Va. 676, 26 S. E. 546; Fox v. Railway Co., 118 Cal. 55, 50 Pac. 25; McNeil v. Ice Co. (Mass.) 54 N. E. 257.

[8] 21 Wend. (N. Y.) 615.

[9] 38 N. Y. 455.

being non sui juris, and having a keeper, in law, to whose discretion, in the care of his person, he is confided, his acts, as regards third persons, must be held, in law, the act of the infant; his negligence the negligence of the infant." But even in states where the decision is still followed the severity of the rule has been greatly softened in later decisions by insisting that the conduct of the child must first be shown to be a proximate cause of his injury, and by holding, where this does not appear, that the negligence of the parent in permitting him to be on the street was remote and immaterial.[10]

SAME—DEGREE OF CARE REQUIRED OF A CHILD.

28. The degree of care required of a child is that reasonably to be expected of children of a like age in similar circumstances; but in their earliest years they are incapable of discretion, and personal negligence cannot then be predicated of their conduct.

At what exact age a child ceases to be non sui juris, and acquires a capacity for any degree of thoughtful action, is not determined, but it is now generally held that in their earliest years they are entirely without such capacity, and consequently incapable of legal negligence.[1] Unless, however, the child is so young as to clearly preclude

[10] Lynch v. Smith, 104 Mass. 52; and in this case the court further said that, even if his parents were negligent in permitting him, a child 4 years and 7 months old, to cross the street alone, their negligence was not contributory, and he may recover, if in crossing he did no act which prudence would have forbidden, and omitted no act which prudence would have dictated, whatever was his physical or intellectual capacity. See, also, cases cited in section 27, notes 4 and 5, supra.

§ 28. [1] A child under three years of age is prima facie incapable of negligence, Barnes v. Railroad Co., 47 La. Ann. 1218, 17 South. 782. In North Pennsylvania R. Co. v. Mahoney, 57 Pa. St. 187, it was broadly held that contributory negligence was impossible in any child of "tender years." Presumption as to age of a "little child," Bottoms v. Railroad Co., 114 N. C. 699, 19 S. E. 730; Wiley v. Railroad Co., 76 Hun, 29, 27 N. Y. Supp. 722; Gunn v. Railroad Co., 42 W. Va. 676, 26 S. E. 546; Missouri Pac. Ry. Co. v. Prewitt (Kan. App.) 51 Pac. 923; South Covington & C. St. Ry. Co. v. Herrklotz (Ky.) 47 S. W. 265; Rice v. Railroad Co. (La.) 24 South. 791; Wise v. Morgan (Tenn. Sup.) 48 S. W. 971; McVoy v. Oakes, 91 Wis. 214, 64 N. W. 748; Merritt v. Hepen-

the supposition of any degree of rational conduct, it is generally left to the jury to determine the measure of care that he should use.[2] But when he is either so old or so young as to leave no room for doubt, it is the duty of the court to rule as to his capacity;[3] and courts have varyingly extended the period in which, as a matter of law, a child is non sui juris, from the time of his birth to the age of 7 years,[4] while in Indiana it has even been held that at 8 years his capacity is a question for the jury.[5]

stal, 25 Can. Sup. Ct. 150; Barnes v. Railroad Co., 47 La. Ann. 1218, 17 South. 782.

[2] Western & A. R. Co. v. Young, 81 Ga. 397, 7 S. E. 912; McCarthy v. Railway Co., 92 Mo. 536, 4 S. W. 516; Silberstein v. Railroad Co., 52 Hun, 611, 4 N. Y. Supp. 843; Bridger v. Railroad Co., 25 S. C. 24; Wilson v. Railroad Co., 132 Pa. St. 27, 18 Atl. 1087; Strawbridge v. Bradford, 128 Pa. St. 200, 18 Atl. 346; Dorman v. Railroad Co. (City Ct. Brook.) 5 N. Y. Supp. 769; Chicago City Ry. Co. v. Wilcox, 138 Ill. 370, 27 N. E. 899; Stone v. Railroad Co., 115 N. Y. 104, 21 N. E. 712; Connolly v. Ice Co., 114 N. Y. 104, 21 N. E. 101; Whalen v. Railway Co., 75 Wis. 654, 44 N. W. 849; Dealey v. Muller, 149 Mass. 432, 21 N. E. 763; Consolidated Traction Co. v. Scott, 58 N. J. Law, 682, 34 Atl. 1094; Wise v. Morgan (Tenn. Sup.) 48 S. W. 971; Penny v. Railway Co., 7 App. Div. 595, 40 N. Y. Supp. 172.

[3] Nagle v. Railroad Co., 88 Pa. St. 35, where Paxson, J., said: "At what age, then, must an infant's responsibility for negligence be presumed to commence? This question cannot be answered by referring it to the jury. That would furnish us with no rule whatever. It would give us a mere shifting standard, affected by the sympathies or prejudices of the jury in each particular case. One jury would fix the period of responsibility at 14, and another at 20 or 21. This is not a question of fact for the jury; it is a question of law for the court." Tucker v. Railroad Co., 124 N. Y. 308, 26 N. E. 916.

[4] Toledo, W. & W. Ry. Co. v. Grable, 88 Ill. 441; Callahan v. Bean, 9 Allen (Mass.) 401; Evansville & C. R. Co. v. Wolf, 59 Ind. 89; Jones v. Railroad Co., 36 Hun (N. Y.) 115; Ryan v. Railroad Co., 37 Hun (N. Y.) 186; Kreig v. Wells, 1 E. D. Smith (N. Y.) 74; Central Trust Co. of New York v. Railway Co., 31 Fed. 246; Moynihan v. Whidden, 143 Mass. 287, 9 N. E. 645; O'Flaherty v. Railroad Co., 45 Mo. 70; Mangam v. Railroad Co., 38 N. Y. 455; Mascheck v. Railroad Co., 3 Mo. App. 600; Pittsburg, A. & M. Pass. Ry. Co. v. Caldwell, 74 Pa. St. 421; Jeffersonville, M. & I. R. Co. v. Bowen, 40 Ind. 545; McGarry v. Loomis, 63 N. Y. 104; Lehman v. City of Brooklyn, 29 Barb. (N. Y.) 234; Gavin v. City of Chicago, 97 Ill. 66; Bay Shore R. Co. v. Harris, 67 Ala. 6; Morgan v. Bridge Co., 5 Dill. 96, Fed. Cas. No. 9,802; Frick v. Rail-

[5] Louisville, N. A. & C. Ry. Co. v. Sears, 11 Ind. App. 654, 38 N. E. 837.

When it has been decided that the infant was possessed of some capacity to avoid danger, the degree of care he should be required to exercise in the circumstances of the particular case is always a question for the jury,[6] under proper instructions to the effect that his conduct should be guided by such prudence and discretion only as is reasonably to be expected of children of the same age in similar circumstances.[7] Nor does this apparent curtailing of the law of contribu-

way Co., 75 Mo. 542; City of Chicago v. Starr, 42 Ill. 174; Meeks v. Railroad Co., 52 Cal. 602; Gillespie v. McGowan, 100 Pa. St. 144; Mackey v. City of Vicksburg, 64 Miss. 777, 2 South. 178; Westbrook v. Railroad Co., 66 Miss. 560, 6 South. 321; City of Vicksburg v. McLain, 67 Miss. 4, 6 South. 774; City of Pekin v. McMahon, 154 Ill. 141, 39 N. E. 484; Kentucky Hotel Co. v. Camp, 97 Ky. 424, 30 S. W. 1010; Pierce v. Conners, 20 Colo. 178, 37 Pac. 721; City of Pekin v. McMahon, 154 Ill. 141, 39 N. E. 484, where it was held that a child of more than 7 years ceases to be non sui juris.

[6] Mitchell v. Motor Co., 9 Wash. 120, 37 Pac. 341. See, also, cases cited in section 28, note 2, supra; Geibel v. Elwell, 19 App. Div. 285, 46 N. Y. Supp. 76; Price v. Water Co., 58 Kan. 551, 50 Pac. 450; Thompson v. Rapid-Transit Co., 16 Utah, 281, 52 Pac. 92; Walters v. Light Co. (Colo. App.) 54 Pac. 960; Biggs v. Barb-Wire Co. (Kan. Sup.) 56 Pac. 4; Atchison, T. & S. F. R. Co. v. Roemer, 59 Ill. App. 93; Kitchell v. Railroad Co., 6 App. Div. 99, 39 N. Y. Supp. 741; Schmidt v. Railway Co., 23 Wis. 186; Kerr v. Forgue, 54 Ill. 482; Philadelphia & R. R. Co. v. Spearen, 47 Pa. St. 300; Boland v. Railroad Co., 36 Mo. 484; Oakland Ry. Co. v. Fielding, 48 Pa. St. 320; Philadelphia City Pass. R. Co. v. Hassard, 75 Pa. St. 367; Manly v. Railroad Co., 74 N. C. 655; Mobile & M. R. Co. v. Crenshaw, 65 Ala. 566; Casey v. Railroad Co., 6 Abb. N. C. (N. Y.) 104; Byrne v. Railroad Co., 83 N. Y. 620; Galveston, H. & H. Ry. Co. v. Moore, 59 Tex. 64; Houston & T. C. Ry. Co. v. Simpson, 60 Tex. 103; Meibus v. Dodge, 38 Wis. 300; Government St. R. Co. v. Hanlon, 53 Ala. 70; Baltimore City Pass. R. Co. v. McDonnell, 43 Md. 534; McMillan v. Railroad Co., 46 Iowa, 231; East Saginaw City Ry. Co. v. Bohn, 27 Mich. 503.

[7] Springfield Consol. Ry. Co. v. Welsch, 155 Ill. 511, 40 N. E. 1034; Wabash R. Co. v. Jones, 53 Ill. App. 125; Hayes v. Norcross, 162 Mass. 546, 39 N. E. 282. General rule, Kentucky Hotel Co. v. Camp, 97 Ky. 424, 30 S. W. 1010; Pierce v. Conners, 20 Colo. 178, 37 Pac. 721; San Antonio & A. P. Ry. Co. v. Jazo (Tex. Civ. App.) 25 S. W. 712; Texas & P. Ry. Co. v. Mother, 5 Tex. Civ. App. 87, 24 S. W. 79; Chicago, B. & Q. R. Co. v. Grablin, 38 Neb. 90, 56 N. W. 796; Wiswell v. Doyle, 160 Mass. 42, 35 N. E. 107; Central Railroad & Banking Co. v. Phillips, 91 Ga. 526, 17 S. E. 952; Brown v. City of Syracuse, 77 Hun, 411, 28 N. Y. Supp. 792; Omaha & R. V. Ry. Co. v. Morgan (Neb.) 59 N. W. 81; Mitchell v. Motor Co., 9 Wash. 120, 37 Pac. 341; Washington & G. Ry. Co. v. Gladmon, 15 Wall. 401; Sioux City & P. R. Co. v. Stout, 17 Wall. 657; Mc-

tory negligence work the injustice and hardship on the defendant that is sometimes claimed. In contending against this alleged limitation of the doctrine, it would seem that the obligation resting on the plaintiff to establish a positive breach of duty by the defendant is not infrequently overlooked. So notable a jurist as Alderson, B., in an opinion involving this question, says: "The negligence, in truth, is attributable to the parent who permits the child to be at large. It seems strange that a person who rides in his carriage without a servant, if a child receives an injury by getting up behind for the purpose of having a ride, should be liable for the injury." [8] It is evident that in the case supposed there is damnum absque injuria. If the driver of a carriage, conducting himself lawfully, and being guilty of no breach of duty, becomes the unwitting instrument of harm to another person, whether infant or adult, he is without legal fault, and no action can be founded on his conduct. Thus, in a recent case, defendant's grocery wagon is being driven along a well-traveled street at a speed of about five or six miles an hour, with ordinary care, when a boy of 5½ years, with his mother's permission, starts to cross the street. While the wagon is but a few feet distant, and close to the curb, he darts quickly in front of it, and is run over in broad daylight.

Govern v. Railroad Co., 67 N. Y. 417; Ihl v. Railroad Co., 47 N. Y. 317; Rauch v. Lloyd, 31 Pa. St. 358; Gray v. Scott, 66 Pa. St. 345; Robinson v. Cone, 22 Vt. 213; Lynch v. Smith, 104 Mass. 52; O'Connor v. Railroad Co., 135 Mass. 352; Birge v. Gardner, 19 Conn. 507; Bronson v. Town of Southbury, 37 Conn. 199; Baltimore & O. R. Co. v. State, 30 Md. 47; Galveston, H. & S. A. Ry. Co. v. Clark (Tex. Civ. App.) 51 S. W. 276; Kinchlow v. Elevator Co., 57 Kan. 374, 46 Pac. 703; Frauenthal v. Gaslight Co., 67 Mo. App. 1; Weldon v. Railroad Co. (Del. Sup.) 43 Atl. 156; Baltimore & P. R. Co. v. Webster, 6 App. D. C. 182; Calumet Electric St. Ry. Co. v. Van Pelt, 68 Ill. App. 582; Texas & P. Ry. Co. v. Phillips, 91 Tex. 278, 42 S. W. 852; Smith v. Railway Co., 90 Fed. 783; Western & A. R. Co. v. Rogers, 104 Ga. 224, 30 S. E. 804; Felton v. Aubrey, 20 C. C. A. 436, 74 Fed. 350; Georgia, C. & N. Ry. Co. v. Watkins, 97 Ga. 381, 24 S. E. 34; Norton v. Volzke, 158 Ill. 402, 41 N. E. 1085; Baltimore & O. S. W. Ry. Co. v. Then, 159 Ill. 535, 42 N. E. 971; Van Natta v. Power Co., 133 Mo. 13, 34 S. W. 505; Cincinnati St. Ry. Co. v. Wright, 54 Ohio St. 181, 43 N. E. 688; Kucera v. Lumber Co., 91 Wis. 637, 65 N. W. 374; Springfield Consol. Ry. Co. v. Welsch, 155 Ill. 511, 40 N. E. 1034; Payne v. Railroad Co., 129 Mo. 405, 31 S. W. 885; Lynch v. Nurdin, 1 Q. B. 29.

[8] Lygo v. Newbold, 9 Exch. 302.

Even at so young an age, he was held in fault, and not entitled to recover.[9]

Machines and Places Attractive to Children.

But where dangerous instrumentalities, in their nature attractive to children, are left in an exposed and accessible place where children are likely to be, the law is well settled that the proprietor cannot shield himself in an action for injuries caused thereby to an infant by showing that the machine or article was not in itself dangerous, and would have done no harm if the plaintiff had not meddled or tampered with it. The turntable cases furnish the most familiar illustration of this principle.[10] In Keffe v. Milwaukee & St. P. Ry. Co.,[11] which is a type of this class of cases, the defendant left its turntable, situated in a public place near the home of plaintiff, unfastened and unguarded. It revolved easily, and could be moved even by small children. Plaintiff, a child of 7 years, was injured while playing upon and revolving it, and it was held that he could recover against the railroad company, the court citing with approval the rule established in Sweeny v. Old Colony & N. R. Co.[12] that an owner or occupant of premises is bound to keep them in a safe and suitable condition for those who come upon and pass over them using due care, if he has held out any inducement, invitation, or allurement, either express or implied, by which they have been led to enter thereon. The court further observes that what an express invitation would be to an adult the temptation of an attractive plaything is to a child of tender years.

[9] Hayes v. Norcross, 162 Mass. 546, 39 N. E. 282.

[10] Railroad Co. v. Stout, 17 Wall. 657; Keffe v. Railroad Co., 21 Minn. 207; Kerr v. Forgue, 54 Ill. 482; Nagel v. Railway Co., 75 Mo. 653; Evansich v. Railway Co., 57 Tex. 126; Kansas Cent. Ry. Co. v. Fitzsimmons, 22 Kan. 686; Koons v. Railroad Co., 65 Mo. 592; Gulf, C. & S. F. Ry. Co. v. Styron, 66 Tex. 421, 1 S. W. 161; Bridger v. Railroad Co., 27 S. C. 456, 3 S. E. 860; Ferguson v. Railway Co., 77 Ga. 102; Gulf, C. & S. F. Ry. Co. v. McWhirter, 77 Tex. 356, 14 S. W. 26. Turntables: Carson v. Railway Co., 96 Iowa, 583, 65 N. W. 831; Merryman v. Railway Co., 85 Iowa, 634, 52 N. W. 545. St. Louis, V. & T. R. Co. v. Bell, 81 Ill. 76, does not clearly follow the rule laid down in the above decisions, but in this case the isolation of the position of the turntable was material in determining defendant's negligence. Walsh v. Railroad Co., 145 N. Y. 301, 39 N. E. 1068, a recent New York case, is opposed to general rule as above laid down.

[11] 21 Minn. 207.

[12] 10 Allen (Mass.) 368.

These cases in no way disturb the doctrine of contributory negligence, but mark a consistent and humane adaptation of the well-settled law. Curiosity, the love of investigation, is as strong in children as in adults, but is not, in them, coupled with mature discretion and judgment; and if, in gratifying this curiosity, using such intelligence and care as their years may furnish, they are injured by an unfastened, unguarded, and dangerous machine, their conduct is not negligent, and cannot prevent their recovery.[13] The distinction between the conduct of children in these cases in going upon and "meddling" with the property of defendant and that of a voluntary trespasser is this: That the children are attracted and induced to go upon defendant's property by the defendant's own conduct, the danger being hidden, and in the nature of a trap.[14]

Same—Negligence of the Parent not Imputed to the Child.

In an action for the benefit of the child for injuries negligently caused by a stranger, the negligence of the parent or custodian is not imputed to the infant, except in California,[15] Indiana,[16] Kansas,[17] Maine,[18] Maryland,[19] Massachusetts,[20] Minnesota,[21] and New York.[22]

[13] The English cases on this proposition are conflicting, and leave the matter in doubt in their courts. Lynch v. Nurdin, 1 Q. B. 29; Hughes v. Macfie, 2 Hurl. & C. 744; Mangan v. Atterton, L. R. 1 Exch. 239.

[14] Keffe v. Railway Co., 21 Minn. 207, 210.

[15] Karr v. Parks, 40 Cal. 188; Meeks v. Railroad Co., 52 Cal. 602.

[16] Pittsburgh, Ft. W. & C. Ry. Co. v. Vining's Adm'r, 27 Ind. 513; although the negligence of his custodians cannot be imputed to a child (eight years). having capacity to exercise discretion in his own behalf, Louisville, N. A. & C. Ry. Co. v. Sears, 11 Ind. App. 654, 38 N. E. 837; City of Evansville v. Senhenn, 151 Ind. 42, 47 N. E. 634; McNamara v. Beck (Ind. App.) 52 N. E. 707; City of Jeffersonville v. McHenry (Ind. App.) 53 N. E. 183.

[17] Missouri, K. & T. Ry. Co. v. Shockman, 59 Kan. 774, 52 Pac. 446; Union Pac. Ry. Co. v. Young, 57 Kan. 168, 45 Pac. 580; Atchison, T. & S. F. R. Co. v. Smith, 28 Kan. 541; Smith v. Railroad Co., 25 Kan. 738.

[18] Leslie v. City of Lewiston, 62 Me. 468; Brown v. Railway Co., 58 Me. 384.

[19] McMahon v. Railway Co., 39 Md. 439.

[20] Casey v. Smith, 152 Mass. 294, 25 N. E. 734; Lynch v. Smith, 104 Mass. 52; Gibbons v. Williams, 135 Mass. 333.

[21] Fitzgerald v. Railway Co., 29 Minn. 336, 13 N. W. 168.

[22] Hartfield v. Roper, 21 Wend. 615; McGarry v. Loomis, 63 N. Y. 104; Lowery v. Ice Co., 26 Misc. Rep. 163, 55 N. Y. Supp. 707. The imputation of the parents' negligence is denied in the following states: ALABAMA, Government St. R. Co. v. Hanlon, 53 Ala. 70; ARKANSAS, St. Louis, I. M. & S. Ry. Co. v.

In the states named, the doctrine of Hartfield v. Roper,[23] is followed with varying consistency, but with a tendency to somewhat abate its harshness. In Maryland it has been held that if, by the exercise of ordinary care, the defendant could have avoided the injury, the neglect of the parents will not prevent recovery by a child non sui juris;[24] also, in another case,[25] it was left to the jury to determine whether a child of 5 years and 9 months had acted with the degree of care and caution in the circumstances which might reasonably be expected from a child of his age and intelligence. In Massachusetts the courts have so reasonably and leniently considered the conduct of both parent[26] and child[27] in determining the question of their contributory negligence as to materially soften the rigor of the rule.

Rexroad, 26 S. W. 1037; CONNECTICUT, Birge v. Gardner, 19 Conn. 506; GEORGIA, Ferguson v. Railway Co., 77 Ga. 102; Atlanta & C. Air-Line Ry. Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550; ILLINOIS, Chicago City Ry. Co. v. Wilcox, 138 Ill. 370, 27 N. E. 899; Louisville & St. L. Consol. R. Co. v. Gobin, 52 Ill. App. 565; IOWA, Wymore v. Mahaska Co., 78 Iowa, 396, 43 N. W. 264; KENTUCKY, South Covington & C. St. Ry. Co. v. Herrklotz, 47 S. W. 265; LOUISIANA, Westerfield v. Levis, 43 La. Ann. 63, 9 South. 52; MICHIGAN, Power v. Harlow, 57 Mich. 107, 23 N. W. 606; Shippy v. Village of Au Sable, 85 Mich. 280, 48 N. W. 584; MISSISSIPPI, Westbrook v. Railroad Co., 66 Miss. 560, 6 South. 321; MISSOURI, Winters v. Railway Co., 99 Mo. 509, 12 S. W. 652; NEBRASKA, Huff v. Ames, 16 Neb. 139, 19 N. W. 623; NEW HAMPSHIRE, Bisaillon v. Blood, 64 N. H. 565, 15 Atl. 147; NEW JERSEY, Newman v. Railroad Co., 52 N. J. Law, 446, 19 Atl. 1102; NORTH CAROLINA, Bottoms v. Railroad Co., 114 N. C. 699, 19 S. E. 730; OHIO, Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350; PENNSYLVANIA, North Pennsylvania R. Co. v. Mahoney, 57 Pa. St. 187; Philadelphia & R. R. Co. v. Long, 75 Pa. St. 257; TEXAS, Galveston, H. & H. Ry. Co. v. Moore, 59 Tex. 64; Texas & P. Ry. Co. v. Fletcher, 6 Tex. Civ. App. 736, 26 S. W. 446; VERMONT, Robinson v. Cone, 22 Vt. 213; Ploof v. Traction Co., 69 Vt. 509, 41 Atl. 1017; VIRGINIA, Norfolk & P. R. Co. v. Ormsby, 27 Grat. 455; Norfolk & W. R. Co. v. Groseclose's Adm'r, 88 Va. 267, 13 S. E. 454; WASHINGTON, Roth v. Depot Co., 13 Wash. 525, 43 Pac. 641; WEST VIRGINIA, Dicken v. Coal Co., 41 W. Va. 511, 23 S. E. 582.

[23] 21 Wend. (N. Y.) 615.

[24] Baltimore City Pass. R. Co. v. McDonnell, 43 Md. 534.

[25] McMahon v. Railroad Co., 39 Md. 439.

[26] Bliss v. South Hadley, 145 Mass. 91, 13 N. E. 352; Marsland v. Murray, 148 Mass. 91, 18 N. E. 680; Slattery v. O'Connell, 153 Mass. 94, 26 N. E. 430;

[27] Mattey v. Machine Co., 140 Mass. 337, 4 N. E. 575; Lynch v. Smith, 104 Mass. 52.

Same—Limitation of the New York Rule.

As the so-called "New York Rule," having its inception in Hartfield v. Roper,[28] continues to hold its place in that and several other states, its limitations in decided cases should be carefully observed. Restated, that rule holds that when a child, too young to be sui juris, fails to exercise the degree of care to be expected of an adult in similar circumstances, the negligence of its parents, or those in loco parentis, is imputed to it. Although, in theory, this doctrine applies whenever a child is negligently exposed to harm by its custodian, in the majority of actual cases where it has been enforced very young children have been allowed to run abroad and wander into places of danger without suitable attendants. Moreover, it may be fairly said that the full application of the principle is now restricted to cases where the child is subjected, through the negligence of the parent, to such a degree of exposure and risk as an adult could not encounter voluntarily without being guilty of contributory negligence. Thus, if a little child is permitted by its parent to cross a much-traveled street, where it would be imprudent for an adult to attempt to pass, he cannot recover for injuries inflicted by the negligent driving of a carriage. And the converse of this proposition is equally true. If the conduct of the child is marked by no act or omission which would indicate a lack of prudence in an adult, the fact that his parents were grossly negligent in allowing him to be unattended on the street would not affect his right to recover for injuries negligently inflicted on him by a stranger.[29] In Ihl v. Forty-Second St. & G. S. F. R. Co.[30] a child of 3 years was sent across defendant's track, unattended except by a 9 year old child, and was struck by a car and killed. It was held by the appellate court that this was not per se such negligence as would defeat a recovery. If the deceased, it was ruled, exercised due care, and the injury was caused solely by the negligence of defendant's driver, the defendant was liable, without regard to the question

Wiswell v. Doyle, 160 Mass. 42, 35 N. E. 107; Creed v. Kendall, 156 Mass. 291, 31 N. E. 6; Mulligan v. Curtis, 100 Mass. 512; Lynch v. Smith, 104 Mass. 52.

[28] 21 Wend. 615.

[29] McGarry v. Loomis, 63 N. Y. 104; Ihl v. Railroad Co., 47 N. Y. 317; O'Brien v. McGlinchy, 68 Me. 552.

[30] 47 N. Y. 317.

whether it was negligence in the parents to let the child go with so young an attendant.

SAME—LUNATICS AND IDIOTS.

29. In general, the contributory negligence of lunatics and others non compos mentis is determined by the same principles that are applied to the conduct of children.

In considering the conduct of lunatics and their custodians, as affecting their right to recover for injuries negligently inflicted on them by strangers, the same general principles apply as in the case of children.[1] And as the degree of care required of children varies according to their age, so more prudence is expected of one whose mind is only slightly clouded than of one who is entirely bereft of reason. As the mental condition of the lunatic is not ordinarily discovered by his appearance, the public is not put on its guard to the same extent as with children, whose stature and movements at once proclaim their youth and immature faculties.[2] For this reason the question of knowledge of the mental condition of the idiot is often important in determining the negligence of the defendant. Thus, one whose mind is merely dull, and who is capable of earning his living, there being no apparent necessity of putting him under the

§ 29. [1] Willetts v. Railroad Co., 14 Barb. (N. Y.) 585; Worthington v. Mencer, 96 Ala. 310, 11 South. 72; Johnson v. Railway Co., 67 Minn. 260, 69 N. W. 900; Platte & D. Canal & Milling Co. v. Dowell, 17 Colo. 376, 30 Pac. 68; Lynch v. Railway Co., 112 Mo. 420, 20 S. W. 642.

[2] East Saginaw City Ry. Co. v. Bohn, 27 Mich. 503; Pittsburg, A. & M. P. Ry. Co. v. Caldwell, 74 Pa. St. 421; Brennan v. Railroad Co., 45 Conn. 284; Walters v. Railroad Co., 41 Iowa, 71, 76. In Robinson v. Cone, 22 Vt. 213, at page 224, Redfield, J., says: "And we are satisfied that although a child or idiot or lunatic may, to some extent, have escaped into the highway through the fault or negligence of his keeper, and so be improperly there, yet, if he is hurt by the negligence of the defendant, he is not precluded from his redress. If one know that such a person is in the highway, or on a railway, he is bound to a proportionate degree of watchfulness; and what would be but ordinary neglect in regard to one whom the defendant supposed a person of full age and capacity would be gross neglect as to a child, or one known to be incapable of escaping danger."

protection of a guardian, is chargeable with the same degree of care for his personal safety as are others of brighter intellect; but, if he is so devoid of intelligence as to be unable to apprehend apparent danger, one through whose negligence he is injured, having notice of his mental incapacity, cannot escape liability on the ground of contributory negligence.[3]

PHYSICAL CONDITION AN ELEMENT OF CONTRIBUTORY NEGLIGENCE.

30. The physical condition of plaintiff at the time of the injury may properly be considered in determining the degree of care to be exercised by both himself and the defendant, reference being had to plaintiff's possible decrepitude, blindness, deafness, lameness, and sex.

Physical condition is merely one of the circumstances to be considered in applying the test of ordinary care to the conduct under investigation, but is often all-important in determining liability. While it is not negligence per se in an active, able-bodied man to get on or off a car when it is moving slowly,[1] such an act would be clearly negligent in one old, weak, sick, lame, or otherwise infirm.[2] Physical infirmities place on the afflicted person an obligation for increased prudence and care. While a person cannot be held responsible for failure to exercise a faculty which he does not possess, yet the knowledge of his infirmity should render him more cautious about placing himself in a position where his incapacity increases the danger, and when necessarily, in a dangerous place the incapacity imposes the obligation of an increased activity of the remaining unimpaired senses.[3] Thus deafness requires increased vigilance in the use of

[3] Worthington v. Mencer, 96 Ala. 310, 11 South. 72.

§ 30. [1] Citizens' St. R. Co. v. Spahr, 7 Ind. App. 23, 33 N. E. 446; Chicago & A. R. Co. v. Byrum, 153 Ill. 131, 38 N. E. 578; Lewis v. Canal Co., 145 N. Y. 508, 40 N. E. 248; Schacherl v. Railway Co., 42 Minn. 42, 43 N. W. 837.

[2] Cincinnati, H. & D. Ry. Co. v. Nolan, 8 Ohio Cir. Ct. R. 347; Chicago & A. R. Co. v. Means, 48 Ill. App. 396; Briggs v. Railway Co., 148 Mass. 72, 19 N. E. 19.

[3] Chicago & N. E. Ry. Co. v. Miller, 46 Mich. 532, 9 N. W. 841; Hayes v. Railroad Co., 111 U. S. 228, 4 Sup. Ct. 369; Central R. Co. v. Feller, 84 Pa. St.

the eyes,[4] and when crossing a railroad track it is negligent in a deaf person not to keep a sharp lookout for trains.[5]

Negligence will never be imputed to those who are physically deficient for the mere reason that they are pursuing their ordinary avocations when injured,[6] but they must still exercise ordinary care, such as they are capable of using; and one with poor sight should use greater care to avoid obstructions in the street than one whose eyesight is normal.[7] The mere fact of blindness in one who, unattended, walks the streets of a large city, does not warrant the conclusion of contributory negligence if he is injured by falling into a cellar way negligently left open.[8]

The sex of the injured party is also a proper matter to be considered by the jury in determining what was ordinary care in the circumstances, on the part of both plaintiff and defendant;[9] and, although it has been held error to charge that the law requires a less degree of care in a woman than in a man,[10] it is apprehended that, in certain conditions, acts which in a man would be merely for the consideration of the jury, as affecting the question of ordinary care, would in a

226; Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274; Laicher v. Railroad Co., 28 La. Ann. 320; Purl v. Railway Co., 72 Mo. 168; Cogswell v. Railroad Co., 6 Or. 417; Morris & E. R. Co. v. Haslan, 33 N. J. Law, 147; Chicago, B. & Q. R. Co. v. Triplett, 38 Ill. 482.

[4] Cleveland, C. & C. R. Co. v. Terry, 8 Ohio St. 570; Fenneman v. Holden, 75 Md. 1, 22 Atl. 1049.

[5] Illinois Cent. R. Co. v. Buckner, 28 Ill. 299.

[6] Sleeper v. Sandown, 52 N. H. 244; Davenport v. Ruckman, 37 N. Y. 568. The test is always ordinary care in the circumstances. Cox v. Road Co., 33 Barb. (N. Y.) 414; Frost v. Inhabitants of Waltham, 12 Allen (Mass.) 85; Thompson v. Inhabitants of Bridgewater, 7 Pick. (Mass.) 188; Renwick v. Railroad Co., 36 N. Y. 133.

[7] Winn v. City of Lowell, 1 Allen (Mass.) 177; Sleeper v. Sandown, 52 N. H. 244; Davenport v. Ruckman, 37 N. Y. 568; Peach v. City of Utica, 10 Hun (N. Y.) 477.

[8] Smith v. Wildes, 143 Mass. 556, 10 N. E. 446, followed in Neff v. Inhabitants of Wellesley, 148 Mass. 487, 20 N. E. 111.

[9] Hassenyer v. Railroad Co., 48 Mich. 205, 12 N. W. 155; Benjamin v. Railway Co., 100 Mass. 3, 35 N. E. 95.

[10] Hassenyer v. Railroad Co., supra. In this case the court said, in substance: A woman driving a horse presumably lacks the amount of skill, knowledge, dexterity, and steadiness of nerve or coolness of judgment—in short, the same degree of competency—that we would expect in a man.

woman be held to constitute contributory negligence, as getting off a moving car.[11]

On the other hand, when the infirmity or incapacity of the person exposed to danger is known, or might reasonably be inferred, by the defendant, it becomes his duty to use proportionate care to avoid injuring him.[12] If an engineer sees a person walking on the track, he has the right, ordinarily, to assume that he will get out of the way when the proper signal is given. "If, however, he sees a child of tender years upon the track, or any person known to him to be, or from his appearance giving him good reason to believe that he is, insane, or badly intoxicated, or otherwise insensible of danger, or unable to avoid it, he has no right to presume that he will get out of the way, but should act upon the belief that he might not, and should therefore take means to stop his train in time." [13]

SAME—INTOXICATION.

31. Intoxication is always competent, but never conclusive, evidence of contributory negligence.[1]

[11] In Snow v. Provincetown, 120 Mass. 580, the charge of the trial court was approved: "Care implies attention and caution, and ordinary care is such a degree of attention and caution as a person of ordinary prudence, of the plaintiff's age and sex, would commonly and might reasonably be expected to exercise under like circumstances;" and on appeal it was held unexceptionable. And in City of Bloomington v. Perdue, 99 Ill. 329, the charge that plaintiff was bound to observe the conduct of a woman of common or ordinary prudence was held not to be erroneous.

[12] Schierhold v. Railroad Co., 40 Cal. 447; Chicago & R. I. R. Co. v. McKean, 40 Ill. 218; Reg. v. Longbottom, 3 Cox, Cr. Cas. 439; East Tennessee & G. R. Co. v. St. John, 5 Sneed (Tenn.) 524; O'Mara v. Railroad Co., 38 N. Y. 445; City of Champaign v. White, 38 Ill. App. 233; Rex v. Walker, 1 Car. & P. 320.

[13] Christiancy, C. J., in Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274.

§ 31. [1] Abb. Tr. Ev. p. 585, § 12, citing Stuart v. Machiasport, 48 Me. 477; Baker v. City of Portland, 58 Me. 199. See, also, Seymer v. Town of Lake, 66 Wis. 651, 29 N. W. 554; Wynn v. Allard, 5 Watts & S. (Pa.) 524; Illinois Cent. R. Co. v. Cragin, 71 Ill. 177; Cleghorn v. Railroad Co., 56 N. Y. 44; People v. Eastwood, 14 N. Y. 562; Wood v. Village of Andes, 11 Hun (N. Y.) 543; Cassedy v. Stockbridge, 21 Vt. 391; Chicago, R. I. & P. R. Co. v. Bell, 70 Ill. 102; Fitzgerald v. Town of Weston, 52 Wis. 354, 9 N. W. 13; Baltimore & O. R. Co. v. State, 81 Md. 371, 32 Atl. 201.

Intoxication does not generally deprive a person entirely of his senses or his judgment, and, although it is a matter of common knowledge that a man is not so prudent when he is drunk as when he is sober, the vital question remains, as always, did he use the ordinary care of a sober man? [2] or, failing to use that ordinary care, was his negligence a proximate cause of his injury? [3] "A drunken man is as much entitled to a safe street as a sober one, and much more in need of it;" [4] and if, in the exercise of ordinary care, he is injured through the negligence of defendant, he may have his recovery.[5] But the fact of intoxication in no degree lessens the amount of care which he is required to take, and he is held to equal prudence with a sober person in like circumstances.[6] He may, however, require that others

[2] Alger v. Lowell, 3 Allen (Mass.) 402; Ford v. Umatilla Co., 15 Or. 313, 16 Pac. 33; but his conduct in the circumstances may be such as to preclude any right to recover, Wood v. Village of Andes, 11 Hun (N. Y.) 543; Cassedy v. Stockbridge, 21 Vt. 391.

[3] Ward v. Railway Co., 85 Wis. 601, 55 N. W. 771; Alger v. City of Lowell, 3 Allen (Mass.) 406; Central Railroad & Banking Co. v. Phinazee, 93 Ga. 488, 21 S. E. 66; Robinson v. Pioche, 5 Cal. 460; Rhyner v. City of Menasha, 97 Wis. 523, 73 N. W. 41; Ward v. Railway Co., 85 Wis. 601, 55 N. W. 771; Morris v. Railroad Co., 68 Hun, 39, 22 N. Y. Supp. 666; Bradwell v. Railway Co., 153 Pa. St. 105, 25 Atl. 623; Lane v. Railway Co., 132 Mo. 4, 33 S. W. 645.

[4] Heydenfeldt, J., in Robinson v. Pioche, 5 Cal. 461.

[5] Seymer v. Town of Lake, 66 Wis. 651, 29 N. W. 554; Stuart v. Machiasport, 48 Me. 477; Ford v. Umatilla Co., 15 Or. 313, 16 Pac. 33; Weymire v. Wolfe, 52 Iowa, 533, 3 N. W. 541; Loewer v. City of Sedalia, 77 Mo. 431; Alger v. City of Lowell, 3 Allen (Mass.) 406; City of Salina v. Trosper, 27 Kan. 545; Baker v. City of Portland, 58 Me. 199, 205; Baltimore & O. R. Co. v. Boteler, 38 Md. 568; Healy v. Mayor, etc., 3 Hun (N. Y.) 708; Ditchett v. Railroad Co., 5 Hun (N. Y.) 165; Kingston v. Railway Co., 112 Mich. 40, 70 N. W. 315, 74 N. W. 230.

[6] Johnson v. Railroad Co., 104 Ala. 241, 16 South. 75; Ford v. Umatilla Co., 15 Or. 313, 16 Pac. 33. In the latter case the court says: "Whether the respondent (plaintiff) was drunk or sober, he had a right to suppose that a bridge open to the use of the public, and under control of the county officials, would bear up his load in crossing it; * * * and, because the respondent might be inclined to be more credulous when intoxicated than when sober, it was no fact that would excuse the appellant. * * * There is no pretense that respondent drove his team carelessly or recklessly, or did any act which contributed to the injury, except in attempting to cross the bridge, and the appellant, in the manner before suggested, invited him to do that." And it is no excuse for injuries caused by defendant when intoxicated that the

shall exercise ordinary care in their conduct towards him, and his intoxication will not excuse them for failure so to do, or relieve them from liability for injuries caused thereby.[7]

Intoxicated Trespassers.

Although intoxication is never a defense to contributory negligence, there would seem to be no valid reason why an intoxicated trespasser should be treated by the law with greater severity than a sober one. If it appears that a sober trespasser, in the same circumstances, and using the same degree of care, would be entitled to recover for injuries caused by the negligence of the proprietor, it is submitted that no degree of inebriety should change his legal status.[8] While this position is not strongly supported by decisions, few, if any, cases can be found which directly refute it, although so eminent an authority as Mr. Beach takes a radically different view of the proposition, and says: "Drunkenness, however, on the part of a trespasser, is universally held to be such negligence as will prevent entirely any recovery of damages for injuries sustained at the time or by reason of the trespass." [9] We fail to find any authorities for this proposition. It is true the courts have quite uniformly, and very consistently, held that trespassers upon railroad property cannot recover for injuries suffered by reason of their intoxication; but it is believed that the gist of this holding, in every case, lies in the finding, either of fact or law, that their negligent conduct contributed to the harm, not that the combination of drunkenness and trespass created an absolute bar to recovery.[10]

liquor was sold him by the plaintiff. Cassady v. Magher, 85 Ind. 228; Johnson v. Railroad Co., 61 Ill. App. 522.

[7] Rommel v. Schambacher, 120 Pa. St. 579, 11 Atl. 779; Kean v. Railroad Co., 61 Md. 154; Houston & T. C. R. Co. v. Reason, 61 Tex. 613.

[8] In Louisville, C. & L. R. Co. v. Sullivan, 81 Ky. 624, a drunken passenger refused to pay his fare, and was negligently put off in the snow by the conductor. *Held*, that he could recover. Memphis & C. R. Co. v. Jones, 2 Head (Tenn.) 517.

[9] Beach, Contrib. Neg. (2d Ed.) §§ 391, 392.

[10] Denman v. Railroad Co., 26 Minn. 357, 4 N. W. 605; McClelland v. Railway Co., 94 Ind. 276; Yarnall v. Railway Co., 75 Mo. 575; Little Rock & Ft. S. Ry. Co. v. Pankhurst, 36 Ark. 371; Houston & T. C. R. Co. v. Smith, 52 Tex. 178; Houston & T. C. R. Co. v. Sympkins, 54 Tex. 615; Illinois Cent. R. Co. v. Hutchinson, 47 Ill. 408; Manly v. Railroad Co., 74 N. C. 655; Richard-

The opinion of witnesses, other than experts, is competent to prove intoxication,[11] and it is always a question for the jury.

COMPARATIVE NEGLIGENCE

32. It was formerly held in a few states that, where the negligence of the defendant greatly outweighed that of the plaintiff, slight negligence on the part of the latter would not prevent a recovery, but the doctrine is now practically obsolete.

The doctrine of comparative negligence exists in but one or two states to-day, and, indeed, it is doubtful if any state is prepared to admit frankly that the rule, pure and simple, obtains in its courts. The rule is thus stated in one of the earlier cases in Georgia: "That, although the plaintiff be somewhat in fault, yet, if the defendant be grossly negligent, and thereby occasioned or did not prevent the mischief, the action may be maintained." [1] This has been modified materially in later decisions,[2] and it may be said that the Georgia rule is not yet settled,[3] although the tendency of their courts is to require the jury to reduce the damages in proportion to the contributory

son v. Railroad Co., 8 Rich. Law (S. C.) 120; Felder v. Railroad Co., 2 McMul. (S. C.) 403; Southwestern R. Co. v. Hankerson, 61 Ga. 114; Weymire v. Wolfe, 52 Iowa, 533, 3 N. W. 541; Mulherrin v. Railroad Co., 81 Pa. St. 366.

[11] Thomp. Neg. p. 779, § 2, and cases there collected; also see People v. Eastwood, 14 N. Y. 562; Brannan v. Adams, 76 Ill. 331; Woolheather v. Risley, 38 Iowa, 486; McKee v. Nelson, 4 Cow. (N. Y.) 355; People v. Gaynor, 33 App. Div. 98, 53 N. Y. Supp. 86; Quinn v. O'Keeffe, 9 App. Div. 68, 41 N. Y. Supp. 116; Felska v. Railroad Co., 152 N. Y. 339, 46 N. E. 613.

§ 32. [1] Augusta & S. R. Co. v. McElmurry, 24 Ga. 75, substantially followed in Mayor, etc., of City of Rome v. Dodd, 58 Ga. 238. In Atlanta & R. A. L. R. Co. v. Ayers, 53 Ga. 12, we find this modification of the rule: "If it appears that both parties were guilty of negligence, and that the person injured could not, by ordinary care and diligence, have avoided the consequences to himself of the negligence of the company's agents, the plaintiff may recover, but the jury should lessen the damages in proportion to the negligence and want of ordinary care of the injured party." See, also, Macon & W. R. Co. v. Davis, 27 Ga. 113; Flanders v. Meath, Id. 358.

[2] Atlanta & R. A. L. R. Co. v. Ayers, 53 Ga. 12.

[3] Beach, Contrib. Neg. (2d Ed.) § 92.

negligence of the plaintiff.[4] A similar result seems to be reached by statute in Tennessee in actions against railroads, unless the plaintiff's contributory negligence is the direct cause of his own injury.[5]

In Kansas, from an early date, it has been quite uniformly held that the plaintiff need not be entirely free from negligence to entitle him to recover; but it would seem that the relative fault of the parties must be in strong contrast, gross negligence of defendant against slight negligence of plaintiff, with a similar comparison of its causative effect.[6] This confusion of the degrees of negligence with proximateness and remoteness of cause appears in the leading case on this subject, the court saying: "An act that may be grossly negligent, if it proximately contributes to the injury, may be reasonably careful, if it only remotely contributes thereto." [7] And in a later case the following instruction is approved: "If the jury believe from the evidence that the plaintiff's negligence contributed to the injury complained of, he cannot recover. But if such negligence was only slight, or the remote cause of the injury, he may still recover, notwithstanding such slight negligence or remote cause." [8] Thus, as observed by Mr. Beach,[9] the doctrine is formulated in such a way as to suggest the conclusion that "slight negligence" is synonymous with negligence which is but a remote cause, and that "gross negligence" means hardly more than negligence which is a proximate cause,—a mistaking of causation for negligence.

[4] Atlanta & R. A. L. R. Co. v. Ayers, 53 Ga. 12; Alabama G. S. Ry. Co. v. Coggins, 32 C. C. A. 1, 88 Fed. 455; Southern Ry. Co. v. Watson, 104 Ga. 243, 30 S. E. 818.

[5] East Tennessee, V. & G. R. Co. v. Fain, 12 Lea, 35; Louisville, N. & G. S. R. Co. v. Fleming, 14 Lea, 128; Dush v. Fitzhugh, 2 Lea, 307; Railroad Co. v. Walker, 11 Heisk. 383; Southern R. Co. v. Pugh, 97 Tenn. 624, 37 S. W. 555.

[6] Union Pac. Ry. Co. v. Rollins, 5 Kan. 167; Wichita & W. R. Co. v. Davis, 37 Kan. 743, 16 Pac. 78; Caulkins v. Mathews, 5 Kan. 191; Sawyer v. Sauer, 10 Kan. 466; Pacific R. Co. v. Houts, 12 Kan. 328; Kansas Pac. Ry. Co. v. Pointer, 14 Kan. 37; Edgerton v. O'Neil, 4 Kan. App. 73, 46 Pac. 206; Atchison, T. & S. F. R. Co. v. Henry, 57 Kan. 154, 45 Pac. 576; St. Louis & S. F. Ry. Co. v. Stevens, 3 Kan. App. 176, 43 Pac. 434.

[7] Union Pac. Ry. Co. v. Rollins, 5 Kan. 167, at page 182.

[8] Sawyer v. Sauer, 10 Kan. 466.

[9] Beach, Contrib. Neg. (2d Ed.) § 87.

It appears that the doctrine is no longer recognized by the supreme court of Illinois.[10]

EVIDENCE—BURDEN OF PROOF.

33. If contributory negligence is not disclosed by plaintiff's case, the burden of proving it is on the defendant.

"The question as to burden of proof in respect to plaintiff's freedom from negligence, and as to whether he should make the affirmative averment that he exercised proper care and was free from negligence, is new in this court, and is involved in uncertainty by the conflicting and evasive decisions of the courts of other states. While some courts hold that he must allege and affirmatively establish that he was free from culpable negligence contributing to the injury, others hold that his negligence is matter of defense, of which the burden of pleading and proving rests upon the defendant."[1] The question, which party shall shoulder the burden of proving contributory negligence or freedom from fault, seems to be as far from a definite settlement to-day as when the opinion from which the above is an excerpt was written. In the same case, Wagner, J., goes on to say: "Negligence on the part of the plaintiff is a mere defense, to be set up in the answer and shown like any other defense, though, of course, it may be inferred from the circumstances proved by the plaintiff upon the trial. It seems to be illogical, and not required by the rules of good pleading, to compel a plaintiff to aver and prove negative matters in cases of this kind." On the other side, an equally high authority says: "Wherever there is negligence on the part of the plaintiff, contributing directly, or as a proximate cause, to the occurrence from which the injury arises, such negligence will prevent the plaintiff from recovery; and the burden is always upon the plantiff to establish either that he himself was in the exercise of due care, or that the injury is in no degree attributable to any want of proper care on

[10] City of Lanark v. Dougherty, 153 Ill. 163, 38 N. E. 892; Chicago & A. R. Co. v. Kelly, 75 Ill. App. 490; Chicago, B. & Q. R. Co. v. Levy, 160 Ill. 385, 43 N. E. 357; Cicero & P. St. Ry. Co. v. Meixner, 160 Ill. 320, 43 N. E. 823; Kinnare v. Railway Co., 57 Ill. App. 153.

§ 33. [1] Thompson v. Railroad Co., 51 Mo. 190.

his part." [2] This ruling is founded in good sense as well as sound law, and is undoubtedly the generally accepted doctrine to-day throughout this country.[3] Even in those states, however, where this doctrine has been uniformly accepted, an occasional divergence occurs which would seem to indicate a tendency to break away from the rule. Thus, in Minnesota it has been uniformly held that, to maintain an action, it must appear that the injury was occasioned by negligence on defendant's part, and it must not appear that there was contributory negligence on plaintiff's part; and, when the undisputed facts of the case show contributory negligence on the part of the plaintiff, it is proper for the court to rule, as a matter of law, that the plaintiff cannot recover.[4] Notwithstanding this well-settled rule, however, the supreme court of Minnesota has recently held that the plaintiff may establish a prima facie case, although his own uncontroverted testimony discloses contributory negligence in law.[5]

[2] Wells, J., in Murphy v. Deane, 101 Mass. 466, citing Trow v. Railroad Co., 24 Vt. 487; Birge v. Gardner, 19 Conn. 507.

[3] Allyn v. Railroad Co., 105 Mass. 77; Burns v. Railroad Co., 101 Mass. 50; Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274; Rothe v. Railroad Co., 21 Wis. 256; Bellefontaine Ry. Co. v. Hunter, 33 Ind. 335; North Pennsylvania R. Co. v. Heileman, 49 Pa. St. 60; McKee v. Bidwell, 74 Pa. St. 218; Wilcox v. Railroad Co., 39 N. Y. 358; Conner v. Railroad Co., 146 Ind. 430, 45 N. E. 662; Miller v. Miller, 17 Ind. App. 605, 47 N. E. 338; Whalen v. Gaslight Co., 151 N. Y. 70, 45 N. E. 363; Padgett v. Railroad Co., 7 Kan. App. 736, 52 Pac. 578; Kammerer v. Gallagher, 58 Ill. App. 561; Campbell v. Mullen, 60 Ill. App. 497; City of Huntingburg v. First (Ind. App.) 43 N. E. 17; Wahl v. Shoulders, 14 Ind. App. 665, 43 N. E. 458.

[4] Donaldson v. Railway Co., 21 Minn. 293; St. Anthony Falls Water-Power Co. v. Eastman, 20 Minn. 277 (Gil. 249).

[5] Cleary v. Packing Co., 71 Minn. 150, 73 N. W. 717. In the trial court the defendant made a motion to direct a verdict on the ground that the plaintiff had failed to make out a prima facie case, and an appeal was taken from the order denying this motion. The appellate court reversed the order, and directed judgment entered for defendant, on the ground that it conclusively appeared that plaintiff was guilty of contributory negligence in law. On a motion for a reargument the appellate court modified its ruling, and remanded the case for a new trial, on the ground that the defendant, in making its motion to direct a verdict, did not specify the contributory negligence of plaintiff as a ground; thus, in effect, holding that a plaintiff may make out a prima facie case, although his contributory negligence in law conclusively appears in its presentation.

Much time has been devoted by jurists and theorists to the discussion of the question whether a presumption of ordinary care or of negligence exists as to the plaintiff's conduct; but it is believed that in the practical consideration of the problem, as it presents itself in trials, the want of harmony is not so great as it appears.

The gist of actionable negligence is injury, proximately caused by the legal fault of the defendant. If the plaintiff proves these main facts, he has made out a prima facie case, and need go no further. Suppose, however, that he shows defendant's negligence and his own damage; it remains to show the causal connection, and if it appears that this has been in any degree broken, or interrupted or seriously jostled, by his own wrong conduct, his proof is insufficient, and his case will fail, unless he overcomes the presumption, now raised for the first time, of want of ordinary care. And it is apprehended that a slight disturbance of this causal connection by his own wrong conduct will be sufficient to raise the presumption of want of ordinary care on the part of the plaintiff. Thus, if, in the development of his case, it appears that in the circumstances a positive duty devolved upon the plaintiff, he must show either performance, or inability to perform, or that the nonperformance had no proximate influence on the result of defendant's breach of duty, as the duty of a person about to cross a railroad track to look and listen;[6] or if it appears that he was in an intoxicated condition at the time of the accident;[7] or if the plaintiff, by reason of infirmity, is incapable of ordinary care;[8] and, if the instrumentalities furnished by plaintiff were defective, the presumption is raised against him, unless he shows that he was not in fault in employing them.[9] A fortiori, where it appears plainly that plaintiff's undoubted negligence contributed to the injury.[10] On the other hand, the absence of any fault on the part of the plaintiff must be inferred in some circumstances. So, if he proves

[6] Missouri Pac. Ry. Co. v. Lee, 70 Tex. 496, 7 S. W. 857; State v. Maine Cent. R. Co., 76 Me. 357; Cleveland, C. & C. R. Co. v. Crawford, 24 Ohio St. 631; Pennsylvania R. Co. v. Beale, 73 Pa. St. 504.

[7] Button v. Railroad Co., 18 N. Y. 248; Fitzgerald v. Town of Weston, 52 Wis. 354, 9 N. W. 13; Stuart v. Machiasport, 48 Me. 477.

[8] Curtis v. Railroad Co., 49 Barb. (N. Y.) 148.

[9] Winship v. Enfield, 42 N. H. 197.

[10] Sprong v. Railroad Co., 60 Barb. (N. Y.) 30; Stoeckman v. Railroad Co., 15 Mo. App. 503.

that, while he was walking on a public sidewalk, he was struck by a plank negligently dropped from defendant's building by his servant. Here his case is complete, and he need not prove the absence of barriers, that he looked up or heard no warning cry, or any other matter to negative a presumption of carelessness.

In the opinion of Denio, J., in a New York case,[11] often cited as expounding the rule of that state, which is supposed to place the burden of proof on the plaintiff, we find the following: "The true rule, in my opinion, is this: The jury must eventually be satisfied that the plaintiff did not, by any negligence of his own, contribute to the injury;" which is nothing more than a negative and illogical form of the proposition that the plaintiff must prove that defendant's negligence was the cause of his injury, and it goes without saying that this is not proven if it appears in any way that the plaintiff's negligence in any degree contributed to the injury.

The above would seem to be the only logical rule in all cases, and it is well settled in many states and in the federal courts that the burden of proving contributory negligence, where it does not appear from the plaintiff's own case, is on the defendant.[12]

[11] Johnson v. Railroad Co., 20 N. Y. 64.

[12] Walker v. Westfield, 39 Vt. 246; Smith v. Railroad Co., 35 N. H. 356; Cassidy v. Angell, 12 R. I. 447; Delaware, L. & W. R. Co. v. Toffey, 38 N. J. Law, 525; Pennsylvania R. Co. v. Weber, 76 Pa. St. 157; County Com'rs of Prince George Co. v. Burgess, 61 Md. 29; Crouch v. Railway Co., 21 S. C. 495; Thompson v. Central Railroad & Banking Co., 54 Ga. 509; Mobile & M. R. Co. v. Crenshaw, 65 Ala. 566; Dallas & W. R. Co. v. Spicker, 61 Tex. 427; Louisville, C. & L. R. Co. v. Goetz's Adm'x, 79 Ky. 442; Fowler v. Railroad Co., 18 W. Va. 579; Baltimore & O. R. Co. v. Whitacre, 35 Ohio St. 627; Hoth v. Peters, 55 Wis. 405, 13 N. W. 219; Hocum v. Weitherick, 22 Minn. 152; Stephens v. City of Macon, 83 Mo. 345; Lincoln v. Walker, 18 Neb. 244, 20 N. W. 113; Kansas City, L. & S. R. Co. v. Phillibert, 25 Kan. 405; Sanderson v. Frazier, 8 Colo. 79, 5 Pac. 632; Lopez v. Mining Co., 1 Ariz. 464, 2 Pac. 748; MacDougall v. Railroad Co., 63 Cal. 431; Grant v. Baker, 12 Or. 329, 7 Pac. 318; Hough v. Railway Co., 100 U. S. 213; Indianapolis & St. Louis R. Co. v. Horst, 93 U. S. 291; Washington & G. Ry. Co. v. Gladmon, 15 Wall. 401; Morgan v. Bridge Co., 5 Dill. 96, Fed. Cas. No. 9,802; The America, 6 Ben. 122, Fed. Cas. No. 282; Western Ry. Co. of Alabama v. Williamson, 114 Ala. 131, 21 South. 827; Consolidated Traction Co. v. Behr, 59 N. J. Law, 477, 37 Atl. 142; Sopherstein v. Bertels, 178 Pa. St. 401, 35 Atl. 1000; Doyle v. Railroad Co., 27 C. C. A. 264, 82 Fed. 869; Fitchburg R. Co. v. Nichols, 29 C. C. A. 500, 85 Fed. 945; Louth v. Thompson (Del. Super.) 39

PLEADING CONTRIBUTORY NEGLIGENCE.

34. It is a general and almost universal rule that plaintiff need not allege his freedom from fault. The admissibility of proof of contributory negligence under a general denial is not general, varying in different states.

In those states where the burden of proof is on the defendant, it follows, as of course, that freedom from fault need not be alleged in the complaint,[1] and, even in those states where the burden is on the plaintiff, the same rule prevails, with one or two exceptions;[2] this seeming inconsistency being explained on the ground that, if plaintiff proves that the injury complained of was proximately caused by defendant's negligence, it must follow that plaintiff's fault did not contribute to the result.

Of the states placing the burden on the plaintiff, Indiana appears to be the only one which consistently requires the plaintiff to allege that he was free from contributory negligence.[3]

Atl. 1100; Wood v. Bartholomew, 122 N. C. 177, 29 S. E. 959; City of Hillsboro v. Jackson (Tex. Civ. App.) 44 S. W. 1010; Houston & T. C. Ry. Co. v. O'Neal (Tex. Civ. App.) 45 S. W. 921; Harrington v. Mining Co. (Utah) 53 Pac. 737; Rhyner v. City of Menasha, 97 Wis. 523, 73 N. W. 41; Pullman Palace-Car Co. v. Adams (Ala.) 24 South. 921; Maxwell v. Railway Co., 1 Marv. 199, 40 Atl. 945; Mills v. Railway Co., 1 Marv. 269, 40 Atl. 1114; Baker v. Railroad Co. (Mo. Sup.) 48 S. W. 838; Cox v. Railroad Co., 123 N. C. 604, 31 S. E. 848; Daly v. Hinz, 113 Cal. 366, 45 Pac. 693; Prosser v. Railway Co., 17 Mont. 372, 43 Pac. 81; Union Stockyards Co. v. Conoyer, 41 Neb. 617, 59 N. W. 950; Omaha St. Ry. Co. v. Martin, 48 Neb. 65, 66 N. W. 1007; Stewart v. City of Nashville, 96 Tenn. 50, 33 S. W. 613; Central Tex. & N. W. Ry. Co. v. Bush, 12 Tex. Civ. App. 291, 34 S. W. 133.

§ 34. [1] Holt v. Whatley, 51 Ala. 569; Robinson v. Railroad Co., 48 Cal. 409; Cox v. Brackett, 41 Ill. 222; Hocum v. Weitherick, 22 Minn. 152; Smith v. Railroad Co., 35 N. H. 356; Potter v. Railway Co., 20 Wis. 533; Matthews v. Bull (Cal.) 47 Pac. 773; Berry v. Railroad Co., 70 Fed. 193; Johnson v. Improvement Co., 13 Wash. 455, 43 Pac. 370; Thompson v. Railway Co., 70 Minn. 219, 72 N. W. 962.

[2] May v. Inhabitants of Princeton, 11 Metc. (Mass.) 442; Lee v. Gaslight Co., 98 N. Y. 115.

[3] Evansville & C. R. Co. v. Hiatt, 17 Ind. 102; Rogers v. Overton, 87 Ind. 411; Williams v. Moray, 74 Ind. 25. But it is sufficient to allege that the

In some states proof of contributory negligence is admissible under a general denial,[4] while in others it must be expressly averred in the answer.[5] There is no general rule on this subject, although we find it thus stated by two of the leading authorities: "But evidence of the plaintiff's fault is inadmissible under a general denial;" [6] and, "The defense of contributory negligence is admissible under the general plea of not guilty or under a general denial." [7]

CONTRIBUTORY NEGLIGENCE AS QUESTION OF FACT.

35. The question of contributory negligence is generally one of fact for the jury, and, unless the plaintiff's conduct was palpably careless, it should not be decided by the court.[1]

injury was without fault on plaintiff's part, Gheens v. Golden, 90 Ind. 427; Ohio & M. Ry. Co. v. Nickless, 71 Ind. 271; or even that it was wholly caused by defendant's negligence, Brinkman v. Bender, 92 Ind. 234; Wilson v. Road Co., 83 Ind. 326; City of Anderson v. Hervey, 67 Ind. 420; Peirce v. Oliver, 18 Ind. App. 87, 47 N. E. 485.

[4] St. Anthony Falls Water-Power Co. v. Eastman, 20 Minn. 277 (Gil. 249); Cunningham v. Lyness, 22 Wis. 236; Ellet v. Railway Co., 76 Mo. 518; (but see Stone v. Hunt, 94 Mo. 475, 7 S. W. 431); MacDonell v. Buffum, 31 How. Prac. 154; Indianapolis & C. R. Co. v. Rutherford, 29 Ind. 82; Jonesboro & F. Turnpike Co. v. Baldwin, 57 Ind. 86; Grey's Ex'r v. Trade Co., 55 Ala. 387; Denver, T. & Ft. W. R. Co. v. Smock, 23 Colo. 456, 48 Pac. 681; Chesapeake & O. Ry. Co. v. Smith (Ky.) 39 S. W. 832.

[5] Stone v. Hunt, 94 Mo. 475, 7 S. W. 431 (but see Ellet v. Railway Co., 76 Mo. 518); Western Union Tel. Co. v. Apple (Tex. Civ. App.) 28 S. W. 1022; Willis v. City of Perry, 92 Iowa, 297, 60 N. W. 727; Martin v. Railway Co., 51 S. C. 150, 28 S. E. 303; Clark v. Railway Co., 69 Fed. 543.

[6] Beach, Contrib. Neg. (2d Ed.) § 443.

[7] Shear. & R. Neg. (4th Ed.) § 113.

§ 35. [1] O'Brien v. McGlinchy, 68 Me. 552; Sleeper v. Railroad Co., 58 N. H. 520; Fassett v. Roxbury, 55 Vt. 552; Brooks v. Railroad Co., 135 Mass. 21; O'Connor v. Adams, 120 Mass. 427; Beers v. Railroad Co., 19 Conn. 566; Bell v. Railroad Co., 29 Hun (N. Y.) 560; Thomas v. City of New York, 28 Hun (N. Y.) 110; Salter v. Railroad Co., 88 N. Y. 42; Orange & N. H. R. Co. v. Ward, 47 N. J. Law, 560, 4 Atl. 331; North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15; Mayor, etc., of City of Baltimore v. Holmes, 39 Md. 243; Sheff v. City of Huntington, 16 W. Va. 307; Central R. Co. v. Freeman, 66 Ga. 170; Louisville, C. & L. R. Co. v. Goetz's Adm'x, 79 Ky. 442; Hill v. Gust, 55 Ind. 45; Town of Albion v. Hetrick, 90 Ind. 545; Wabash, St. L. & P. Ry. Co.

The same rules substantially govern the submission to the jury of either the plaintiff's or defendant's negligence, due regard being had to the rule of the particular court in placing the burden of proof. Nor should the court withdraw the case from the jury for the reason that to its mind the facts were so weak as to give no support to the proposition of negligence, either of plaintiff or defendant. The question is, rather, are the facts so weak, in the estimate of fair, sound minds, that the law would not tolerate a verdict founded upon them? [2] If but one inference can be drawn from the evidence, it is, of course, purely a question of law for the decision of the court.

Where the action is to recover for death caused by defendant's negligence, there is a lack of harmony as to the presumption of negligence on the part of plaintiff, there being no direct evidence on the point; and this, even in those courts which hold that the burden of proof is on the plaintiff.[3] In the courts where the defendant must assume the burden, the discussion can hardly arise.

v. Shacklet, 105 Ill. 364; Anderson v. Morrison, 22 Minn. 274; Garrett v. Railway Co., 36 Iowa, 121; Kelly v. Railroad Co., 70 Mo. 604; Swoboda v. Ward, 40 Mich. 420; Kelley v. Railway Co., 53 Wis. 74, 9 N. W. 816; Fernandes v. Railroad Co., 52 Cal. 45; Bierbach v. Rubber Co., 14 Fed. 826, 15 Fed. 490; Cunningham v. Railway Co., 115 Cal. 561, 47 Pac. 452; Town of Salem v. Walker, 16 Ind. App. 687, 46 N. E. 90; Hadley v. Railroad Co. (Ind. App.) 46 N. E. 935; Union Pac. Ry. Co. v. Lipprand, 5 Kan. App. 484, 47 Pac. 625; Village of Culbertson v. Holliday, 50 Neb. 229, 69 N. W. 853; New York & G. L. Ry. Co. v. Railway Co., 60 N. J. Law, 52, 37 Atl. 627; Klinkler v. Iron Co., 43 W. Va. 219, 27 S. E. 237; Patton v. Railway Co., 27 C. C. A. 287, 82 Fed. 979; Herbert v. Southern Pac. Co., 121 Cal. 227, 53 Pac. 651; West Chicago St. R. Co. v. Feldstein, 169 Ill. 139, 48 N. E. 193; Ashland Coal, Iron & Railway Co. v. Wallace's Adm'r (Ky.) 42 S. W. 744; Stone v. Railroad Co., 171 Mass. 536, 51 N. E. 1; Lillibridge v. McCann (Mich.) 75 N. W. 288; Hygienic Plate Ice Mfg. Co. v. Railroad Co., 122 N. C. 881, 29 S. E. 575; Heckman v. Evenson, 7 N. D. 173, 73 N. W. 427; Mitchell v. Railway Co., 100 Tenn. 329, 45 S. W. 337; Reese v. Mining Co., 15 Utah, 453, 49 Pac. 824; Deisenrieter v. Malting Co., 97 Wis. 279, 72 N. W. 735; Ward v. Manufacturing Co., 123 N. C. 248, 31 S. E. 495; Ryan v. Ardis, 190 Pa. St. 66, 42 Atl. 372; Schwartz v. Shull (W. Va.) 31 S. E. 914.

[2] Hart v. Bridge Co., 80 N. Y. 622. See, also, Northrup v. Railway Co., 37 Hun (N. Y.) 295; Greany v. Railroad Co., 101 N. Y. 419, 5 N. E. 425; Payne v. Reese, 100 Pa. St. 301.

[3] Where there was no direct evidence as to the care of the deceased, Indiana, B. & W. Ry. Co. v. Greene, 106 Ind. 279, 6 N. E. 603; Cordell v. Rail-

In any event, if there is any evidence reasonably tending to show contributory negligence on the part of plaintiff, the defendant is entitled to an instruction that plaintiff cannot recover if his negligence in any degree contributed to the injury complained of, unless it further appears that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's carelessness.[4]

road Co., 75 N. Y. 330. Where evidence was not sufficient to warrant a finding that there was no negligence on the part of deceased, Reynolds v. Railroad Co., 58 N. Y. 248. Per contra, absence of evidence of ordinary care does not justify a presumption of negligence, Massoth v. Canal Co., 64 N. Y. 524. See, also, in general, Jones v. Railroad Co., 28 Hun (N. Y.) 364; Lindeman v. Railroad Co., 42 Hun (N. Y.) 306.

[4] See ante, § 8, notes 7, 8, and cases cited; Pittsburg, Ft. W. & C. Ry. Co. v. Krichbaum's Adm'r, 24 Ohio St. 119; Baltimore & O. R. Co. v. Whittaker, Id. 642. Also, see, Patterson v. Railroad Co., 4 Houst. (Del.) 103.

CHAPTER III.

LIABILITY OF MASTER TO SERVANT.

DUTY OF MASTER.

36. It is the duty of the master, which cannot be shifted by delegation, to exercise ordinary care to protect his servants from injury while in his employment,[1] and includes

§§ 36–37. [1] Hough v. Railway Co., 100 U. S. 213; Baltimore & O. & C. R. Co. v. Rowan, 104 Ind. 88, 3 N. E. 627; Tissue v. Railroad Co., 112 Pa. St. 91, 3 Atl. 667; Noyes v. Smith, 28 Vt. 59; Ryan v. Fowler, 24 N. Y. 410; Wabash R. Co. v. Kelley (Ind. Sup.) 52 N. E. 152; McGeary v. Railroad Co. (R. I.) 41 Atl. 1007; Keown v. Railroad Co., 141 Mo. 86, 41 S. W. 926; Oliver v. Railroad Co., 42 W. Va. 703, 26 S. E. 444; Sievers v. Lumber Co., 151 Ind. 642, 50 N. E. 877; Texas Cent. Ry. Co. v. Lyons (Tex. Civ. App.) 34 S. W. 362; Bertha Zinc Co. v. Martin's Adm'r, 93 Va. 791, 22 S. E. 869; Burnes v. Railway Co., 129 Mo. 41, 31 S. W. 347; Gulf, W. T. & P. Ry. Co. v. Abbott (Tex. Civ. App.) 24 S. W. 299; Morrisey v. Hughes, 65 Vt. 553, 27 Atl. 205. And it is error to charge that a railroad company owes a duty

(a) The duty to provide proper opportunities and instrumentalities for the performance of the work.
(b) The duty to select competent fellow servants in sufficient number.
(c) The duty to establish proper regulations.

SAME—APPLIANCES AND PLACES FOR WORK.

37. The master is bound to use ordinary care in providing a reasonably safe place in which, and reasonably safe and proper materials and instruments with which, the servant may do his work.[2]

to its employés to do all that human care, vigilance, and foresight can do, consistently with the operating of its road, regarding all appliances. Cleveland, C., C. & St. L. R. Co. v. Selsor, 55 Ill. App. 685. That the duty cannot be shifted by delegation, Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 647, 6 Sup. Ct. 590, 593, where the court says, "No duty required of him for the safety and protection of his servants can be transferred, so as to exonerate him from such liability." On this point see, also, Booth v. Railroad Co., 73 N. Y. 38, 40; Ford v. Railroad Co., 110 Mass. 240; Chicago & N. W. Ry. Co. v. Jackson, 55 Ill. 492; Cooper v. Railroad Co., 24 W. Va. 37; Texas & P. Ry. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707; Herdler v. Range Co., 136 Mo. 3, 37 S. W. 115; Rollings v. Levering, 18 App. Div. 223, 45 N. Y. Supp. 942; Norfolk & W. R. Co. v. Ampey, 93 Va. 108, 25 S. E. 226; Denver & R. G. R. Co. v. Sipes (Colo. Sup.) 55 Pac. 1093; Ferris v. Hernsheim (La.) 24 South. 771; Stewart v. Ferguson, 34 App. Div. 515, 54 N. Y. Supp. 615; Wright v. Railroad Co., 123 N. C. 280, 31 S. E. 652; McCauley v. Railway Co., 10 App. D. C. 560; Huber v. Jackson, 1 Marv. 374, 41 Atl. 92; Chicago & A. R. Co. v. Maroney, 170 Ill. 520, 48 N. E. 953; Edward Hines Lumber Co. v. Ligas, 172 Ill. 315, 50 N. E. 225; Rice & Bullen Malting Co. v. Paulsen, 51 Ill. App. 123; G. H. Hammond Co. v. Mason, 12 Ind. App. 469, 40 N. E. 642; Northern Pac. R. Co. v. Poirier, 15 C. C. A. 52, 67 Fed. 881. Thus, in the selection and dismissal of servants, Wright v. Railroad Co., 28 Barb. 80; Walker v. Bolling, 22 Atl. 294; in providing and maintaining suitable ma-

[2] McCarthy v. Muir, 50 Ill. App. 510; McIntyre v. Railroad Co., 163 Mass. 189, 39 N. E. 1012; Fenderson v. Railroad Co., 56 N. J. Law, 708, 31 Atl. 767; Fosburg v. Fuel Co., 93 Iowa, 54, 61 N. W. 400; Galveston, H. & S. A. Ry. Co. v. Gormley (Tex. Civ. App.) 27 S. W. 1051; Nordyke & Marmon Co. v. Van Sant, 99 Ind. 188; Chicago & N. W. R. Co. v. Swett, 45 Ill. 197; Perry v. Ricketts, 55 Ill. 234; Louisville & N. R. Co. v. Johnson, 27 C. C. A. 367, 81 Fed. 679.

It is not incumbent upon the master to furnish the best or safest equipment for the performance of the duty. It is sufficient if the tools, materials, and facilities generally are reasonably suitable for the prosecution of the work, and could be used with reasonable safety if the workman exercised ordinary care.[3] It follows that it is not necessary that the newest inventions or the most improved safeguards should be adopted by the employer,[4] and, a fortiori, questions of mere

chinery, etc., Hough v. Railway Co., 100 U. S. 213; Fuller v. Jewett, 80 N. Y. 46; Benzing v. Steinway, 101 N. Y. 547, 5 N. E. 449; Ford v. Railroad Co., 110 Mass. 240; in inspection of machinery, etc., Durkin v. Sharp, 88 N. Y. 225; Brann v. Railroad Co., 53 Iowa, 595, 6 N. W. 5; Fay v. Railway Co., 30 Minn. 231, 15 N. W. 241; O'Neil v. Railway Co., 9 Fed. 337; and in repairing machinery, etc., Shanny v. Androscoggin Mills, 66 Me. 420; Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 651, 6 Sup. Ct. 590; Bessex v. Railroad Co., 45 Wis. 477; Drymala v. Thompson, 26 Minn. 40, 1 N. W. 255.

[3] Illinois Cent. R. Co. v. Jones, 11 Ill. App. 324; Greenleaf v. Railroad Co., 29 Iowa, 14; Payne v. Reese, 100 Pa. St. 301; Jones v. Granite Mills, 126 Mass. 84; Bajus v. Railroad Co., 103 N. Y. 312, 8 N. E. 529; Johnson v. Mining Co., 16 Mont. 164, 40 Pac. 298; Fosburg v. Fuel Co., 93 Iowa, 54, 61 N. W. 400; St. Louis S. W. Ry. Co. v. Jagerman, 59 Ark. 98, 26 S. W. 591; Nutt v. Railway Co., 25 Or. 291, 35 Pac. 653; Williams v. Railway Co., 119 Mo. 316, 24 S. W. 782; Kansas City & P. R. Co. v. Ryan, 52 Kan. 637, 35 Pac. 292; Atchison, T. & S. F. R. Co. v. Wagner, 33 Kan. 660, 7 Pac. 204; Watts v. Hart, 7 Wash. 178, 34 Pac. 423; Huber v. Jackson & Sharp Co., 1 Marv. 374, 41 Atl. 92; Chicago & E. I. R. Co. v. Garner, 78 Ill. App. 281; Chicago, B. & Q. R. Co. v. Oyster (Neb.) 78 N. W. 359; Fritz v. Light Co. (Utah) 56 Pac. 90; Schwartz v. Shull (W. Va.) 31 S. E. 914; Last Chance Mining & Milling Co. v. Ames, 23 Colo. 167, 47 Pac. 382; Quintana v. Refining Co., 14 Tex. Civ. App. 347, 37 S. W. 369; Jones v. Shaw (Tex. Civ. App.) 41 S. W. 690; Gormully & Jeffery Mfg. Co. v. Olsen, 72 Ill. App. 32; Disano v. Brick Co. (R. I.) 40 Atl. 7. Railroad companies are not bound to provide the best appliances, Lake Shore & M. S. Ry. Co. v. McCormick, 74 Ind. 440; Umback v. Lake Shore & M. S. Ry. Co., 83 Ind. 191; nor the most improved machinery in a factory, Harsha v. Babiex, 54 Ill. App. 586; and it was held error to charge that the appliances should be "of modern improvements and safe," Galveston, H. & S. A. Ry. Co. v. Gormley (Tex. Civ. App.) 27 S. W. 1051.

[4] Matteson v. Railroad Co., 62 Barb. (N. Y.) 364; Sweeney v. Envelope Co., 101 N. Y. 520, 5 N. E. 358; Wabash Paper Co. v. Webb, 146 Ind. 303, 45 N. E. 474; Shadford v. Railway Co., 111 Mich. 390, 69 N. W. 661; Murphy v. Hughes (Del. Super.) 40 Atl. 187; Bonner v. Bridge Co., 5 Pa. Super. Ct. 281; Texas & P. Ry. Co. v. Thompson, 17 C. C. A. 524, 70 Fed. 944; Chicago & G. W. Ry. Co. v. Armstrong, 62 Ill. App. 228; Wood v. Heiges, 83 Md. 257, 34

convenience or facility are immaterial.[5] And where the tools are simple, and their construction and adaptability to the work within the comprehension of ordinary, untrained intelligence, the user cannot complain, after injury, that they were unsuitable,—as a ladder used for lighting lamps, which was not provided with hooks or spikes, and, in consequence, slipped, and caused plaintiff to fall, after he had used it with safety for some six weeks.[6]

The Existence of the Relation.

A servant is one who is actually or impliedly engaged in rendering service or assistance at the request and for the benefit of the master, and the peculiar duties which the master owes the servant arise only when the servant is thus employed in doing his work. At other times, although the contract relation may continue, the master's duty to him is no other or greater than he owes to any third person in like circumstances, and the schedule hours of labor afford no material test of the existence of the relation in any concrete case.[7] Ordinarily the relation does not exist while the servant is going to or from the place of work, but, if the master provides transportation for the servant, the relation and concomitant duties exist while he is being so

Atl. 872; Gulf, C. & S. F. Ry. Co. v. Warner (Tex. Civ. App.) 36 S. W. 118; Bertha Zinc Co. v. Martin's Adm'r, 93 Va. 791, 22 S. E. 869; France v. Railroad Co., 88 Hun, 318, 34 N. Y. Supp. 408; Rooney v. Cordage Co., 161 Mass. 153, 36 N. E. 789. Failure to provide "target switches" on railroad, Salters v. Canal Co., 3 Hun (N. Y.) 338; nor (in the absence of statute) need a railroad company block its frogs, McGinnis v. Bridge Co., 49 Mich. 466, 13 N. W. 819; also Lake Shore & M. S. R. Co. v. McCormick, 74 Ind. 440; Philadelphia W. & B. R. Co. v. Keenan, 103 Pa. St. 124; Burns v. Railroad Co., 69 Iowa, 450, 30 N. W. 25. Failure to use air brakes instead of hand brakes, when latter were considered reasonably safe and suitable, France v. Railroad Co., 88 Hun, 318, 34 N. Y. Supp. 408.

[5] Cook v. Manufacturing Co., 53 Hun, 632, 7 N. Y. Supp. 950; Hough v. Railway Co., 100 U. S. 213; Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491.

[6] Marsh v. Chickering, 101 N. Y. 396, 5 N. E. 56; Guggenheim Smelting Co. v. Flanigan (N. J. Err. & App.) 41 Atl. 844; Biddiscomb v. Cameron, 35 App. Div. 561, 55 N. Y. Supp. 127.

[7] But where a laborer customarily ate his dinner in the master's pump house, with his sanction, not having time to go home to dinner, and was there injured by the negligent escape of steam, the master was held liable. Cleveland, C., C. & St. L. R. Co. v. Martin (Ind. App.) 39 N. E. 759.

conveyed. Thus, where an employé of a railroad company was passed daily over the road, in going to and from his work, free of charge, and by reason of a defective track the train on which he was riding was derailed, it was held that while he was so riding the relation of master and servant, and not that of common carrier and passenger, obtained.[8] But if the servant pays any fare for such transportation, even by a deduction from his wages, he has all the rights of a passenger.[9]

Safe Place to Work.

The general duty rests upon the master to see to it that the place in which the servant must do the work is reasonably safe for the purpose,[10] and in general to provide safe means of access and departure.[11] In this connection is included the duty to foresee and provide against dangers which, in the exercise of proper diligence,

[8] Seaver v. Railroad Co., 14 Gray (Mass.) 466; Moss v. Johnson, 22 Ill. 633; McGuirk v. Shattuck, 160 Mass. 45, 35 N. E. 110.

[9] O'Donnell v. Railroad Co., 59 Pa. St. 239; Vick v. Railroad Co., 95 N. Y. 267. In the latter case it was held that, in the circumstances, the deduction did not amount to a payment of fare.

[10] Fosburg v. Fuel Co., 93 Iowa, 54, 61 N. W. 400. Cf. Collins v. Crimmins (Super. N. Y.) 31 N. Y. Supp. 860. Also, see Blondin v. Quarry Co., 11 Ind. App. 395, 37 N. E. 812, affirmed in 39 N. E. 200; Austin v. Railroad Co., 172 Mass. 484, 52 N. E. 527; Callan v. Bull, 113 Cal. 593, 45 Pac. 1017; Parlin & Orendorff Co. v. Finfrouck, 65 Ill. App. 174; Ryan v. Armour, 166 Ill. 568, 47 N. E. 60; Barber Asphalt Pav. Co. v. Odasz, 29 C. C. A. 631, 85 Fed. 754; Gibson v. Sullivan, 164 Mass. 557, 42 N. E. 110; Smith v. Transportation Co., 89 Hun, 588, 35 N. Y. Supp. 534; McKenna v. Paper Co., 176 Pa. St. 306, 35 Atl. 131; Big Creek Stone Co. v. Wolf, 138 Ind. 496, 38 N. E. 52; Gulf, C. & S. F. Ry. Co. v. Jackson, 12 C. C. A. 507, 65 Fed. 48; Curley v. Hoff (N. J. Err. & App.) 42 Atl. 731; San Antonio & A. P. Ry. Co. v. Brooking (Tex. Civ. App.) 51 S. W. 537. Illinois Cent. R. Co. v. Gilbert, 51 Ill. App. 404; Mississippi Cotton Oil Co. v. Ellis, 72 Miss. 191, 17 South. 214; McGonigle v. Canty, 80 Hun, 301, 30 N. Y. Supp. 320; Plank v. Railroad Co., 60 N. Y. 607 (trench); Wilson v. Linen Co., 50 Conn. 433 (defective shafting); Benzing v. Steinway, 101 N. Y. 547, 5 N. E. 449; Ferren v. Railroad Co., 143 Mass. 197, 9 N. E. 608 (plaintiff crushed between car and building); Sunney v. Holt, 15 Fed. 880 (unlighted hatchway); Campbell v. Railroad Co. (Pa. Sup.) 2 Atl. 489.

[11] Brydon v. Stewart, 2 Macq. 30; Buzzell v. Manufacturing Co., 48 Me. 113; Ferris v. Hernsheim (La.) 24 South. 771; Lauter v. Duckworth, 19 Ind. App. 535, 48 N. E. 864.

might have been anticipated.[12] But, like all general propositions, this must be interpreted reasonably, and with due consideration for the character of the work to be done. So, in tearing down an old building, the master's duty is not to furnish a safe place for his servants in which to do a work necessarily dangerous, but consists in not subjecting them to a danger of which, in the exercise of due care, he, but not they, should have knowledge.[13] And in general it may be said that the requirement of providing a safe place in which to work does not apply to cases where the servant's work consists in making dangerous places or things safe;[14] or where the business or work consists in or necessitates the handling of unsafe or unsound things, known to the servant to be so,—as where the employment consists in moving damaged and defective cars to the repair shops.[15] Moreover, if the place or appliance is put to an unusual test,[16] or a use not reasonably to be anticipated,[17] the master is not responsible for resulting injury.

Materials and Instruments.

The materials and instruments with which the servant is required to labor must be reasonably safe and suited to the employment, due reference being had to the character of the work.[18] The servant has

12 Prendible v. Manufacturing Co., 160 Mass. 131, 35 N. E. 675; Denning v. Gould, 157 Mass. 563, 32 N. E. 862; Cougle v. McKee, 151 Pa. St. 602, 25 Atl. 115; Union Pac. Ry. Co. v. Jarvi, 3 C. C. A. 433, 53 Fed. 65; Lineoski v. Coal Co., 157 Pa. St. 153, 27 Atl. 577; Linton Coal & Mining Co. v. Persons, 11 Ind. App. 264, 39 N. E. 214; Union Pac. Ry. Co. v. Erickson, 41 Neb. 1, 59 N. W. 347; Muncie Pulp Co. v. Jones, 11 Ind. App. 110, 38 N. E. 547; Hennessy v. City of Boston, 161 Mass. 502, 37 N. E. 668; Norfolk & W. R. Co. v. Ward, 90 Va. 687, 19 S. E. 849; Indiana Pipe Line & Refining Co. v. Neusbaum. 21 Ind. App. 559, 52 N. E. 471.

13 Clark v. Liston, 54 Ill. App. 578.

14 Finalyson v. Milling Co., 14 C. C. A. 492, 67 Fed. 507. See, also, Gulf, C. & S. F. Ry. Co. v. Jackson, 12 C. C. A. 507, 65 Fed. 48.

15 Flannagan v. Railway Co., 50 Wis. 462, 7 N. W. 337; on former appeal, 45 Wis. 98; Watson v. Railroad Co., 58 Tex. 434; Yeaton v. Railroad Corp., 135 Mass. 418.

16 Preston v. Railway Co., 98 Mich. 128, 57 N. W. 31.

17 Richmond & D. R. Co. v. Dickey, 90 Ga. 491, 16 S. E. 212.

18 Buzzell v. Manufacturing Co., 48 Me. 113; Laning v. Railroad Co., 49 N. Y. 521; Nordyke & Marmon Co. v. Van Sant, 99 Ind. 188; Chicago & N. W. R. Co. v. Swett, 45 Ill. 197; Benzing v. Steinway, 101 N. Y. 547, 5 N. E. 449;

the right to assume that all reasonable attention will be given by his employer to his safety, so that he will not be needlessly exposed to risks which might be avoided by ordinary care and precaution.[19] But it does not follow that a tool or implement which has become worn, or even defective, if still useful, should be cast aside as dangerous, unless its continued employment involves an apparent risk. "Defect" is not synonymous with "danger." [20] The obligation of the master to supply proper materials and instruments to his servants is, as in other matters, largely one of good faith, and is, in every situation, measured by the character and necessary exposures of the business,[21] and the test of his liability would seem to be, not whether he omitted to supply something or do something which he could have supplied or done, and which would have lessened the danger or averted the injury, but whether, in the circumstances and the exercise of ordinary care and prudence, he failed to take the course or precautions which a prudent and careful man would have adopted.[22]

Inspecting and Keeping in Repair.

Moreover, it is the general duty of the master to inspect and keep in repair and suitable condition the places of work, instruments, and appliances; but the same limitation of reasonableness is placed upon the degree of care which is in this respect required of the master. And, having provided a reasonably safe and proper place or appliance,

Collyer v. Railroad Co., 49 N. J. Law, 59, 6 Atl. 437; Louisville & N. R. Co. v. Semonis (Ky.) 51 S. W. 612; Jones v. Railway Co. (La.) 26 South. 86; Butler v. Railroad Co. (Sup.) 58 N. Y. Supp. 1061; Green v. Sansom (Fla.) 25 South. 332; Cleveland, C., C. & St. L. Ry. Co. v. Brown, 20 C. C. A. 147, 73 Fed. 970; Central R. Co. of New Jersey v. Keegan, 160 U. S. 259, 16 Sup. Ct. 269; Northern Pac. R. Co. v. Peterson, 162 U. S. 346, 16 Sup. Ct. 843; Same v. Charless, 162 U. S. 359, 16 Sup. Ct. 848; Hathaway v. Railway Co., 92 Iowa, 337, 60 N. W. 651; French v. Aulls, 72 Hun, 442, 25 N. Y. Supp. 188.

[19] Boyce v. Fitzpatrick, 80 Ind. 526; Western Coal & Mining Co. v. Berberich, 36 C. C. A. 364, 94 Fed. 329; McFarlan Carriage Co. v. Potter (Ind. Sup.) 53 N. E. 465.

[20] Little Rock & F. S. R. Co. v. Duffey, 35 Ark. 602; Nelson v. Car-Wheel Co., 29 Fed. 840.

[21] Devitt v. Railroad Co., 50 Mo. 302; Wonder v. Railroad Co., 32 Md. 411; Myers v. W. C. De Pauw Co., 138 Ind. 590, 38 N. E. 37.

[22] Leonard v. Collins, 70 N. Y. 90; Carroll v. Telegraph Co., 160 Mass. 152, 35 N. E. 456.

he has a right to assume that it will be used intelligently and carefully, and he need not constantly inspect it to see that it does not become unsafe through misuse or carelessness; as in the case of a scaffold the boards of which are necessarily movable, the master has the right to assume that they will be properly moved and adjusted, as occasion may require, and kept in place by the servant, and, if the servant allows them to become so misplaced that in walking over them they give way, and he is injured, he cannot recover.[23] But where one has been injured through a defect in an appliance which could have been discovered and remedied by proper inspection and care, it is no defense to an action based thereon that the master was not in fact informed of the defect or danger.[24] And the duty of inspection and care applies equally to places and instrumentalities which the servant uses in the course of his employment, no matter whether they are the actual property of the master or not; as in the case of a railroad employé who is required to handle cars not belonging to the employing company,[25] or to run the cars of his own employer over the tracks of another company.[26]

[23] Jennings v. Iron Bay Co., 47 Minn. 111, 49 N. W. 685; Wachsmuth v. Crane Co. (Mich.) 76 N. W. 497; Coyle v. Iron Co. (N. J. Sup.) 41 Atl. 680; Miller v. Railroad Co., 21 App. Div. 45, 47 N. Y. Supp. 285.

[24] Benzing v. Steinway, 101 N. Y. 547, 5 N. E. 449; McFarlan Carriage Co. v. Potter (Ind. Sup.) 53 N. E. 465; Union Show Case Co. v. Blindauer, 75 Ill. App. 358; Cleveland, C., C. & St. L. Ry. Co. v. Ward, 147 Ind. 256, 45 N. E. 325, and 46 N. E. 462.

[25] Gottlieb v. Railroad Co., 29 Hun (N. Y.) 637, affirmed in 100 N. Y. 462, 3 N. E. 344; O'Neil v. Railway Co., 9 Fed. 337. But see, also, Michigan Cent. R. Co. v. Smithson, 45 Mich. 212, 7 N. W. 791; Baldwin v. Railroad Co., 50 Iowa, 680; Ballou v. Railway Co., 54 Wis. 257, 11 N. W. 559; Mackin v. Railroad Co., 135 Mass. 201; Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491; Dooner v. Canal Co., 164 Pa. St. 17, 30 Atl. 269; Atchison, T. & S. F. R. Co. v. Myers, 11 C. C. A. 439, 63 Fed. 793; Union Stock-Yards Co. v. Goodwin (Neb.) 77 N. W. 357.

[26] Stetler v. Railway Co., 46 Wis. 497, 1 N. W. 112; Id., 49 Wis. 609, 6 N. W. 303.

SAME—SELECTING AND RETAINING SERVANTS.

38. It is the duty of the master to exercise ordinary care in the selection and retention of his servants, with a view to employing a sufficient number, and only such as are fairly skillful and competent, to the end that co-employés may not be endangered in the performance of their duty by the conduct of persons who are not possessed of these reasonable qualifications.[1]

If the master fails in the performance of this duty, he is liable for any injury to his servant resulting therefrom; that is to say, if the negligence, unskillfulness, or incompetency of a co-employé, such as might have been reasonably anticipated or discovered by ordinary care on the part of the master, is the cause of injury to a servant, he can recover therefor against the employer.[2] This liability is based on the master's supposed knowledge of the servant's incompetency, or, what amounts to the same thing, the means of knowledge in the exercise of ordinary care; and it follows, of course, that actual knowledge of incompetency, although increasing the responsibility, is not essential.[3]

§ 38. [1] Wabash Ry. Co. v. McDaniels, 107 U. S. 454, 2 Sup. Ct. 932; Curley v. Harris, 11 Allen (Mass.) 112, 121; Chicago & G. E. Ry. Co. v. Harney, 28 Ind. 28; Laning v. Railroad Co., 49 N. Y. 521; Crew v. Railway Co., 20 Fed. 87; Porter v. Machine Co., 94 Tenn. 370, 29 S. W. 227; McPhee v. Scully, 163 Mass. 216, 39 N. E. 1007 (fellow servant obviously drunk at time defendant ordered him to work); Norfolk & W. R. Co. v. Nuckol's Adm'r, 91 Va. 193, 21 S. E. 342 (duty of master to keep himself informed of servant's competency); Jungnitsch v. Iron Co., 105 Mich. 270, 63 N. W. 296 (only reasonable care required, and not such care as will reduce danger to a minimum).

[2] Faulkner v. Railway Co., 49 Barb. (N. Y.) 324; Chicago & N. W. Ry. Co. v. Swett, 45 Ill. 197; Chicago & G. E. Ry. Co. v. Harney, 28 Ind. 28; Nordyke & Marmon Co. v. Van Sant, 99 Ind. 188; Blake v. Railroad Co., 70 Me. 60; Mann v. Canal Co., 91 N. Y. 495; Huntsinger v. Trexler, 181 Pa. St. 497, 37 Atl. 574; Murphy v. Hughes (Del. Super.) 40 Atl. 187; Wright v. Railway Co., 123 N. C. 280, 31 S. E. 652.

[3] Laning v. Railroad Co., 49 N. Y. 521; Gilman v. Railroad Corp., 10 Allen (Mass.) 233; Huntingdon & B. T. R. Co. v. Decker, 84 Pa. St. 419.

The mere fact of incompetency is not sufficient to establish the responsibility of the master. In some cases the proof of incompetency may be of such a nature as to raise an inference of knowledge sufficient to sustain a verdict, although it would not raise a legal presumption of notice. Thus, in an action by a coal miner for injuries sustained while being lowered into a mine, proof that the operating engineer had theretofore always been a mule driver or manual laborer was held to be merely evidence of negligence in his selection for the consideration of the jury.[4] But, apart from all question of notice, it should be observed that the individual negligent act of the fellow servant which caused the injury complained of is not in itself sufficient evidence of the fact of incompetency.[5]

The number of employés, also, should be sufficient to do the work with reasonably safety, and to this end the master must exercise the same reasonable degree of care to hire and maintain a fairly adequate force.[6] And this duty is not discharged by the mere provision of a sufficient number of men for the manual labor to be performed. It may also require the stationing of lookouts,[7] patrols, and watchmen;[8] in short, there must be servants enough, not only for ordinary, but for extraordinary, occasions, and it will not do to say that "one man cannot be in two places at one time." There must be "a man for every place, as need may be."[9]

[4] Joch v. Dankwardt, 85 Ill. 331; Bunnell v. Railway Co., 29 Minn. 305, 13 N. W. 129; no presumption, Murphy v. Pollock, 15 Ir. C. L. 224; Wright v. Railroad Co., 25 N. Y. 562; Harvey v. Same, 88 N. Y. 481; O'Loughlin v. Same, 87 Hun, 538, 34 N. Y. Supp. 297.

[5] McCarthy v. Shipowners' Co., L. R. Ir. 10 Exch. 384; Hathaway v. Railway Co., 92 Iowa, 337, 60 N. W. 651; but a former commission of a similarly incompetent act, if known to the master, is competent evidence of notice. Wabash Western Ry. Co. v. Brow, 13 C. C. A. 222, 65 Fed. 941. On proof of incompetency, see post, p. 100.

[6] Flike v. Railroad Co., 53 N. Y. 549; Booth v. Same, 73 N. Y. 38. See, also, Whitt. Smith, Neg. p. 125, etc., and cases cited; McMullen v. Railway Co., 1 Mo. App. Rep'r, 230.

[7] Burlington & M. R. Co. v. Crockett, 19 Neb. 138, 26 N. W. 921, 24 Am. & Eng. R. Cas. 390.

[8] Hardy v. Railway Co., 76 N. C. 5 (washout, and failure of railroad to have a man at the break to warn the train).

[9] Read, J., in Hardy v. Railway Co., 76 N. C. 5.

If the injured servant knew of the incompetency,[10] or had opportunities of knowledge equal to those of the master,[11] he cannot recover.

Evidence.

Evidence of general reputation for incompetency is admissible as tending to show notice;[12] as is also the previous record, when obtainable by the master.[13] The decided weight of authority supports the proposition that the ultimate fact of unfitness cannot be established by proof of general reputation for incompetency.[14] Reputation is but a suggestion of what actual investigation will disclose. If the disclosed fact does not accord with the reputation, the latter cannot be proof of a fact which exists only as a rumor. Suppose a banker is reputed to be worth a million dollars. Actual investigation discloses that he is, in fact, insolvent. Is proof of his general reputation competent to show his solvency? In Gier v. Los Angeles Consol. Electric Ry. Co.[15] the court says: "It becomes apparent, therefore, that, as evidence of reputation becomes necessary only where there is an inability to furnish direct proof of the employer's knowledge, so it is proper only after the establishment of the

[10] Parker v. Sample, 11 Ind. App. 698, 39 N. E. 173.

[11] Bonnet v. Railway Co. (Tex. Civ. App.) 31 S. W. 525.

[12] Driscoll v. City of Fall River, 163 Mass. 105, 39 N. E. 1003; Park v. Railroad Co., 85 Hun, 184, 32 N. Y. Supp. 482; Norfolk & W. R. Co. v. Hoover, 79 Md. 253, 29 Atl. 994; Monahan v. City of Worcester, 150 Mass. 439, 23 N. E. 228; Morrow v. Railway Co. (Minn.) 73 N. W. 973; Park v. Railroad Co., 155 N. Y. 215, 49 N. E. 674; Galveston, H. & S. A. Ry. v. Henning (Tex. Civ. App.) 39 S. W. 302; Stoll v. Mining Co. (Utah) 57 Pac. 295.

[13] Baltimore & O. R. Co. v. Camp, 13 C. C. A. 233, 65 Fed. 952.

[14] Gier v. Railway Co., 108 Cal. 129, 41 Pac. 22; Gilman v. Railroad Co., 13 Allen (Mass.) 433. In the latter case the court says: "It is indeed objected that the admission of evidence that Shute had the general reputation of being intemperate, was erroneous. But such evidence was admitted, as the report expressly states, not for the purpose of showing that he was intemperate, but for the purpose of showing that his habitual intemperance, which there was other evidence tending to prove, was well known in the community. This fact was competent to show that the defendants, if they used due care, must have known that he was habitually intemperate, and therefore an unsuitable servant to be employed by them." And see Driscoll v. City of Fall River, 163 Mass. 105, 39 N. E. 1003.

[15] 108 Cal. 129, 41 Pac. 22, at page 24.

fact that the employé is in truth an unfit person. And reputation is not proof of that fact. A man's reputation may be at variance with his character or in accord with it. He may be reputed reckless, and in fact be careful. An employer is not bound to discharge an employé merely because of his ill repute, but he is culpable if he retains in his employ a servant with a bad reputation, well founded. So it is that evidence of individual acts evincing negligence or incompetency is admissible." And in a Massachusetts case the court says: "A general reputation regarding the incompetency of a servant is admissible on the ground that it furnished some reason to believe that, if a master had exercised due care, he might have learned or heard of the incompetency." The conclusion, supported by the great weight of authority, is that the fact of incompetency can be established only by specific acts.[16]

Incompetency not Proof of Negligence.

Incompetency of the servant and his prior acts in that regard are not admissible in proof of his negligence at the time of the injury complained of. In Cunningham v. Los Angeles Ry. Co.[17] the law

[16] Driscoll v. City of Fall River, 163 Mass. 105, 39 N. E. 1003; Cosgrove v. Pitman, 103 Cal. 274, 37 Pac. 232; Baulec v. Railroad Co., 59 N. Y. 356; Davis v. Railroad Co., 20 Mich. 105; Norfolk & W. R. Co. v. Hoover, 79 Md. 253, 29 Atl. 994; Monahan v. City of Worcester, 150 Mass. 439, 23 N. E. 228; Lake Shore & M. S. Ry. Co. v. Stupak, 123 Ind. 210, 229, 23 N. E. 246.

[17] 115 Cal. 561, 47 Pac. 452; Warner v. Railway Co., 44 N. Y. 465; McDonald v. Savoy, 110 Mass. 49; Maguire v. Railroad Co., 115 Mass. 239; Whitney v. Gross, 140 Mass. 232, 5 N. E. 619; Boggs v. Lynch, 22 Mo. 563; Thompson v. Bowie, 4 Wall. 463; Morris v. Town of East Haven, 41 Conn. 252; Tenney v. Tuttle, 1 Allen (Mass.) 185; Bryant v. Railroad Co., 56 Vt. 710; Dunham v. Rackliff, 71 Me. 345; Central Railroad & Banking Co. v. Roach, 64 Ga. 635; Jagger v. Bank, 53 Minn. 386, 55 N. W. 545. In Baltimore & O. R. Co. v. Colvin, 118 Pa. St. 230, 12 Atl. 337, the court says: "The general reputation of a flagman at a railroad crossing for carelessness is inadmissible in evidence to prove his carelessness on a particular occasion. * * * It was also error to admit the evidence offered to show that the flagman had the reputation of being a careless and incompetent person for the place. He may have had a bad reputation, and yet have discharged his duty faithfully on this occasion. The question was, what did he do? How did he discharge his duty at this time? What he had done or left undone on former occasions was wholly immaterial and irrelevant, and the only effect of the admission of the evidence objected to was to excite the prejudices of the jury against the flagman and his employer, and so indirectly and improperly im-

on this point is thus tersely stated in the opinion of the court: "Defendant was responsible to plaintiff for a want of ordinary care only, and whether it was in the exercise of such care was to be determined from a consideration of what actually occurred at the time of the alleged negligent act, regardless of any fact affecting the general character of the servant for skill or proficiency in the discharge of his duties. The question was, did the servant exercise the ordinary care to avoid the injury? If he did, the plaintiff could not recover, no matter how wanting the servant may have been in general competency; while, if he did not exercise such care, plaintiff was entitled to recover, even if the servant possessed the utmost degree of efficiency and skill in the performance of his duty. The sole question, therefore, was, what was the conduct of the servant at the time? and this was to be unembarrassed by any consideration of his general qualifications." Where, therefore, the competency of the servant is not in issue, this class of testimony is inadmissible for any purpose; and, where the competency of the servant is in issue, evidence of this kind, even if properly introduced, cannot be made the basis of improper argument by counsel to show negligence at the time of the injury.

SAME—RULES AND REGULATIONS.

39. For the protection of his servants, the master is further obligated

(a) To prescribe and publish suitable rules, and

(b) To warn and instruct his servants.

peach his credit, and injure the defendant." In Fonda v. Railway Co. (Minn.) 74 N. W. 166, at page 168, the action being by a stranger, the court says: "The defendant is liable, if at all, for the acts of its servant upon the doctrine of respondeat superior. If the motorman was negligent upon this occasion, the defendant is liable, no matter how competent he was, or how habitually careful he had been, on other occasions. On the other hand, if he was not negligent on this occasion, the defendant is not liable, notwithstanding that he may have been incompetent or habitually careless on former occasions. * * * If the plaintiff could offer testimony as to the general incompetency or as to prior negligent acts or omissions of the motorman, then, with equal propriety, the defendant, upon the issue of contributory negligence, might offer evidence of plaintiff's general carelessness, or of his negligent acts on other occasions."

40. PROMULGATION OF RULES—It is the duty of the master to prescribe and publish such suitable rules as the circumstances may reasonably require for the proper and safe transaction of the business.[1]

This duty of the master to protect his servants by making suitable rules for the safe management of the business becomes more imperative in proportion to the danger and complication of the work;[2] but whether any rule at all is required in the exercise of ordinary care, in a particular case, or whether the one in effect at the time of the injury was reasonably sufficient, are generally questions of fact for the jury.[3] The rules must also be sufficiently published and brought to the attention of the workmen.[4] And this is especially true regarding changes in established rules, as where an accommodation train was altered to an express, and the running time changed, without notice to an employé, who was run over and

§§ 39–40. [1] Lake Shore & M. S. Ry. Co. v. Lavalley, 36 Ohio St. 221; Pittsburg, Ft. W. & C. Ry. Co. v. Powers, 74 Ill. 341; and generally, Berrigan v. Railroad Co., 131 N. Y. 582, 30 N. E. 57; Richmond & D. R. Co. v. Williams, 88 Ga. 16, 14 S. E. 120; Murphy v. Hughes (Del. Super.) 40 Atl. 187; Abel v. Canal Co., 128 N. Y. 662, 28 N. E. 663; Morgan v. Iron Co., 133 N. Y. 666, 31 N. E. 234; Gordy v. Railroad Co., 75 Md. 297, 23 Atl. 607. The reasonableness of such rule is a question of law. Kansas City, Ft. S. & M. Ry. Co. v. Hammond, 58 Ark. 324, 24 S. W. 723; Little Rock & M. R. Co. v. Barry, 28 C. C. A. 644, 84 Fed. 944; Nolan v. Railroad Co., 70 Conn. 159, 39 Atl. 115; Willis v. Railroad Co., 122 N. C. 905, 29 S. E. 941. The master must exercise such supervision as to have reason to believe that the business is conducted in pursuance to the rule. Warn v. Railroad Co., 80 Hun, 71, 29 N. Y. Supp. 897. Officers charged with notice of customary breach. Lowe v. Railway Co., 89 Iowa, 420, 56 N. W. 519.

[2] Slater v. Jewett, 85 N. Y. 61; Sheehan v. Railroad Co., 91 N. Y. 332; Dana v. Railroad Co., 92 N. Y. 639.

[3] Kain v. Smith, 80 N. Y. 458; Abel v. Canal Co., 103 N. Y. 581, 9 N. E. 325; Ely v. Railroad Co., 88 Hun, 323, 34 N. Y. Supp. 739; Eastwood v. Mining Co., 86 Hun, 91, 34 N. Y. Supp. 196; Moore Lime Co. v. Richardson's Adm'r, 95 Va. 326, 28 S. E. 334.

[4] Haynes v. Railroad Co., 3 Cold. (Tenn.) 222; Bradley v. Railroad Co., 62 N. Y. 99; Chicago & N. W. R. Co. v. Taylor, 69 Ill. 461; Chicago, B. & Q. R. Co. v. Oyster (Neb.) 78 N. W. 359; Whalen v. Railroad Co., 114 Mich. 512, 72 N. W. 323. Rules for making "flying switches," excessive speed of locomotives running backwards, Cooper v. Railroad Co., 44 Iowa, 134.

killed.[5] And the master must also exercise ordinary care to see that the rules and regulations are enforced. So, track repairers have a right to rely on the customary signals being given by approaching trains.[6] An accepted custom, uniformly acquiesced in, becomes a rule, and is as much entitled to be relied on as though formally promulgated,—as that the person coupling cars should give the signals for the movement of the train.[7] But whether or not certain rules have been established is a question for the jury.[8] As a matter of course, an arbitrary rule, framed for the convenience and benefit of the master, cannot relieve him of a responsibility which he is bound to carry,—as that of inspecting appliances. So, one requiring brakemen to examine brakes before leaving a terminal station, and report any found out of order.[9] If a servant knowingly violates reasonable rules, or, knowing of their habitual violation by fellow servants, fails to make objection, or report the same, such conduct may constitute contributory negligence;[10] but the violation may be so universal as to constitute a custom, and, if known to the master, will not prevent recovery.[11] If the servant bases his right to recover on the failure of the employer to prescribe and enforce suitable rules, such failure must be affirmatively proved.[12]

[5] Baltimore & O. R. Co. v. Whittington's Adm'r, 30 Grat. (Va.) 805.

[6] Erickson v. Railroad Co., 41 Minn. 500, 43 N. W. 332; Moran v. Railway Co., 48 Minn. 46, 50 N. W. 930; Schulz v. Railway Co., 57 Minn. 271, 59 N. W. 192; Anderson v. Mill Co., 42 Minn. 424, 44 N. W. 315; Northern Pac. R. Co. v. Charless, 7 U. S. App. 359, 2 C. C. A. 380, and 51 Fed. 562; Alabama G. S. R. Co. v. Fulghum, 94 Ga. 571, 19 S. E. 981. Rules not required by nature of business, Texas & N. O. Ry. Co. v. Echols, 87 Tex. 339, 27 S. W. 60, 28 S. W. 517.

[7] Kudik v. Railroad Co., 78 Hun, 492, 29 N. Y. Supp. 533; Rutledge v. Railway Co., 123 Mo. 121, 24 S. W. 1053, affirmed 27 S. W. 327.

[8] Gulf, C. & S. F. Ry. Co. v. Finley, 11 Tex. Civ. App. 64, 32 S. W. 51.

[9] Louisville & N. R. Co. v. Orr, 91 Ala. 548, 8 South. 360; Kerns v. Railway Co., 94 Iowa, 121, 62 N. W. 692. But see Louisville, E. & St. L. Consol. R. Co. v. Utz, 133 Ind. 265, 32 N. E. 881.

[10] Lake Shore & M. S. Ry. Co. v. Knittal, 33 Ohio St. 468; Drake v. Railroad Co., 80 Hun, 490, 30 N. Y. Supp. 671.

[11] Strong v. Railway Co., 94 Iowa. 380, 62 N. W. 799; Chicago & W. I. R. Co. v. Flynn, 154 Ill. 448, 40 N. E. 332; 54 Ill. App. 387, affirmed.

[12] Rose v. Railroad Co., 58 N. Y. 217; Texas & N. O. R. Co. v. Tatman, 10 Tex. Civ. App. 434, 31 S. W. 333.

Private Rules as Affecting Strangers.

Although falling under another division of this subject, it is proper to call attention at this time to the fact that the infraction of private rules of the master, adopted for the benefit of his employés, and the safe conduct of his business, is not admissible in evidence in an action by a stranger,[13] unless where the rules have been so long in use as to establish a custom, or where the stranger plaintiff, having knowledge of them, relied upon them.[14] The degree of care required in any particular case is determined by the common law, and is not affected by a city ordinance requiring street cars, in certain cases, to be stopped "in the shortest time possible."[15] And so the degree of care can in no case be determined by the pri-

[13] Louisville, N. A. & C. Ry. Co. v. Berkey, 136 Ind. 181, 35 N. E. 3; Louisville, E. & St. L. Consol. R. Co. v. Utz, 133 Ind. 268, 32 N. E. 881; Central Railroad & Banking Co. v. Ryles, 84 Ga. 420, 11 S. E. 499.

[14] Larson v. Ring, 43 Minn. 88, 44 N. W. 1078; Same v. Railroad Co., 43 Minn. 423, 45 N. W. 1096; Fonda v. Railway Co., 71 Minn. 438, 74 N. W. 166.

[15] Fath v. Railway Co., 39 Mo. App. 447. In this case the court said: "We are inclined to agree with the defendant on the second proposition. The municipal assembly, in paragraph 4, not only undertook to regulate the running of street cars, but endeavored to legislate on the subject of diligence as an abstract question. The question is whether the ordinance is valid for the purpose of establishing a different degree of care to be exercised by the defendant than that exacted by the common law. It must be conceded that the city council had the right to prescribe all reasonable rules and regulations for the government of street railways, and under the power thus conferred its ordinances regulating the speed of cars, the motor power to be used, the construction of the cars, and other regulations, must be upheld. But beyond this it cannot go. It cannot prescribe such duties, and then determine the degree of care to be used in their performance. In controversies between third persons and a street railway, growing out of an alleged failure to properly observe such regulation, the degree of diligence to be exercised by the defendant in the discharge of the duty imposed must be determined by the application of common-law principles, and not by another and different rule provided in the ordinance. In the case under consideration the ordinance requires the car to be stopped 'in the shortest space and time possible.' In the discharge of the duty imposed the ordinance demands the exercise of the 'greatest possible diligence,' whereas the general law exacts reasonable care. To this extent the ordinance in question is inconsistent with the law of the state."

vate rules adopted by the master, which may involve a greater or less degree of prudence than that established by the common law.

41. WARNING AND INSTRUCTING SERVANTS—Reasonable precaution for the safety of his servants further requires the master to point out such dangers as are not readily discoverable by the servant in the exercise of ordinary care.

The converse of this proposition is equally true,—that the master need not warn the servant of those ordinary hazards which are patent to the average workman, or discoverable in the exercise of ordinary intelligence and care. Thus, it is obviously unnecessary to warn a laborer who is undermining a bank that the force of gravity will, sooner or later, cause the surface crust to break off and fall;[1] but it would be otherwise if some unusual element, such as the extreme friability of the soil, made the danger of caving greater than was apparent, and this fact was known to the master.[2] And the master may rightfully assume that the servant possesses such knowledge, experience, and judgment as is ordinarily found in workmen of his grade, and that he is reasonably skilled in what he undertakes to do. Thus, where one who was engaged to fill defendant's ice houses, being ordered to couple cars, in which he was unskilled, went about the work without objection, and so awkwardly that he was injured, it was held that he could not recover.[3] But if laborers

§ 41. [1] Griffin v. Railway Co., 124 Ind. 326, 24 N. E. 888; Swanson v. City of Lafayette, 134 Ind. 625, 33 N. E. 1033. See, also, Fones v. Phillips, 39 Ark. 17; Keats v. Machine Co., 13 C. C. A. 221, 65 Fed. 940; McCarthy v. Mulgrew (Iowa) 77 N. W. 527; Gleason v. Smith (Mass.) 51 N. E. 460; Ford v. Pulp Co. (Mass.) 52 N. E. 1065; Ryan v. Armour, 166 Ill. 568, 47 N. E. 60; Hill v. Drug Co., 140 Mo. 433, 41 S. W. 909; Richmond Locomotive Works v. Ford, 94 Va. 627, 27 S. E. 509.

[2] Lynch v. Allyn, 160 Mass. 248, 35 N. E. 550. Also, Railsback v. Turnpike Co., 10 Ind. App. 622, 38 N. E. 221; Larich v. Moies, 18 R. I. 513, 28 Atl. 661. But see St. Louis, A. & T. Ry. Co. v. Torrey, 58 Ark. 217, 24 S. W. 244, where it was held that a bridge carpenter was not entitled to warning where there was no evidence of inexperience or necessity for special training. General rule, Deweese v. Mining Co., 128 Mo. 423, 31 S. W. 110. And see Carlson v. Telephone Exch. Co., 63 Minn. 428, 65 N. W. 914.

[3] Whittaker v. Coombs, 14 Ill. App. 498; Wilson v. Retinning Co., 163 Mass.

engaged in hazardous occupations are not informed of the accompanying dangers by the master, and, remaining in ignorance, are consequently injured, the employer is responsible;[4] and, in general, whatever the nature of the work, if the dangers are not obvious, and are known to, or reasonably knowable by, the master, he must bring them to the actual knowledge of the servant.[5] The distinction between apparent and latent dangers and the corresponding duty of instruction is clearly stated by Sanborn, J., in Bohn Mfg. Co. v. Erickson:[6] "Obviously, the line between dangers apparent and latent varies with the varying experience and capacity of the servants employed. Risks and dangers that are apparent to the man of long experience and of a high order of intelligence may be unknown to the inexperienced and ignorant. Hence, if the youth, inexperience, and incapacity of a minor who is employed in a hazardous occupation are such that a master of ordinary intelligence and prudence would know that he is unaware of, or does not appreciate, the ordinary risks of his employment, it is his duty to notify him of them, and instruct him how to avoid them. This notice and instruction should be graduated to the age, intelligence, and experience of the servant. They should be such as a master of ordinary prudence

315, 39 N. E. 1039; Arcade File Works v. Juteau, 15 Ind. App. 385, 40 N. E. 818, and 44 N. E. 326; but, if his ignorance or inexperience is brought to his notice, he must warn him, Rummell v. Dilworth, 111 Pa. St. 343, 2 Atl. 355; Louisville, N. A. & C. Ry. Co. v. Frawley, 110 Ind. 18, 9 N. E. 594; Spelman v. Iron Co., 56 Barb. (N. Y.) 151; Smith v. Iron Co., 42 N. J. Law, 467; Reynolds v. Railroad Co., 64 Vt. 66, 24 Atl. 134 ("single deadwoods" made to couple those with double deadwoods); Bennett v. Railroad Co., 2 N. D. 112, 49 N. W. 408 (drawbars of unusual dimensions).

[4] Mather v. Rillston, 156 U. S. 391, 15 Sup. Ct. 464; International & G. N. R. Co. v. Smith (Tex. Civ. App.) 30 S. W. 501 (vicious steer); Felice v. Railroad Co., 14 App. Div. 345, 43 N. Y. Supp. 922; Turner v. Lumber Co., 119 N. C. 387, 26 S. E. 23.

[5] Helmke v. Stetler, 69 Hun, 107, 23 N. Y. Supp. 392 (vicious horse); Lowe v. Railway Co., 89 Iowa, 420, 56 N. W. 519; Leigh v. Railway Co., 36 Neb. 131, 54 N. W. 134; O'Connor v. Adams, 120 Mass. 427; Coombs v. Cordage Co., 102 Mass. 572; Parkhurst v. Johnson, 50 Mich. 70, 15 N. W. 107; Ryan v. Tarbox, 135 Mass. 207; Wolski v. Knapp, Stout & Co. Company, 90 Wis. 178, 63 N. W. 87 (skidding logs); Carlson v. Telephone Exch. Co., 63 Minn. 428, 65 N. W. 914.

[6] 5 C. C. A. 341, 55 Fed. 943.

and sagacity would give under like circumstances for the purpose of enabling the minor not only to know the dangerous nature of the work, but also to understand and appreciate its risks, and avoid its dangers. They should be governed, after all, more by the experience and capacity of the servant than by his age, because the intelligence and experience of men measure their knowledge and appreciation of the dangers about them far more accurately than their years."

The source of the servant's information as to the peril, is immaterial, provided he has actual notice.[7]

The employer need not anticipate every risk which may happen, but discharges his duty if he gives such general instructions as will enable the servant to comprehend the danger.[8]

Infants.

The above propositions apply with equal force where the servant is a minor. Whether the servant be an adult or an infant, he is equally entitled to notice of the dangers which he is likely to encounter. If the master furnishes this notice, he has discharged his duty. But in the case of a minor the question may arise whether he was possessed of a mind sufficiently mature to appreciate the danger which was pointed out, whether in fact he had the necessary knowledge or notice,[9] and this is generally for the jury to determine.[10]

[7] Foley v. Railway Co., 48 Mich. 622, 12 N. W. 879; Hanson v. Hammell (Iowa) 77 N. W. 839; Hayes v. Colchester Mills, 69 Vt. 1, 37 Atl. 269.

[8] Thompson v. Edward P. Allis Co., 89 Wis. 523, 62 N. W. 527.

[9] Coombs v. Cordage Co., 102 Mass. 572; Andersen v. Berlin Mills Co., 32 C. C. A. 143, 88 Fed. 944; Chielinsky v. Hoopes & Townsend Co., 1 Marv. 273, 40 Atl. 1127; Hettchen v. Chipman, 87 Md. 729, 41 Atl. 65; Verdelli v. Commercial Co., 115 Cal. 517, 47 Pac. 364; Ryan v. Armour, 166 Ill. 568, 47 N. E. 60; Missouri, K. & T. Ry. of Texas v. Evans (Tex. Civ. App.) 41 S. W. 80; Latorre v. Stamping Co., 9 App. Div. 145, 41 N. Y. Supp. 99.

[10] Hayden v. Manufacturing Co., 29 Conn. 548.

LIMITATIONS OF MASTER'S DUTY.

42. The master does not guaranty the safety of his servant, who assumes:

(a) Ordinary risks incident to the employment.

(b) Known dangers, however great, but not

1. Unusual dangers, unless

(1) Patent or reasonably observable, or unless

(2) Notified of their existence by the master.

2. Nor defects or dangers not discoverable by him in the exercise of ordinary care.

3. Nor a known defect which the master neglects to repair within a reasonable time after promise.

4. Nor a danger incurred under express orders, unless the risk is known and appreciated.

(c) Risk of negligence of fellow servants.

SAME—ORDINARY RISKS.

43. The servant is held to assume the ordinary risks incident to his employment, in so far as they may fairly be presumed to be within his knowledge, in the exercise of ordinary care,[1] provided the master has used ordinary diligence to eliminate them.

§§ 42–43. [1] Peoria, D. & E. Ry. Co. v. Hardwick, 53 Ill. App. 161; Halliburton v. Railroad Co., 58 Mo. App. 27. And so a civil engineer employed by railroad to build bridges assumes risk from absence of watchman at a bridge on the railroad, Texas & P. Ry. Co. v. Smith, 14 C. C. A. 509, 67 Fed. 524; and even if the employment is very dangerous, Stewart v. Railroad Co., 40 W. Va. 188, 20 S. E. 922; and where a brakeman employed for three years, while riding on the front of an engine, was killed by collision with a wagon, caused by failure of the railroad to maintain gates or signals, the risk was held to be assumed, Bancroft v. Railroad Co. (N. H.) 30 Atl. 409. Also, Doyle v. Railway Co., 42 Minn. 79, 43 N. W. 787; Jacksonville, T. & K. W. Ry. Co. v. Galvin, 29 Fla. 636, 11 South. 231; Northern Pac. R. Co. v. Everett, 152 U. S. 107, 14 Sup. Ct. 474; Johnson v. Snuff Co. (N. J. Err. & App.) 41 Atl. 936; Reese v. Railroad Co., 42 W. Va. 333, 26 S. E. 204. But see Dewey v. Railway Co., 97 Mich. 329, 56 N. W. 756. Uneven new side track, O'Neal v. Railway Co., 132 Ind. 110, 31 N. E. 669; appliances generally, Texas & P.

This is true, not only of those dangers which are incident to the employment at the time he enters the service,[2] but applies equally to such hazards as may afterwards naturally and observably attach to the employment.[3] And it is the duty of the employé to observe his surroundings and the incidental risks, and if, by reason of his inattention, he is injured, he cannot recover.[4] The degree of actual danger involved is immaterial, so long as it is ordinary or incident in that particular line of work.[5]

On the other hand, it is the duty of the master to use ordinary

Ry. Co. v. Rogers, 6 C. C. A. 403, 57 Fed. 378; Craven v. Smith, 89 Wis. 119, 61 N. W. 317; McGuirk v. Shattuck, 160 Mass. 45, 35 N. E. 110.

[2] Haas v. Railroad Co., 40 Hun (N. Y.) 145; Gibson v. Railroad Co., 63 N. Y. 449; Shaw v. Sheldon, 103 N. Y. 667, 9 N. E. 183; Huber v. Jackson & Sharp Co., 1 Marv. 374, 41 Atl. 92; Chicago & E. I. R. Co. v. Maloney, 77 Ill. App. 191; Broderick v. Railway Co. (Minn.) 77 N. W. 28; Nourie v. Theobald (N. H.) 41 Atl. 182; Pennsylvania Co. v. Ebaugh (Ind. Sup.) 53 N. E. 763; Worlds v. Railroad Co., 99 Ga. 283, 25 S. E. 646. Absence of side platform on which to stand when trains pass on elevated road, Kennedy v. Railroad Co., 33 Hun (N. Y.) 457; iron rails projecting from ends of cars to be coupled by brakeman, Wabash, St. L. & P. Ry. Co. v. Deardorff, 14 Ill. App. 401; drawheads on different levels, Hulett v. Railroad Co., 67 Mo. 239; "flying switches," Lake Shore & M. S. Ry. Co. v. Knittal, 33 Ohio St. 468; throwing mail bags into moving trains, Coolbroth v. Railroad Co., 77 Me. 165; rolling a grindstone over an uneven floor, Walsh v. Railroad Co., 27 Minn. 367, 8 N. W. 145; riding on handcar and run over by delayed train, Railway Co. v. Leech, 41 Ohio St. 388.

[3] Houston & T. C. Ry. Co. v. Conrad, 62 Tex. 627; Dowell v. Railroad Co., 62 Iowa, 629, 17 N. W. 901; Taylor v. Manufacturing Co., 140 Mass. 150, 3 N. E. 21; rolling a grindstone over an uneven floor, Walsh v. Railroad Co., 27 Minn. 367, 8 N. W. 145; Baltimore & O. S. W. Ry. Co. v. Welsh, 17 Ind. App. 505, 47 N. E. 182. In a cold climate railroad employés assume the risks incident to the accumulation of snow and ice on the tracks. Lawson v. Truesdale, 60 Minn. 410, 62 N. W. 546.

[4] Chicago & N. W. R. Co. v. Kane, 50 Ill. App. 100. The opportunity of knowledge is the equivalent of actual knowledge. McDugan v. Railroad Co. (Com. Pl.) 10 Misc. Rep. 336, 31 N. Y. Supp. 135.

[5] Stewart v. Railroad Co., 40 W. Va. 188, 20 S. E. 922; moving a "dead" engine," Anglin v. Railway Co., 9 C. C. A. 130, 60 Fed. 553; uncovered gearing in plain sight, McGuerty v. Hale, 161 Mass. 51, 36 N. E. 682; commutator of electric motor, Burnell v. Railroad Co., 87 Wis. 387, 58 N. W. 772. See, also, Red River Line v. Cheatham, 9 C. C. A. 124, 60 Fed. 517, reversing 56 Fed. 248.

care to eliminate or reduce the dangers of the employment, and if, by reason of his negligence in this respect, a servant is injured, he cannot avail himself of the defense of assumption of risk; the questions of negligence and contributory negligence are open to the jury.[6]

Low Bridges.

Thus in the case of bridges over railroad tracks, built so low that a brakeman upon a freight car cannot safely pass under them in an erect position, it is now very generally held by our courts of last resort that the risk of injury is not assumed by the trainman,[7] unless actual knowledge of the danger by the servant affirmatively appears.[8]

In general, however, it is immaterial how extraordinary is the actual danger involved in any given line of work, if it is properly incident and germane to the employment. If the business is conducted with the usual methods, in a manner fairly prudent in the circumstances, the hazards become ordinary so far as the servant's exposure is concerned. Thus the work of removing damaged or crippled cars to the repair shop is extremely dangerous, but the danger, however great, is necessarily incident to the employment.[9] So, also, the employment of coupling cars is one of constant peril, but car couplers are held to assume the risks connected therewith.[10]

[6] Sowden v. Mining Co., 55 Cal. 443; Hawkins v. Johnson, 105 Ind. 29, 4 N. E. 172; Northern Pac. R. Co. v. Mortenson, 11 C. C. A. 335, 63 Fed. 530; Gaar, Scott & Co. v. Wilson, 21 Ind. App. 91, 51 N. E. 502; Banks v. City of Effingham, 63 Ill. App. 221.

[7] Baltimore & O. & C. R. Co. v. Rowan, 104 Ind. 88, 3 N. E. 627. In ILLINOIS it is held to be the absolute duty of the railroad company to build its bridges sufficiently high to avoid all danger of brakeman being injured by striking them, Chicago & A. R. Co. v. Johnson, 116 Ill. 206, 4 N. E. 381; Atchison, T. & S. F. R. Co. v. Rowan, 55 Kan. 270, 39 Pac. 1010; and in KENTUCKY the construction of "low bridges" is held to be willful negligence, Cincinnati, N. O. & T. P. Ry. Co. v. Sampson's Adm'r, 97 Ky. 65, 30 S. W. 12; Fitzgerald v. Railroad Co., 37 App. Div. 127, 55 N. Y. Supp. 1124.

[8] Brossman v. Railroad Co., 113 Pa. St. 490, 6 Atl. 226.

[9] Stewart v. Railroad Co., 40 W. Va. 188, 20 S. E. 922, where it was pointed

[10] Hathaway v. Railroad Co., 51 Mich. 253, 16 N. W. 634; Toledo, W. & W. Ry. Co. v. Fredericks, 71 Ill. 294; Northern Cent. R. Co. v. Husson, 101 Pa. St. 1; Hannigan v. Railway Co., 157 N. Y. 244, 51 N. E. 992.

And if a servant voluntarily undertakes dangerous work, outside the scope of his employment, and is injured by reason of his unfamiliarity with the work, or his lack of appreciation of the danger involved, he assumes the risk, and cannot recover.[11]

Distinction between Risk and Condition.

It should be observed that it is not sufficient that the condition of the place, machine, utensil, or equipment is within the knowledge of the servant. In order to establish his assumption of the risk, it must appear that he knew, or in the exercise of ordinary prudence should have known, that the condition involved possible injury or risk. Thus, in the case of a brakeman coupling cars, equipped, one with the old-style platform, and the other with the then new Miller platform, the conditions were known to the brakeman, yet the court said that the servant might not have understood that, upon the curve where they were to be coupled, there was danger of the drawbars passing one another; in other words, although he knew the conditions, he might not have appreciated the risk.[12]

SAME—KNOWN DANGERS ASSUMED.

44. A servant assumes the risks arising from dangers connected with the employment, of which he has knowledge, or which are so obvious as not to escape the observation of an ordinarily prudent person.[1]

out that the test of liability is the negligence of the master, not the danger of the employment; removing damaged or "crippled" cars, Chicago & N. W. R. Co. v. Ward, 61 Ill. 130; Flannagan v. Railway Co., 50 Wis. 462, 7 N. W. 337; Yeaton v. Railroad Corp., 135 Mass. 418.

[11] Richmond & D. R. Co. v. Finley, 12 C. C. A. 595, 63 Fed. 228; Central Railroad & Banking Co. v. Chapman, 96 Ga. 769, 22 S. E. 273.

[12] Russell v. Railway Co., 32 Minn. 230, 20 N. W. 147; Mundle v. Manufacturing Co., 86 Me. 400, 30 Atl. 16 (splinter from floor penetrating foot).

§ 44. [1] Moore v. Wire Mill Co., 55 Mo. App. 491; Claybaugh v. Railway Co., 56 Mo. App. 630; McIntosh v. Railway Co., 58 Mo. App. 281; Hoyle v. Laundry Co., 95 Ga. 34, 21 S. E. 1001; Connelly v. Woolen Co., 163 Mass. 156, 39 N. E. 787. Light not used on switch, Illinois Cent. R. Co. v. Swisher, 53 Ill. App. 411; trees bordering an unfinished railroad, risk of striking, Manning v. Railway Co., 105 Mich. 260, 63 N. W. 312; insecure prop, Lucey v. Oil Co., 129 Mo. 32, 31 S. W. 340; and even where the servant is ordered to engage in the dangerous work, or lose his position, Dougherty v. Steel Co.,

This is equally true, although it appears that the work in question might just as well have been performed in a less dangerous manner. Where plaintiff had been injured by the caving-in of a bank, after being fully advised of the attendant danger, the court said: "It is immaterial that there was a customary, better, and safer way in which the work might have been done, which, had it been done in that way, would have relieved the plaintiff from peril and avoided the injury." [2]

And if the risk, although not necessarily incident to the business, is manifest, it is none the less assumed; as if an employé, voluntarily and unnecessarily, uses an obviously defective ladder to adjust electric lights, and is injured thereby, he cannot recover.[3]

But, if the danger or the involved risk is not fairly within the reasonable knowledge or observation of the servant, it is not assumed. This is well illustrated in the case of Gates v. State,[4] where a laborer on a scow was transferred by the foreman to work in repairing a defective bridge, which fell and injured him. The court there says: "While, in work of an inherently dangerous nature, the workman is ordinarily held to assume that certain risk which must attend upon its execution, that rule involves, and must depend for its application upon, the knowledge or means of knowledge, upon

88 Wis. 343, 60 N. W. 274. But see Wells & French Co. v. Gortorski, 50 Ill. App. 445; Leary v. Railroad Co., 139 Mass. 580, 2 N. E. 115. Also, where the danger arises from the negligence of the employer, Bonnet v. Railway Co. (Tex. Civ. App.) 31 S. W. 525; Mundle v. Manufacturing Co., 86 Me. 400, 30 Atl. 16. See, also, Goodes v. Railroad Co., 162 Mass. 287, 38 N. E. 500; Railsback v. Turnpike Co., 10 Ind. App. 622, 38 N. E. 221; Marean v. Railroad Co., 167 Pa. St. 220, 31 Atl. 562; Kennedy v. Railway Co., 145 N. Y. 288, 39 N. E. 956 (in the latter case the servant fell through an opening in an elevated railroad); Muncie Pulp Co. v. Jones, 11 Ind. App. 110, 38 N. E. 547; Michaelson v. Brick Co., 94 Iowa, 725, 62 N. W. 15; Colorado Coal & Iron Co. v. Lamb, 6 Colo. App. 255, 40 Pac. 251.

[2] Lyon, J., in Naylor v. Railway Co., 53 Wis. 661, 11 N. W. 24.

[3] Jenney Electric Light & Power Co. v. Murphy, 115 Ind. 566, 18 N. E. 30 (but cf. Burns v. Steamship Co., 84 Ga. 709, 11 S. E. 493); Steinhauser v. Spraul, 127 Mo. 541, 28 S. W. 620, 30 S. W. 102; O'Neal v. Railway Co., 132 Ind. 110, 31 N. E. 669; Matchett v. Railway Co., 132 Ind. 334, 31 N. E. 792; and in respect to a defective telegraph pole, Foley v. Light Co., 54 N. J. Law, 411, 24 Atl. 487.

[4] 128 N. Y. 221, 28 N. E. 373.

the workman's part, of the attendant peril to him. Such knowledge may be presumed to be possessed by reason of previous employment and experience, or to be suggested by ordinary observation and appearances. If the workman is without experience in the particular work required of him, and if, as here, danger for him exists from causes not apparent, but which are known to his employers, I think it unquestionable in principle that an obligation should be deemed to rest upon them to communicate such information as would apprise the workman of the nature of the work, and of the possible risks in its execution."

45. UNUSUAL DANGERS NOT ASSUMED—The servant does not assume the risk arising from unusual dangers, such as he could not reasonably anticipate as incidental to the employment, unless

(a) The peril is so patent as to be discoverable in the exercise of that intelligence which the servant may be reasonably presumed to possess; or unless

(b) He has actual knowledge of the peril from some source.

When the servant has no actual or presumptive knowledge of the equipment or methods of his master's business, he may rightfully assume that he will be exposed to no dangers or risks other than those which are naturally and ordinarily incident to service of that kind, and if in the discharge of his duty he is, without warning, subjected to such a danger, and is injured, he may recover. Thus, where an employé in an iron foundry having been ordered, contrary to the accustomed service, to assist others in conveying a ladle of melted iron across an alley way coated with ice, one of the assistants slipped, and the liquid metal, coming in contact with the ice, was thrown on the employé, burning him so that he died.[1] And where

§ 45. [1] Smith v. Car Works, 60 Mich. 501, 27 N. W. 662. At least there is no presumption that he assumes the unusual and unknown risk, and the question of the master's negligence is open for the jury. Tissue v. Railroad Co., 112 Pa. St. 91, 3 Atl. 667, 33 Alb. Law J. 284. See, also, Baxter v. Roberts, 44 Cal. 187; Fairbank v. Haentzsche, 73 Ill. 236; Atlas Engine Works v. Randall, 100 Ind. 293; Sullivan v. Manufacturing Co., 113 Mass. 396.

a watchman was bitten by a savage dog, which the employer generally kept fastened, but which, on this occasion, had been let out without warning to the servant, the court said: "He [the watchman] assumed the risks consequent upon the keeping of a ferocious dog which was kept fastened, except when he was otherwise notified." [2] But in the large majority of cases where the injury complained of is the result of an unusual risk, or one not contemplated at the inception of the service, the main question is the knowledge or ignorance of the servant of the encountered danger,—whether he knew, or in the exercise of reasonable care and intelligence should have known, of its existence. In the admirably considered case of Foley v. Jersey City Electric Light Co.,[3] the court says: "Obvious dangers which he [the servant] enters upon voluntarily are impliedly assumed by him, if he continues in the service. * * * If the servant knows of the defect, and it is of such a nature that a prudent person will not abandon the service on account of it, then no negligence can be charged to the master for permitting the defect to continue. * * * The servant and the master had equal means of forming a correct judgment. Therefore, whatever want of prudence in taking the risk is chargeable to the one must be imputed to the other. * * * The cases rigidly hold the doctrine that the servant takes upon himself such definite and determinate risks as are obvious, and no action will lie against the master for injuries to the servant in such cases. There is no circumstance present in this case to take the case out of the general rule."

It is the duty of the servant to exercise care to avoid injuries to himself. He is under as great obligation to provide for his own safety from such dangers as are known to him, or discernible by ordinary care on his part, as the master is to provide for him.[4]

In a voluminous class of cases falling under this head, some conflict and confusion is found in the decisions. The case of Dorsey v. Phillips & Colby Const. Co.[5] will serve as an illustration. In this case the conductor of a freight train was injured while climbing up

[2] Muller v. McKesson, 73 N. Y. 195. See, also, Fitzgerald v. Paper Co., 155 Mass. 155, 29 N. E. 464; Mahoney v. Dore, 155 Mass. 513, 30 N. E. 366.

[3] 54 N. J. Law, 411, 24 Atl. 487.

[4] Wormell v. Railroad Co., 79 Me. 397, 10 Atl. 49.

[5] 42 Wis. 583.

the ladder of a car, by being struck by a cattle chute placed near the track. During his employment of several months he had passed the chute almost daily, and knew of its existence and exact location; yet the court said that, while he may have known generally of the proximity of the chute in question to the track, yet necessarily it did not follow that he knew its precise distance therefrom, and consequently not its precise danger. So, also, in a similar case, where a switchman in climbing the ladder of a freight car was struck by a signal post, the court says: "We are not prepared to say, however, that this is conclusive evidence that he was negligent, or that he knew, or should have known, if he used ordinary prudence, the danger of such an accident. * * * While he must have known of the existence and location of the post, he may not have known, from mere observation, or unless his attention had in some way been specially called to it, that it was near enough to the cars to be dangerous, but might be misled, unless he had made actual measurement or calculation." [6] In these and other similar cases,[7] the injured person was perfectly familiar with the condition which embraced the danger. It did not require unusual intelligence or special training to foresee the menace which existed in the proximity of the structures to the track. It is the servant's duty to use reasonable care to inform himself by an examination of his surroundings,[8] and, if the defect or danger is obvious, knowledge will be presumed.[9] That a switchman or conductor is not informed of the exact number of inches that will intervene between a signal post and a passing car cannot raise any possible inference that he does not know and appreciate the danger. But by far the greater weight of authority in this line of cases holds strongly that, when the condition, character, and position of structures incident to the service are known to the servant, he must be presumed to know the

[6] Johnson v. Railway Co., 43 Minn. 53, 44 N. W. 884. Compare Bengtson v. Railway Co., 47 Minn. 486, 50 N. W. 531.

[7] Sweet v. Railroad Co., 87 Mich. 559, 49 N. W. 559; Goodes v. Railroad Co., 162 Mass. 287, 38 N. E. 500.

[8] Wormell v. Railroad Co., 79 Me. 397, 10 Atl. 49; Batterson v. Railway Co., 53 Mich. 125, 18 N. W. 584.

[9] Lovejoy v. Railroad Co., 125 Mass. 79; and see cases cited in section 45, note 10, infra.

danger and to assume the attendant risk.[10] Thus, in Tuttle v. Detroit, G. H. & M. Ry. Co.,[11] the alleged defect and negligence consisted in the sharpness of the curves on a side track. The court here says: "The perils in the present case, arising from the sharpness of the curve, were seen and known. Everything was open and visible, and the deceased had only to use his senses and his faculties to avoid the dangers to which he was exposed."

From what has already been said, it follows, as a general proposition of law, that if an employé continues in the service, after full knowledge and appreciation of a defect and accompanying danger, he cannot recover for injuries sustained thereby. Exception has been taken to this rule, as being unjust, and not based on sound legal principle, and the following has been offered as the true rule of the effect of notice in such cases: "A servant cannot recover against his master, for an injury suffered through exposure to danger from defects of which he had notice, if, under all the circumstances, a servant of ordinary prudence, acting with such prudence, would not have continued the same work under the same risk." [12] The proposition is doubtless sound, but the corollary suggests itself: If, on the contrary, in the circumstances, a servant of ordinary prudence, acting with such prudence, would have continued the same work, under the same risk, the defect in question could not be of such a nature as to place the imputation of negligence upon the master, if he permitted it to continue.[13]

[10] Lovejoy v. Railroad Co., 125 Mass. 79; Gibson v. Railway Co., 63 N. Y. 449; De Forest v. Jewett, 88 N. Y. 264; Batterson v. Railway Co., 53 Mich. 127, 18 N. W. 584; Michigan Cent. R. Co. v. Austin, 40 Mich. 247; Illick v. Railroad Co., 67 Mich. 632, 35 N. W. 708; Alabama G. S. R. Co. v. Davis (Ala.) 24 South. 862; Chielinsky v. Hoopes & Townsend Co., 1 Marv. 273, 40 Atl. 1127; Westville Coal Co. v. Milka, 75 Ill. App. 638; Whelton v. Railway Co. (Mass.) 52 N. E. 1072; Lang v. Transportation Line (Mich.) 77 N. W. 633; Nashville, C. & St. L. R. Co. v. Gann (Tenn. Sup.) 47 S. W. 493; Dugal v. City of Chippewa Falls (Wis.) 77 N. W. 878; Henion v. Railroad Co., 25 C. C. A. 223, 79 Fed. 903; Louisville & N. R. Co. v. Kemper, 147 Ind. 561, 47 N. E. 214; Chicago, B. & Q. R. Co. v. McGinnis, 49 Neb. 649, 68 N. W. 1057; Nuss v. Rafsnyder, 178 Pa. St. 397, 35 Atl. 958.

[11] 122 U. S. 189, 7 Sup. Ct. 1166. See, also, Randall v. Railroad Co., 109 U. S. 478, 3 Sup. Ct. 322; Stephenson v. Duncan, 73 Wis. 404, 41 N. W. 337.

[12] Shear. & R. Neg. (4th Ed.) § 211 et seq.

[13] Foley v. Light Co., 54 N. J. Law, 411, 24 Atl. 487.

Newly-Discovered Dangers.

When the knowledge of the defect or danger is so recent as not, in the circumstances, to afford reasonable opportunity for an estimate of the attendant risk, as in the case of a newly-hired servant or an unusual danger injected into the service after its inception, the proposition becomes entirely different, and an assumption of the peril cannot be imputed to the employé.[14]

46. UNKNOWN DEFECTS OR DANGERS—The servant does not assume the risk of injury from defects or dangers not known, and not discoverable by him in the exercise of ordinary care.

Thus, where the employé of a shipbuilder was directed to do certain work beneath a scaffolding which was improperly constructed,[1] and where a brakeman was required to couple cars furnished with double deadwoods,[2] no instructions as to the attendant, unknown danger having been given in either case, the risk was not assumed. Thus, also, in the case of Pantzar v. Tilly Foster I. Min. Co.,[3] the court said: "The evidence tends to show that the plaintiff was ignorant of the dangerous condition of the rock, and that his duties did not call him to any place from which it could be observed. He therefore had a right to rely upon the performance of the duty owing by the master,

[14] Brakeman on his first trip struck by a signal post, Scanlon v. Railroad Co., 147 Mass. 484, 18 N. E. 209; reasonable opportunity not afforded employé to become familiar with location of an awning on station house, Nugent v. Railroad Co., 80 Me. 62, 12 Atl. 797.

§ 46. [1] Connolly v. Poillon, 41 Barb. (N. Y.) 366, affirmed in 41 N. Y. 619.

[2] Gibson v. Railroad Co., 46 Mo. 163. See, also, Philadelphia & R. R. Co. v. Huber, 128 Pa. St. 63, 18 Atl. 334; Sherman v. Railway Co., 34 Minn. 259, 25 N. W. 593; Barbo v. Bassett, 35 Minn. 485, 29 N. W. 198; Buzzell v. Manufacturing Co., 48 Me. 113; Reber v. Tower, 11 Mo. App. 199; Baker v. Railroad Co., 95 Pa. St. 211; Ryan v. Fowler, 24 N. Y. 410; Arkerson v. Dennison, 117 Mass. 407; Warden v. Railroad Co., 137 Mass. 204; Hough v. Railway Co., 100 U. S. 213; Toledo, W. & W. R. Co. v. Ingraham, 77 Ill. 309; Alabama G. S. R. Co. v. Davis (Ala.) 24 South. 862; Nofsinger v. Goldman (Cal.) 55 Pac. 425; Alton Paving, Building & Fire-Brick Co. v. Hudson, 176 Ill. 270, 52 N. E. 256; Norfolk & W. R. Co. v. Ampey, 93 Va. 108, 25 S. E. 226.

[3] 99 N. Y. 368, 2 N. E. 24.

of adopting proper and suitable measures of precaution to guard him against the consequence of any danger arising from the obviously unsafe condition of the rock, and is not justly censurable for an omission to discover the impending danger himself in time to avoid it." But it does not follow that, in the event of injury to the servant from a danger of this class, the master is necessarily liable. If the master has exercised ordinary care to guard against the defect or danger, and is unaware of its existence, he is exonerated. The negligence of the master must combine with the nonassumption of risk on the part of the servant in order to justify a recovery.[4]

Nor does the servant assume the risk of injury when, taking all the circumstances into consideration and the physical defect or condition being known, he does not, in the exercise of ordinary care and prudence, appreciate the attendant danger.[5] In a suit by a carpenter for injuries caused by the use of a defective "jigger" in loading car wheels, the court used the following language: "It is said the plaintiff might also see the defects. True, but he did not know the effect of such deficiencies, and was, moreover, directed by his superior to get and use the instrument, and whether, under the circumstances, he should be charged with knowledge, and with negligence by reason of it, was also for the jury." [6]

The foregoing rule as to the appreciation of an incurred risk is, perhaps, somewhat emphasized in the case of minors, although, in principle, no distinction should be made on account of the age of the servant.[7] As a matter of fact, a person of immature age and judg-

[4] Painton v. Railroad Co., 83 N. Y. 7.

[5] The test as to assumption of risk by an employé who uses a dangerous machine is whether an ordinarily prudent person of his age and experience, under like circumstances, would have appreciated the danger. Craven v. Smith, 89 Wis. 119, 61 N. W. 317. See, also, Louisville & N. R. Co. v. Vestal (Ky.) 49 S. W. 204; Whitney & Starrette Co. v. O'Rourke, 172 Ill. 177, 50 N. E. 242; Gusman v. Railroad Co., 49 La. Ann. 1264, 22 South. 742; Galveston, H. & S. A. Ry. Co. v. McCrary (Tex. Civ. App.) 43 S. W. 275.

[6] Kain v. Smith, 89 N. Y. 375. See, also, Smith v. Car-Works, 60 Mich. 501, 27 N. W. 662; McGowan v. Smelting Co., 3 McCrary, 393, 9 Fed. 861; Dale v. Railway Co., 63 Mo. 455.

[7] Pittsburgh, C. & St. L. Ry. Co. v. Adams, 105 Ind. 151, 5 N. E. 187; Gartland v. Railway Co., 67 Ill. 498; De Graff v. Railroad Co., 76 N. Y. 125; Kaufhold v. Arnold, 163 Pa. St. 269, 29 Atl. 883; Alabama Mineral R. Co. v.

ment is less likely to appreciate the exact danger of a given defect than one of riper years and intelligence. For this reason, the age, intelligence, and experience of the servant are material circumstances for consideration in determining the question of realization of the peril,[8] but, if the risk is actually appreciated, the rule is not relaxed on account of the age of the servant.[9]

For the reasons above stated, it is the duty of the master, in setting minors to work at dangerous machinery or in exposed positions, to warn them in plain, explicit language of the attendant danger. Instructions by the master which might easily satisfy the requirements of ordinary care in dealing with an adult might fall far short of the standard of duty when given to a child of tender years and slight experience.[10] And, even if a full explanation of the danger is given the minor, if he is not sufficiently mature to appreciate the risk it is not assumed, and recovery may be had for injuries sustained thereby.[11] But, where the danger is obvious to even a child, it is not the duty of the master to point it out. Thus, in the case of a boy 14 years old, who was injured in an elevator by allowing his foot to project beyond the door, it was held that the danger was one which a child of his age should have observed and appreciated without warning.[12] The test in these cases is similar to that stated under contributory negligence,—if the danger is one which, by fair presumption, would be observed and realized by a reasonably prudent child of the same age in similar circumstances, the master is not bound to give special instruction or warning.[13]

Marcus, 115 Ala. 389, 22 South. 135; Dunn v. McNamee, 59 N. J. Law, 498, 37 Atl. 61.

[8] Luebke v. Machine Works, 88 Wis. 442, 60 N. W. 711.

[9] Reardon v. Card Co., 51 N. Y. Super. Ct. 134; Curran v. Manufacturing Co., 130 Mass. 374; Anderson v. Morrison, 22 Minn. 274; Schliermann v. Typewriter Co., 11 Misc. Rep. 546, 32 N. Y. Supp. 748.

[10] Coombs v. Cordage Co., 102 Mass. 572; Buckley v. Manufacturing Co., 41 Hun (N. Y.) 450; Louisville, N. A. & C. Ry. Co. v. Frawley, 110 Ind. 18, 9 N. E. 594.

[11] Hamilton v. Railroad Co., 54 Tex. 556; Coombs v. Cordage Co., 102 Mass. 572; Turner v. Railroad Co., 40 W. Va. 675, 22 S. E. 83.

[12] Costello v. Judson, 21 Hun (N. Y.) 396; and where a child of 10 years had her hand crushed between hot rollers, Phillips v. Michaels, 11 Ind. App. 672, 39 N. E. 669.

[13] Atlas Engine Works v. Randall, 100 Ind. 293; Hayes v. Colchester Mills,

47. PROMISE TO REPAIR—If a servant, noting a defect in the appliance or place, complains to the master, who promises that it shall be remedied, he may, in reliance on the promise, continue in the service for a reasonable time thereafter without thereby assuming the risk, provided the danger is not of so imminent a character that a person of ordinary prudence would refuse to continue in the service.

In Hough v. Texas & P. Ry. Co.[1] defendant's engineer complained of a defective cowcatcher on his engine, which, it was promised, would be remedied. The repair was not made, and the engineer was injured in consequence. The court held that the continued use of the engine, in the well-grounded belief that it would be put in proper condition within a reasonable time, did not necessarily, as a matter of law, make the engineer guilty of contributory negligence; that it was for the jury to determine whether, relying upon such promise, and using the machinery after he knew of its defective or insufficient condition, he was in the use of due care.

But it must appear that the master, and not some unauthorized person, made the promise to repair upon which the servant relied,[2] and there must be no equivocation or uncertainty about the prom-

69 Vt. 1, 37 Atl. 269; Vorbrich v. Manufacturing Co., 96 Wis. 277, 71 N. W. 434; Chicago, B. & Q. R. Co. v. Eggman, 59 Ill. App. 680.

§ 47. [1] 100 U. S. 213. The principle applies equally to both appliances and places, Greene v. Railway Co., 31 Minn. 248, 17 N. W. 378; and to incompetent fellow servants, Laning v. Railroad Co., 49 N. Y. 521. See, also, Wuotilla v. Lumber Co., 37 Minn. 153, 33 N. W. 551; Lyberg v. Railroad Co., 39 Minn. 15, 38 N. W. 632; Missouri Furnace Co. v. Abend, 107 Ill. 44; Conroy v. Iron Works, 62 Mo. 35; Union Mfg. Co. v. Morrissey, 40 Ohio St. 148; Parody v. Railway Co., 15 Fed. 205; Linch v. Manufacturing Co., 143 Mass. 206, 9 N. E. 728; Hatt v. Nay, 144 Mass. 186, 10 N. E. 807; Buzzell v. Manufacturing Co., 48 Me. 113; Donley v. Dougherty, 174 Ill. 582, 51 N. E. 714; McFarlan Carriage Co. v. Potter (Ind. Sup.) 52 N. E. 209; Miller v. Mining Co. (Utah) 55 Pac. 58; Nelson v. Shaw (Wis.) 78 N. W. 417; Texas & N. O. R. Co. v. Bingle, 91 Tex. 287, 42 S. W. 971; Standard Oil Co. v. Helmick, 148 Ind. 457, 47 N. E. 14.

[2] Ehmcke v. Porter, 45 Minn. 338, 47 N. W. 1066; Chesapeake, O. & S. W. R. Co. v. McDowell (Ky.) 24 S. W. 607. Promise of superintendent in charge sufficient. Patterson v. Railroad Co., 76 Pa. St. 389.

ise.[3] Where complaint is made, but there is a failure to repair the defect within a reasonable time, there can be no recovery.[4] But where a particular danger is foreseen by the servant, and the work is undertaken in reliance upon an express promise to provide against it, the same general principle holds true; as where a servant of a railroad company, sent out to shovel snowdrifts, was frozen by reason of the master's failure to provide a warming car, according to promise.[5]

If, however, the danger which threatens is of such an immediately impending and menacing character that a continuance in the service would not be consistent with ordinary prudence, a promise to repair will not relieve the servant from the assumption of the risk, if he proceeds with the work.[6]

It is apprehended that this general rule must be restricted to some extent, where the use of simple tools and utensils, and not complicated and dangerous machinery, is involved. In Marsh v. Chickering [7] the court said: "In cases, however, where persons are employed in the performance of ordinary labor, in which no machinery is used, and no materials furnished, the use of which requires the exercise

[3] Wilson v. Railroad Co., 37 Minn 326, 33 N. W. 908; Jones v. File Co. (R. I.) 42 Atl. 509; Brewer v. Railway Co., 97 Tenn. 615, 37 S. W. 549. A mere acknowledgment of defect by the master, with an evasive remark, is not a promise to remedy. Breig v. Railway Co., 98 Mich. 222, 57 N. W. 118. But see Indianapolis Union Ry. Co. v. Ott, 11 Ind. App. 564, 38 N. E. 842; Rothenberger v. Milling Co., 57 Minn. 461, 59 N. W. 531. And even a promise to repair is immaterial if the continuance at the work is not made in reliance upon the promise. Showalter v. Fairbanks, Morse & Co., 88 Wis. 376, 60 N. W. 257. Mere objection or protest on the part of the servant, unless coupled with a promise by the master, is insufficient. Sweeney v. Envelope Co., 101 N. Y. 520, 5 N. E. 358; Cole v. Railway Co., 71 Wis. 114, 37 N. W. 84; Webber v. Piper, 38 Hun (N. Y.) 353; Ft. Wayne, J. & S. R. Co. v. Gildersleeve, 33 Mich. 133.

[4] Morbach v. Mining Co., 53 Kan. 731, 37 Pac. 122; Trotter v. Furniture Co. (Tenn. Sup.) 47 S. W. 425.

[5] Hyatt v. Railroad Co., 19 Mo. App. 287; Huber v. Jackson & Sharp Co., 1 Marv. 374, 41 Atl. 92.

[6] Indianapolis Union Ry. Co. v. Ott (Ind. App.) 35 N. E. 517, 38 N. E. 842; Russell v. Tillotson, 140 Mass. 201, 4 N. E. 231; Greene v. Railway Co., 31 Minn. 248, 17 N. W. 378; Atchison, T. & S. F. R. Co. v. Midgett, 1 Kan. App. 138, 40 Pac. 995; Erdman v. Steel Co., 95 Wis. 6, 69 N. W. 993.

[7] 101 N. Y. 399, 5 N. E. 57.

of great skill and care, it can scarcely be claimed that a defective instrument or tool furnished by the master, of which the employé has full knowledge and comprehension, can be regarded as making out a case of liability, within the rule laid down. * * * He fully comprehended that the spade, or the hoe, or the ladder, or the instrument which he employed was not perfect. If he was thereby injured, it was by reason of his own fault and negligence. The fact that he notified the master of the defect, and asked for another instrument, and the master promised to furnish the same, in such a case does not render the master responsible if an accident occurs."

48. COMPLIANCE WITH EXPRESS ORDERS—When a servant, in obedience to instruction, undertakes to perform a service outside the scope of his employment, he assumes only such increased risks as are patent and obvious, or discoverable in the exercise of such skill and intelligence as are presumably possessed by workmen of the grade of his original employment.

Courts are not entirely harmonious as to the character and extent of risks which should be deemed assumed in the conditions named, but it is believed that the foregoing proposition fairly carries the weight of authority.[1]

The principle may be more cautiously expressed as follows: If a common laborer, who, at the request of his master, attempts to perform a hazardous service temporarily, outside his employment, without objection, is injured while performing such duty, his apparent consent will not alone defeat his right of recovery, although the danger is apparent to a person possessed of skill, but not to a common laborer.[2] It follows, as a corollary of the stated rule, that when the temporary service required of the employé is entirely different in kind, and the attendant perils of such a nature that the servant

§ 48. [1] Dougherty v. Steel Co., 88 Wis. 343, 60 N. W. 274; Rooney v. Carson, 161 Pa. St. 26, 28 Atl. 996; Gill v. Homrighausen, 79 Wis. 634, 48 N. W. 862. See, also, Davidson v. Cornell, 132 N. Y. 228, 30 N. E. 573. But see Fitzgerald v. Paper Co., 155 Mass. 155, 29 N. E. 464.

[2] Paule v. Mining Co., 80 Wis. 350, 50 N. W. 189.

could not acquire a knowledge of them in the work for which he was hired, he has not assumed the increased risk.[3]

It should be observed that the cases cited in support of this rule are based on the ignorance, actual or presumed, of the dangers to which the change in employment subjected the servant; but there would seem to be no tenable theory by which the master could be held liable for injuries sustained by the servant in the performance of a temporary and unusual service, merely by reason of the increased risks and dangers attendant thereon, and which were fully understood and appreciated by the servant.[4] In the case of Cole v. Chicago & N. W. Ry. Co.,[5] counsel for the plaintiff argued that the mere act of the master in directing the performance of such temporary and dangerous work is such negligence as to sustain the action of the servant for injuries suffered in its performance, while using ordinary care. But the court says: "We are very clear that the broad rule contended for by the learned counsel for the respondent is not sustained by the authorities nor by the general rules of law which define the relations of the employer and employé. Some of the cases cited by the learned counsel for the respondent may have some general statements in the opinions which give some countenance to the rule as stated by counsel; but, when the facts of each case are considered, it will, we think, be found that no such broad rule was ever intended to be sanctioned by any of the courts."

In Leary v. Boston & A. R. Co.[6] the general rule is laid down

[3] Paule v. Mining Co., 80 Wis. 350, 50 N. W. 189; Mann v. Print Works, 11 R. I. 152.

[4] McGinnis v. Bridge Co., 49 Mich. 466, 13 N. W. 819; Wormell v. Railroad Co., 79 Me. 397, 10 Atl. 49; Rummell v. Dilworth, 111 Pa. St. 343, 2 Atl. 355; Leary v. Railway Co., 139 Mass. 587, 2 N. E. 115; Union Pac. Ry. Co. v. Fort, 17 Wall. 554; Cahill v. Hilton, 106 N. Y. 512, 13 N. E. 339; Lalor v. Railway Co., 52 Ill. 401; Ohio & M. R. Co. v. Hammersley, 28 Ind. 371; Pittsburgh, C. & St. L. Ry. Co. v. Adams, 105 Ind. 151, 5 N. E. 187; Mann v. Print Works, 11 R. I. 152; Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205; Cook v. Railway Co., 34 Minn. 45, 24 N. W. 311; O'Connor v. Adams, 120 Mass. 427; Benzing v. Steinway, 101 N. Y. 547, 5 N. E. 449. And, even if the unusual danger is incurred in obedience to the command of a superior, but in violation of an established rule, the servant assumes the risk. Richmond & D. R. Co. v. Finley, 12 C. C. A. 595, 63 Fed. 228.

[5] 71 Wis. 114, 37 N. W. 84.

[6] 139 Mass. 580, 2 N. E. 115; Hogan v. Railroad Co., 53 Fed. 519. And see

with great breadth: If a servant of full age and ordinary intelligence, upon being required by his master to perform other duties more dangerous and complicated than those embraced in his original hiring, undertakes such duties knowing their dangerous character, although unwillingly and from fear of losing his employment, and he is injured, he cannot maintain an action for the injury.

SAME—SERVANT AND FELLOW SERVANT.

49. A servant, on entering employment, impliedly agrees with his master to assume all ordinary risks incident to the service, including that of negligence on the part of a fellow servant, unless

(a) The master was negligent in employing the fellow servant; or unless

(b) The master's personal negligence caused or co-operated to cause the injury complained of.

The earliest reported case in any degree embodying the present doctrine of fellow servant is said to be that of Priestley v. Fowler [1] (1837), but the first clear enunciation of the rule occurred in 1841 in a South Carolina case (Murray v. South Carolina R. Co.),[2] and was thoroughly established a year later by the masterly opinion of Judge Shaw in Farwell v. Boston & W. R. Co.[3] The federal courts early recognized the general doctrine, and when construing the common law of a particular state on this point, they regard the question as one of construction of general contract of service and not as

cases collected in 14 Am. & Eng. Enc. Law, p. 859, note 1. But compare Mahoney v. Dore, 155 Mass. 513, 30 N. E. 366; O'Maley v. Gaslight Co., 158 Mass. 135, 32 N. E. 1119. In Leary v. Railroad Co., supra, the court further adds: "Morally to coerce a servant to an employment, the risks of which he does not wish to encounter, by threatening otherwise to deprive him of an employment he can readily and safely perform, may sometimes be harsh; but, when one has assumed an employment, if an additional and more dangerous duty is added to his original labor, he may accept or refuse it."

§ 49. [1] Priestley v. Fowler, 3 Mees. & W. 1. In Hutchinson v. Railway Co. (1850) 5 Exch. 343, the English courts unreservedly adopted the rule.

[2] 1 McMul. 385.

[3] 4 Metc. (Mass.) 49.

a rule of property. Under such circumstances, therefore, local decisions do not control.[4]

The reason for the doctrine of fellow servant is founded on the same basis as the assumption of any other risk incident to the accepted employment. The men employed in building a house or digging a trench are as truly a part of the appliances of the work as a scaffold or a spade. If the master has selected them in sufficient number, with due care, he has performed his immediate duty, and the outcropping of negligence in an individual servant is neither more nor less than a human defect, which could not be foreseen or guarded against, and against which the master did not undertake to protect the employé. "The general rule, resulting from considerations as well of justice as of policy, is that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and, in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is likely to know, and against which he can as effectually guard as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others. * * * The master, in the case supposed, is not exempt from liability because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer; but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself, and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger. Hence the separation of the employment into different departments cannot create that liability when it does not arise from

[4] Newport News & M. V. Co. v. Howe, 3 C. C. A. 121, 52 Fed. 362. As to Kentucky rule that brakeman and engineer are not fellow servants, see Louisville & N. R. Co. v. Brooks' Adm'x, 83 Ky. 131 (in this case the negligence was willful); also Louisville & N. R. Co. v. Brantley's Adm'r, 96 Ky. 297, 28 S. W. 477; Jag. Torts, p. 1031.

express or implied contract, or from a responsibility created by law to third persons and strangers for the negligence of a servant." [5]

This is doubtless the only satisfactory, logical basis of the doctrine, and in theory it is very simple and unobjectionable, but, when its practical application is attempted in the multiplex and constantly changing relations and gradations of employment, its difficulties at once appear. Any one may properly assume a risk, and thus bar his right to recover for consequent injury, and there is nothing peculiar in the relation of master and servant that should except it from the operation of the rule. But the difficulty arises in changing the general doctrine of the assumption of risk to meet the changes in the relationship. The day is not long past when all employments were comparatively simple. Fellow servants, in a given occupation, were limited in number and well known in the community where they worked. Hand labor was the rule, machinery the exception, and in these conditions the danger of being injured by the carelessness of a co-employé was a risk easily measured, and properly classed as incident to the service. But, while the rule has been preserved by the conservatism of the courts, the tremendous mechanical development of the last few decades has outstripped the conditions which justified its adoption, and left it more or less of a burden upon the great class of employés. Some relief has been afforded in a few states by exempting certain classes of servants, notably those of railroads, from the operation of the rule, and in some courts the assumption of risk and the relationship of fellow servant are treated as questions of fact to be determined by the jury.[6]

The hopeless conflict of decisions in the various state courts and the federal courts on this subject is not due to any lack of harmony

[5] Judge Shaw in Farwell v. Railroad Co., 4 Metc. (Mass.) 49. See, also, Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, where the court says: "The obvious reason for this exemption is that he has, or in law is supposed to have, them [the dangers] in contemplation when he engages in the service, and that his compensation is arranged accordingly. He cannot, in reason, complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid."

[6] Wenona Coal Co. v. Holmquist, 152 Ill. 581, 38 N. E. 946; Mexican Nat. Ry. Co. v. Finch, 8 Tex. Civ. App. 409, 27 S. W. 1028; Northern Pac. Coal Co. v. Richmond, 7 C. C. A. 485, 58 Fed. 756; Lake Erie & W. R. Co. v. Middleton, 142 Ill. 550, 32 N. E. 453.

in the acceptation of the general doctrine of the servant's assumption of the risk of injury from consociation with other negligent employés, but to inability to agree on any fixed, general rules for the determination and definition of the relationship of fellow servant. At the outset, however, it may be stated that all courts would agree to the fundamental proposition that the act of any employé, done in the proper discharge of the master's duty, is not the act of a fellow servant, but of the master. No court would, in the absence of statute, stop short of this, but many would extend the liability of the master on much broader lines.

To attempt a definition of the relationship of fellow servant would, for the reasons stated, be absurd. It would amount to nothing more than a selection from the many conflicting decisions of the interpretation placed on the term by one particular court, to the exclusion of all others which had not adopted a similar theory. Thus, in New York a fireman is held to be a fellow servant of the conductor,[7] but in Michigan a common laborer is not a fellow servant of the conductor of a construction train.[8] In Virginia a conductor is not a fellow servant of trainmen,[9] while in the federal courts the relationship would appear to depend on the circumstances of the individual case and the character of the duty with which the conductor was charged at the time of his shortcoming.[10]

In the discussion of this subject it should not be overlooked that the mere establishment of the fact that the offending employé was not a fellow servant of the injured co-laborer does not, ipso facto, determine the master's liability. The question of fellow servant being eliminated, it then becomes necessary to ascertain whether the master, or the representative to whom his authority was delegated, was lacking in the exercise of the proper degree of care which was demanded in the circumstances.

Primarily, however, and as a condition precedent to the determination of the relationship of the different employés, it is essential that the master's duty in the circumstances should be clearly settled.

[7] Slater v. Jewett, 85 N. Y. 61.

[8] Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205.

[9] Ayers' Adm'x v. Railroad Co., 84 Va. 679, 5 S. E. 582.

[10] Chicago, M. & St. P. Ry. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914.

The general duties of the master to his servants have already been enumerated,—furnishing and keeping in repair proper appliances and instrumentalities, hiring competent workmen in sufficient number, promulgating and enforcing rules, and exercising a general supervision of the work, etc.; but in Ohio, which is the exponent of a clearly-defined line of decisions on this subject, and in those states which adopt her doctrine, the further duty of a detailed supervision of the work and servants is imposed on the master. It will therefore be readily seen that in determining the relation of one servant, as a conductor, to another, as a brakeman, the question of detailed supervision,—in other words, the master's duty, in the circumstances,—would be all important.

Community of Service.

To establish the relation of fellow servant, it is invariably essential that community of service should exist; that both servants should be employed by the same master.[11] So, if the wife of a servant is injured by a co-employé of the latter, the defense of fellow servant cannot be maintained by the master against the claim for damages.[12] And for the purposes of the relation he is to be deemed the master for whose benefit the servant is laboring at any given time. Thus, a servant, placed by his general employer temporarily in the service of another, becomes for the time the servant of the latter, and assumes the risk of injury from the negligence of his regular employés, and, if he is injured by their carelessness, he can recover from neither his general nor temporary master.[13] And in some instances a volun-

[11] Sullivan v. Railroad Co., 112 N. Y. 643, 20 N. E. 569; Sanford v. Oil Co., 118 N. Y. 571, 24 N. E. 313; Johnson v. Navigation Co., 132 N. Y. 576, 30 N. E. 505; Devlin v. Smith, 89 N. Y. 470; Catawissa R. Co. v. Armstrong, 49 Pa. St. 186; Johnson v. Spear, 76 Mich. 139, 42 N. W. 1092; Hardy v. Railroad Co., 57 N. J. Law, 505, 31 Atl. 281; Rehm v. Railroad Co., 164 Pa. St. 91, 30 Atl. 356; Edward Hines Lumber Co. v. Ligas, 68 Ill. App. 523; Chicago & A. R. Co. v. O'Brien, 155 Ill. 630, 40 N. E. 1023; Wilson v. Railway Co., 51 S. C. 79, 28 S. E. 91.

[12] Campbell v. Harris, 4 Tex. Civ. App. 636, 23 S. W. 35; Gannon v. Railroad Co., 112 Mass. 234.

[13] Illinois Cent. R. Co. v. Cox, 21 Ill. 20; Hasty v. Sears, 157 Mass. 123, 31 N. E. 759; Coyle v. Pierrepont, 33 Hun (N. Y.) 311; Burke v. Refining Co., 11 Hun (N. Y.) 354; The Harold, 21 Fed. 428; Ewan v. Lippincott, 47 N. J. Law, 192.

teer becomes a servant of the person for whose benefit he contributes his service, and cannot recover against the employer for injuries sustained by the negligence of his fellow workmen;[14] but, if the service is contributed with the knowledge and consent of the master, he has been held entitled to recover for such injuries.[15] Servants of different connecting lines of railroad are not fellow servants, no matter what the agreement between the different roads may be.[16] And, in general, the servants of one employer, and those of another engaged in conducting an independent piece of work, although laboring side by side, are not fellow servants.[17]

50. COMMON EMPLOYMENT AS TEST—In the English, and in a few American, courts, the test of common employment is applied to determine the relationship of fellow servant.

To attempt to define or test the relation of fellow servant by the community of employment would seem to merely increase the con-

[14] Potter v. Faulkner, 31 Law J. Q. B. 30; Millsaps v. Railway Co., 69 Miss. 423, 13 South. 696; Holmes v. Railway Co., L. R. 4 Exch. 254.

[15] Eason v. Railway Co., 65 Tex. 577; Chicago, M. & St. P. Ry. Co. v. West, 125 Ill. 320, 17 N. E. 788.

[16] Sullivan v. Railroad Co., 112 N. Y. 643, 20 N. E. 569; Catawissa R. Co. v. Armstrong, 49 Pa. St. 186; Sawyer v. Railroad Co., 27 Vt. 370; Stetler v. Railroad Co., 46 Wis. 497, 1 N. W. 112; Smith v. Railroad Co., 19 N. Y. 127; In re Merrill, 54 Vt. 200; Connolly v. Davidson, 15 Minn. 519 (Gil. 428); Taylor v. Railroad Co., 45 Cal. 323; Zeigler v. Railroad Co., 52 Conn. 543; Gray v. Railroad Co., 24 Fed. 168; Strader v. Railroad Co., 157 N. Y. 708, 52 N. E. 1126. And a Pullman car porter is not a fellow servant of switchman in employ of railroad company. Hughson v. Railroad Co., 2 App. D. C. 98. See, also, Tierney v. Railroad Co., 85 Hun, 146, 32 N. Y. Supp. 627; Bosworth v. Rogers, 27 C. C. A. 385, 82 Fed. 975; Strader v. Railroad Co., 157 N. Y. 708, 52 N. E. 1126.

[17] Coughtry v. Woolen Co., 56 N. Y. 124; Hass v. Steamship Co., 88 Pa. St. 269; Cunningham v. Railroad Co., 51 Tex. 503; Goodfellow v. Railroad Co., 106 Mass. 461; Lake Superior Iron Co. v. Erickson, 39 Mich. 492; Galveston, H. & S. A. Ry. Co. v. Masterson (Tex. Civ. App.) 51 S. W. 1091. But see Ewan v. Lippincott, 47 N. J. Law, 192; Johnson v. City of Boston, 118 Mass. 114; Illinois Cent. R. Co. v. Cox, 21 Ill. 20; Charles v. Taylor, 3 C. P. Div. 492. As to the servants of a subcontractor, see Curley v. Harris, 11 Allen, 112; Wiggett v. Fox, 11 Exch. 832; Murray v. Currie, L. R. 6 C. P. 24.

fusion attending this subject by the addition of a new phrase. Yet the English courts have adopted this test, and hold that a "common employment" is established if it appears that both servants were engaged in one general business, in the service of the same master, with one aim or result in view.[1] Mr. Pollock says: "All persons engaged under the same employer, for the purposes of the same business, however different in detail those purposes may be, are fellow servants. The kind of work need not be the same; the employer must be. They need not be engaged in the same department of service, but they must be working for a common object."[2] Thus, it was held that a general carpenter in the employ of a railroad company, who was injured while at work on a shed near the tracks, by the careless shifting by porters of an engine, which struck and knocked down the scaffold on which he was standing, could not recover from his employer.[3] And similar decisions are not wanting in our own courts.[4] In Illinois it is necessary, to constitute co-employés "fellow servants in the same common employment," either that, at the time the injury is suffered, they should be actually co-operating in the achievement of the object in view, or should be in constant, habitual association in the performance of their ordinary duties;[5] as a common laborer on a wood train and the engineer of the same train.[6] And some of our ablest American text writers not only make the determination of the question of common employment of supreme importance, but even go so far as to make it the test of the master's exemption, to the exclusion of the relation of fellow servant. Thus, Shearman and Redfield in their most excellent treatise say: "The opinions of the courts

§ 50. [1] Bartonshill Coal Co. v. Reid, 3 Macq. H. L. Cas. 266.

[2] Pol. Torts, pp. 86–88.

[3] Morgan v. Railway Co., 5 Best & S. 570, L. R. 1 Q. B. 149. See, also, Swainson v. Railway Co., 3 Exch. Div. 341.

[4] Catawissa R. Co. v. Armstrong, 49 Pa. St. 186; Moynihan v. Hills Co., 146 Mass. 586–594, 16 N. E. 574; Webb v. Railway Co., 7 Utah, 363, 26 Pac. 981; Dixon v. Railroad Co., 109 Mo. 413, 19 S. W. 412. See, also, Griffiths v. Wolfram, 22 Minn. 185; Osborne v. Morgan, 130 Mass. 102.

[5] Chicago & N. W. R. Co. v. Snyder, 117 Ill. 376, 7 N. E. 604; Honner v. Railroad Co., 15 Ill. 550; Illinois Cent. R. Co. v. Cox, 21 Ill. 20; Columbus, C. & I. C. Ry. Co. v. Troesch, 68 Ill. 545; Gartland v. Railroad Co., 67 Ill. 498. See, also, Chicago & A. R. Co. v. Kelly, 127 Ill. 637, 21 N. E. 203; Joliet Steel Co. v. Shields, 134 Ill. 209, 25 N. E. 569.

[6] Illinois Cent. R. Co. v. Cox, 21 Ill. 20.

have generally failed to distinguish between the questions of what constitutes a fellow servant and what constitutes common employment; and in many cases it has been held that two servants of the same master were not fellow servants, when all that was really meant by the court was that they were not in the same common employment."[7] Whereby it would appear that two persons may be fellow servants, and yet not be in the same common employment. But, from a logical as well as a common-sense point of view, common employment would seem to be a mere prerequisite, a condition precedent to the establishment of the relationship of fellow servant, and not an added condition. All fellow servants must be in the same common employment, but not all in the same common employment are necessarily fellow servants. Whatever the proper function of the term may be, its use in a technical sense is apt to breed confusion, and will not be so used hereafter.

51. VICE PRINCIPAL — In American courts the relation of fellow servant is commonly tested by the application of the doctrine of vice principal.

52. A vice principal, for the purposes of the test, is one who, regardless of grade, is actually engaged in the discharge of some positive duty owed by the common master to his employés.

In determining the relation of fellow servant, and the consequent exemption from liability of the master, the consideration of the relation of vice principal is, in a majority of cases, intimately blended; for the circumstances of employment of two men may in every way satisfy the requirements of the relation of fellow servants, yet if it happen that the offending employé, at the time of his shortcoming, is, with authority, attempting to discharge a master's duty, the employer would, in any court, be held liable for the consequent injury to his fellow.

Prima facie all who enter into the employment of a single master are engaged in a common service, and are fellow servants. A fellow servant ceases to be such, and becomes a vice principal, when he is clothed with power of control and direction, and, in the due

[7] Shear. & R. Neg. (4th Ed.) § 234.

exercise of such power, is intrusted with the performance of some positive duty, owed to other employés, and which has devolved on him from the master.

A master assumes the duty towards his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place in which to work, with reasonably safe machinery, tools, and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow servants to work with him; and, when the master has properly discharged these duties, then, at common law, the servant assumes all the risks and hazards incident to and attendant upon the exercise of the particular employment or the performance of the particular work, including those risks and hazards resulting from the possible negligence and carelessness of his fellow servants and co-employés.[1] In other words, the master may not absolve himself from the performance of a positive duty by delegating it to a subordinate. But, to render the master liable, it would appear that the act complained of, whether it be that of himself or one acting for him, must involve the commission of some positive wrong, the breach of some special duty. If he discharges all that may be called positive duty, and is himself guilty of no neglect, it would seem that he should be absolved from all personal responsibility.[2] And so, in the federal and many other courts, the liability of the master is not made to depend in any manner upon the grade of service of a co-employé, but upon the character of the act itself, and a breach of a positive obligation of the master; it being immaterial how or by whom the master undertakes to discharge the duty.[3]

§§ 51–52. [1] Atchison, T. & S. F. R. Co. v. Moore, 29 Kan. 632, 644; Union Pac. R. Co. v. Doyle, 50 Neb. 555, 70 N. W. 43; Norfolk & W. R. Co. v. Houchins' Adm'r, 95 Va. 398, 28 S. E. 578.

[2] Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914.

[3] Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914; Chicago, M. & St. P. Ry. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184; Hough v. Railway Co., 100 U. S. 213; Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590; Loughlin v. State, 105 N. Y. 159, 11 N. E. 371; Slater v. Jewett, 85 N. Y. 61; Filbert v. Canal Co., 121 N. Y. 207, 23 N. E. 1104; O'Brien v. Dredging Co., 53 N. J. Law, 291, 21 Atl. 324; Potter v. Railroad Co., 46 Iowa, 399; State v. Malster, 57 Md. 287; Lewis v. Seifert, 116 Pa. St. 628, 11 Atl. 514; Gaffney v. Railroad Co., 15 R. I. 456, 7 Atl. 284.

Much diversity of opinion exists in different courts as to what constitutes the master's duty, the breach of which, by his representatives, will render him liable. In any instance, the determination of this question is of the first and vital importance.

In New York the gist of the matter consists in determining whether the duty violated by the negligent servant is one owed by him as a co-operative or in a capacity representative of the master. His grade or authority is of no importance. The superintendent is not disqualified by his position from being a fellow servant with the lowest grade of employé, and, if he negligently performs the duty of a mere employé, the act, however careless or injurious, is that of a servant only.[4] If, however, the act, such as the repair of machinery, is within the master's duty, and is negligently performed by any employé charged with its execution, such employé, whatever his grade, is a vice principal, so far as that act is concerned.[5] A similar rule, modified in some instances by statute, is found in many other states.[6]

It is observable, however, that those who are working together

[4] Filbert v. Canal Co., 121 N. Y. 207, 23 N. E. 1104; Loughlin v. State, 105 N. Y. 159, 11 N. E. 371; Jenkinson v. Carlin, 10 Misc. Rep. 22, 30 N. Y. Supp. 530; Kennedy v. Iron Works, 12 Misc. Rep. 336, 33 N. Y. Supp. 630; Conway v. Railroad Co., 13 Misc. Rep. 53, 34 N. Y. Supp. 113; Fitzgerald v. Honkomp, 44 Ill. App. 365 (citing Chicago & A. R. Co. v. May, 108 Ill. 288); Stewart v. Ferguson, 34 App. Div. 515, 54 N. Y. Supp. 615; Perry v. Rogers, 157 N. Y. 251, 51 N. E. 1021.

[5] Scherer v. Manufacturing Co., 86 Hun, 37, 33 N. Y. Supp. 205; Redington v. Railway Co., 84 Hun, 231, 32 N. Y. Supp. 535; Crowell v. Thomas, 18 App. Div. 520, 46 N. Y. Supp. 137; Egan v. Railroad Co., 12 App. Div. 556, 42 N. Y. Supp. 188; Strauss v. Manufacturing Co., 23 App. Div. 1, 48 N. Y. Supp. 425; O'Connor v. Barker, 25 App. Div. 121, 49 N. Y. Supp. 211.

[6] Smoot v. Railroad Co., 67 Ala. 13 (statute); McLean v. Mining Co., 51 Cal. 255 (statute); Pennsylvania Co. v. Whitcomb, 111 Ind. 212, 12 N. E. 380; Doughty v. Log-Driving Co., 76 Me. 143; Moynihan v. Hills Co., 146 Mass. 586, 16 N. E. 574 (statute); Adams v. Cliffs Co., 78 Mich. 271, 288, 44 N. W. 270; Lindvall v. Woods, 41 Minn. 212, 42 N. W. 1020 (but see Blomquist v. Railway Co., 60 Minn. 426, 62 N. W. 818); New Orleans, J. & G. N. R. Co. v. Hughes, 49 Miss. 258 (statute); Jaques v. Manufacturing Co., 66 N. H. 482, 22 Atl. 552; Ell v. Railroad Co., 1 N. D. 336, 48 N. W. 222; International & G. N. Ry. Co. v. Ryan, 82 Tex. 565, 18 S. W. 219 (statute); Zintek v. Mill Co., 9 Wash. 395, 37 Pac. 340; Dwyer v. Express Co., 82 Wis. 307, 52 N. W. 304 (statute); Thomas, Neg. p. 866.

in making, repairing, or altering the appliances or machinery are engaged in a common service, each performing the master's duty, and, inter se, are fellow servants.[7]

The Rule in Ohio.

The Ohio rule embodies all the requirements of that of New York, but goes further, requiring a detailed supervision to be exercised over servants. The heads of departments, therefore, even in minor subdivisions, are representative of the master, and are charged with the performance of the duties that the law lays upon him. This is but an extension of the duty, not of the principle. The distinguishing characteristic of the Ohio rule consists in the adaptation, once a vice principal, always a vice principal. That is to say, the person in control cannot in any way devest himself of his representative capacity and accompanying responsibility; he cannot pull a rope or lift on a timber as an ordinary employé,—a fellow servant with the others,—but the act, if carelessly or unskillfully done, is the negligence of the master, and carries liability for consequent injury.[8]

In Illinois, mere possession of authority or power to control and discharge does not create the relation of vice principal. There must be an exercise of such authority and power at the particular time in question. This is in direct contrast to the Ohio rule. As a prerequisite, however, to the establishment of the relation of fellow servant, it is essential that the employés of the same master should immediately co-operate in the same line of employment, to the end and extent that they may have opportunity to observe and avoid the negligent acts of each other. At the time of the injury they must be actually co-operating in the particular business in hand, or their usual duties must bring them into habitual consociation, so that they can exercise an influence upon each other promotive of proper caution for their personal safety.[9] And under this rule a

[7] Murphy v. Railroad Co., 88 N. Y. 146.

[8] Little Miami R. Co. v. Stevens, 20 Ohio, 415; Berea Stone Co. v. Kraft, 31 Ohio St. 287. But see Lake Shore & M. S. Ry. Co. v. Lamphere, 9 Ohio Cir. Ct. R. 263; Baltimore & O. R. Co. v. Sutherland, 12 Ohio Cir. Ct. R. 309; McCann v. Pennsylvania Co., 10 Ohio Cir. Ct. R. 139, 3 Ohio Dec. 444; Lake Shore & M. S. Ry. Co. v. Hunter, 13 Ohio Cir. Ct. R. 441, 7 Ohio Dec. 206.

[9] Chicago & N. W. Ry. Co. v. Moranda, 108 Ill. 576; North Chicago Rolling-Mill Co. v. Johnson, 114 Ill. 57, 29 N. E. 186; Chicago & A. R. Co. v. O'Brien, 155 Ill. 630, 40 N. E. 1023; Kolb v. Carrington, 75 Ill. App. 159.

station agent, having charge of defendant's station, grounds, side tracks, etc., is not a fellow servant of a brakeman on a pile-driver train, so as to prevent a recovery by the latter for injuries caused by the negligence of the former in leaving a car on a side track too close to the main track to allow the brakeman's train to pass.[10] Whether the employés were so operating and consociating, within the rule as above stated, is a question of fact for the jury.[11] The rule as to superior and subordinate in Illinois is thus stated by the supreme court: "A servant having the exclusive control over other servants under a common master, including the hiring and discharging, is, in the exercise of those powers, the representative of the master, and not a mere fellow servant. The mere fact, however, that one of a number of servants, who are in the habit of working together in the same line of employment for a common master, has power to control and direct the actions of the others with respect to such employment, will not, of itself, render the master liable for the negligence of the governing servant, resulting in an injury to one of the others, without regard to the circumstances. On the other hand, the mere fact that the servant exercising such authority sometimes or generally labors with the others as a common hand will not, of itself, exonerate the master from liability for the former's negligence in his exercise of authority over others. Every case, in this respect, must stand upon its own circumstances. If the negligence complained of consists of some act done or omitted, by one having such authority, which relates to his duty as a co-laborer with those under his control, and which might just as readily have happened with one of them having no such authority, then the common master will not be liable; but when the negligent act complained of arises out of, and is the direct result of, the exercise of the authority conferred upon him by the master over his co-laborer, the master will

[10] St. Louis, A. & T. H. R. Co. v. Biggs, 53 Ill. App. 550; West Chicago St. R. Co. v. Dwyer, 57 Ill. App. 440; Chicago & A. R. Co. v. Swan, 70 Ill. App. 331; Illinois Cent. R. Co. v. McCowan, Id. 345; Chicago & A. R. Co. v. House, 172 Ill. 601, 50 N. E. 151.

[11] Westville Coal Co. v. Schwartz, 177 Ill. 272, 52 N. E. 276; Chicago & A. R. Co. v. O'Brien, 155 Ill. 630, 40 N. E. 1023; Consolidated Coal Co. v. Scheiber, 167 Ill. 539, 47 N. E. 1052; Mobile & O. R. Co. v. Massey, 152 Ill. 144, 38 N. E. 787; Chicago & N. W. Ry. Co. v. Moranda, 108 Ill. 576; Chicago & N. W. Ry. Co. v. Tuite, 44 Ill. App. 535.

be liable. To illustrate the rule, when a railway company confers upon one of its employés authority to take charge of and control a gang of men in carrying on some particular branch of its business, he is the direct representative of the company, and all commands given by him, within the scope of his authority, are, in law, the commands of the company. The fact that he may have an immediate superior standing between him and the company makes no difference in this respect. In exercising the power, he does not stand on the same plane with those under his control. His position is one of superiority. When he gives an order within the scope of his authority, if not manifestly unreasonable, those under his charge are bound to obey, at the peril of losing their situations; and such commands are, in contemplation of law, the commands of the company, and hence it is held responsible for the consequences." [12]

The Rule in Michigan.

The general rule in Michigan is concisely stated in Adams v. Iron Cliffs Co.: [13] "All who serve the same master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades or departments of it, are fellow servants. * * * Nor does it make any difference that the servant guilty of the negligence is a servant of superior authority, unless such superior servant rises to the grade of the alter ego of the principal." Thus, a brakeman is not a fellow servant with a car inspector; [14] a train dispatcher, having absolute control of the running of trains, is not a fellow servant of those, subject to his directions, who are engaged in operating the trains.[15] To constitute the servant vice principal, his control and superintendence must be general, and it matters not

[12] Chicago & A. R. Co. v. May, 108 Ill. 288, 300. See, also, Fraser v. Schroeder, 163 Ill. 459, 45 N. E. 288.

[13] 78 Mich. 271, 288, 44 N. W. 270, 276; Smith v. Potter, 46 Mich. 263, 9 N. W. 273. A founder having charge of the work inside a blast furnace is a fellow servant of the engineer of the locomotive used in moving cars on the premises. Adams v. Iron Cliffs Co., 78 Mich. 271, 44 N. W. 270. Painters are fellow servants of carpenters in the use of a scaffolding previously constructed and used by the latter. Hoar v. Merritt, 62 Mich. 386, 29 N. W. 15; Beesley v. Wheeler, 103 Mich. 196, 61 N. W. 658.

[14] Morton v. Railroad Co., 81 Mich. 423, 46 N. W. 111.

[15] Hunn v. Railroad Co., 78 Mich. 513, 44 N. W. 502.

how the authority devolved on him.[16] But he must have full and absolute charge over both the work and the men, so that his discretion and control dominate.[17] A special authority, giving a power of supervision over a limited portion of the work only, does not make the qualified superintendent a vice principal, or change his relations to his co-laborers so as to make the master responsible for injuries to a servant resulting from his negligence.[18] It would, however, appear that the rule of fellow servant in Michigan has no application when the servant is performing duties outside the scope of his employment, or when he is sent into a dangerous place or exposed to extraordinary perils by one in authority over him.[19] It is, moreover, well settled that those employed to provide and keep in repair the places or supply the machinery and tools for labor are engaged in employments distinctly separate from those who use the places and appliances so furnished, and are not fellow servants with them.[20] But the decisions are not so clear or consistent as to make it certain that this rule applies to those charged with keeping in repair the instrumentalities other than the place where the labor is to be performed.[21]

The Rule in Massachusetts.

In Massachusetts the rule is involved in great perplexity. In Holden v. Fitchburg R. Co.,[22] the court says: "It is well settled in this commonwealth and in Great Britain that the rule of law that a servant cannot maintain an action against his master for an injury

[16] Ryan v. Bagaley, 50 Mich. 179, 15 N. W. 72.

[17] Slater v. Chapman, 67 Mich. 523, 35 N. W. 106; not vice principal, Schroeder v. Railroad Co., 103 Mich. 213, 61 N. W. 663; Morch v. Railway Co., 113 Mich. 154, 71 N. W. 464.

[18] Quincy Min. Co. v. Kitts, 42 Mich. 34, 3 N. W. 240; Ryan v. Bagaley, 50 Mich. 180, 15 N. W. 72.

[19] Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 210.

[20] Roux v. Lumber Co., 94 Mich. 607, 54 N. W. 492, approving Sadowski v. Car Co., 84 Mich. 100, 47 N. W. 598.

[21] Roux v. Lumber Co., 94 Mich. 607, 54 N. W. 492, partially adopting the rule as stated in Northern Pac. R. Co. v. Herbert, 116 U. S. 653, 6 Sup. Ct. 590; Ashman v. Railway Co., 90 Mich. 567, 51 N. W. 645, approvingly citing Ford v. Railroad Co., 110 Mass. 240. And see Hoar v. Merritt, 62 Mich. 330, 29 N. W. 15; Van Dusen v. Letellier, 78 Mich. 492, 44 N. W. 572; Dewey v. Railway Co., 97 Mich. 329, 56 N. W. 756; Frazee v. Stott (Mich.) 79 N. W. 896.

[22] 129 Mass. 268, 271.

caused by the fault or negligence of a fellow servant is not confined to the case of two servants working in company, or having opportunity to control or influence the conduct of each other, but extends to every case in which the two, deriving their authority and their compensation from the same source, are engaged in the same business, though in different departments of duty; * * * and it makes no difference that the servant whose negligence causes the injury is a submanager or foreman, of higher grade or greater authority than the plaintiff." And again, in Ford v. Fitchburg R. Co.:[23] "The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require. In one the master cannot escape the consequences of the agent's negligence; if the servant is injured in the other, he may." The language employed in these cases has occasioned much perplexity and concern in subsequent decisions by the same court, and its excuse has been attempted in Johnson v. Boston Tow-Boat Co.[24] and subsequent

[23] 110 Mass. 240, 260.

[24] 135 Mass. 209. And see Dowd v. Railroad Co., 162 Mass. 185, 38 N. E. 440; McPhee v. Scully, 163 Mass. 216, 39 N. E. 1007; Trimble v. Machine Works, 172 Mass. 150, 51 N. E. 463; Meehan v. Manufacturing Co. (Mass.) 52 N. E. 518; McCoy v. Town of Westboro (Mass.) 52 N. E. 1064; Whelton v. Railway Co. (Mass.) 52 N. E. 1072. Inspector of cars is fellow servant with brakeman. Bowers v. Railroad Co., 162 Mass. 312, 38 N. E. 508. In Johnson v. Tow-Boat Co., 135 Mass. 209, the court says: "When a master has furnished suitable structures, means, and appliances for the prosecution of a business, all persons employed by him in carrying on the business by the use of the means provided, including those who use the means directly in the prosecution of the business, those who maintain them in a condition to be used, and those who adapt them to use by new appliances and adaptations incidental to their use, are fellow servants in the general employment and business. One employed in the care, supervision, and keeping in ordinary repair of the means and appliances used in a business is engaged in the common service." See, also, rule as stated in Moynihan v. Hills Co., 146 Mass. 586, 16 N. E. 574, wherein it is stated that the master's duty is to "maintain," as well as "provide," suitable machinery, appliances, etc. The Massa-

cases, with the result that the whole subject is involved in still greater doubt and uncertainty.

The Rule in Pennsylvania.

The rule in Pennsylvania is in many respects similar to that in Massachusetts; the test of fellow servant being the employment by the same master in common service, without regard to immediate superiority of grade, although the representative having absolute and entire charge is vice principal.

In Lewis v. Seifert,[25] the rule is stated in the following language: "It is sufficient if they are in the same employment by the same master, engaged in the same common work, and performing duties and services for the same general purpose. To constitute such fellow servants, they need not at the time be engaged in the same particular work." But it will be at once discerned that this enunciation is too broad and vague to determine any particular doctrine, or throw any light on the exact position held by the court. As pointed out by Judge Bailey,[26] it is not exactly true that those servants who are employed by the same master, engaged in the common work, and performing duties for the same general purpose, are fellow servants. Their employment for the purposes named is a prerequisite to their

chusetts statute determining the liability of masters in certain cases is in part as follows (chapter 270, Laws 1887): "Section 1. Where, after the passage of this act, personal injury is caused to an employé, who is himself in the exercise of due care and diligence at the time: (1) By reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of any person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition; (2) by reason of negligence of any person in the service of the employer, intrusted with and exercising superintendence, whose sole duty is that of superintendence; (3) by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive, engine, or train upon a railroad,—the employé, or, in case the injury result in death, the legal representatives of such employé, shall have the same right of compensation and remedies against the employer as if the employé had not been an employé of nor in the service of the employer, nor engaged in its work."

[25] 116 Pa. St. 628, 11 Atl. 514.

[26] Bailey, Mast. Liab. p. 295.

classification as fellow servants, but not all thus employed are fellow servants. This is recognized by the court later on in the same decision quoted above: "There are some duties which the master owes to the servant, and from which he cannot relieve himself, except by performance. Thus, the master owes every employé the duty of providing a reasonably safe place in which to work, and reasonably safe instruments, tools, and machinery with which to work. This is a direct, personal, and absolute obligation; and, while the master may delegate these duties to an agent, such agent stands in the place of his principal, and the latter is responsible for the acts of such agent; and where the master or superior places the entire charge of his business, or a distinct branch of it, in the hands of an agent or subordinate, exercising no discretion or oversight of his own, the master is held liable for the negligence of such agent or subordinate." [27] The law as enunciated in this case may probably be taken as the accepted doctrine in Pennsylvania, although earlier and conflicting decisions have not been expressly overruled.[28] These earlier decisions clearly indicate that the master may relieve himself of responsibility in supplying machinery and appliances, however defective and unsuitable they may be in fact, provided he intrusts their structure or selection to competent and skillful persons; but, as they are no longer cited with approval, the disapproval of their principles may be taken as implied.

The doctrine of superior and subordinate is not recognized in this state.

The Rule in Minnesota.

In Minnesota the duty of providing reasonably safe places, appliances, and instrumentalities cannot be delegated by the master so as

[27] Lewis v. Seifert, 116 Pa. St. 628, 11 Atl. 514; Noll v. Railroad Co., 163 Pa. St. 504, 30 Atl. 157; Rehm v. Railroad Co., 164 Pa. St. 91, 30 Atl. 356; Prevost v. Refrigerating Co., 185 Pa. St. 617, 40 Atl. 88. But where the control is qualified, see Schroeder v. Railroad Co., 103 Mich. 213, 61 N. W. 663.

[28] Ardesco Oil Co. v. Gilson, 63 Pa. St. 150. The court illustrates the principle by saying: "If I employ a well-known and reputable machinist to construck a steam engine, and it blows up from bad materials or unskillful work, I am not responsible for any injury which may result, whether to my own servant or to a third person." Mansfield Coal & Coke Co. v. McEnery, 91 Pa. St. 185.

to relieve him of responsibility.[29] Differences of grade or authority do not determine the relation of fellow servant.[30] The employé becomes vice principal only when he is intrusted with the performance of some absolute duty of the master himself, such as the provision of proper instrumentalities with which the servant is to perform his work.[31] But in the construction of appliances or instrumentalities all those who are engaged in the work are fellow servants, regardless of grade or department of service; such building or construction being regarded as a part of the regular work which they are hired to perform. The leading case on this point is that of Lindvall v. Woods,[32] in which a foreman and laborers under him were held to be fellow servants while engaged in building a trestle to be used in furtherance of the general business. In the later case of Blomquist v. Chicago, M. & St. P. Ry. Co.,[33] the foreman of a crew of laborers engaged in constructing bridge piers, and having authority, in the absence of defendant's engineer, to superintend the work, was held to be a vice principal; but in the latter case the violation of defendant's duty consisted in the negligence of the foreman in adjusting and placing the derrick, by means of which the stones were raised into place, the plaintiff being absent when the derrick was so placed.

The master also owes the duty to his servants of reasonable inspection and maintenance of appliances and instrumentalities,[34] and those engaged in making repairs are representative of the master.

The Minnesota statute defining vice principals is nothing more than

[29] Lindvall v. Woods, 41 Minn. 212, 42 N. W. 1020; Brown v. Railway Co., 31 Minn. 553, 18 N. W. 834. But car inspector is not fellow servant of brakeman. Fay v. Railway Co., 30 Minn. 231, 15 N. W. 241; Tierney v. Railway Co., 33 Minn. 311, 23 N. W. 229; Macy v. Railroad Co., 35 Minn. 200, 28 N. W. 249.

[30] Lindvall v. Woods, 41 Minn. 212, 42 N. W. 1020; Fraker v. Railway Co., 32 Minn. 54, 19 N. W. 349; Brown v. Railway Co., 31 Minn. 553, 18 N. W. 834; Tierney v. Railway Co., 33 Minn. 311, 23 N. W. 229.

[31] Brown v. Railway Co., 31 Minn. 553, 18 N. W. 834; Stahl v. City of Duluth, 71 Minn. 341, 74 N. W. 143; Lundberg v. Shevlin-Carpenter Co., 68 Minn. 135, 70 N. W. 1078; Holman v. Kempe, 70 Minn. 422, 73 N. W. 186.

[32] 41 Minn. 212, 42 N. W. 1020; Fraser v. Lumber Co., 45 Minn. 235, 47 N. W. 785.

[33] 60 Minn. 426, 62 N. W. 818.

[34] Anderson v. Railroad Co., 39 Minn. 523, 41 N. W. 104.

an enunciation of the doctrine which has long been the well-settled common law of the state.[35]

53. RULE IN FEDERAL COURTS — The master is responsible for any breach of a positive duty owed by him to his employés, and the grade of the servant through whose immediate negligence the breach occurs is immaterial in determining the master's liability, although a distinction is drawn between servants exercising no supervision and those whose duties are those solely of superintendence and direction.

54. The master cannot avoid responsibility in the delegation of his duty as to premises, appliances, and machinery.

The case of Baltimore & O. R. Co. v. Baugh [1] enunciates the law on this subject as now settled in the federal courts. In that case the fireman on a locomotive engine was injured by reason of the negligence of the engineer in charge of the engine, which was running without any train attached. The judgment of the trial court, allowing recovery, was reversed, the court holding that the engineer and fireman were fellow servants. The doctrine therein stated as the correct rule for determining the relation of vice principal is a modification of that found in the earlier case of Chicago, M. & St. P. Ry. Co. v. Ross,[2] decided in 1884. The latter case involved a somewhat radical departure from the former holdings of this court on the same subject. Ross was a locomotive engineer, and was injured through the negligence of the conductor in charge of the train to

[35] Whenever a master or employer delegates to any one the performance of his duties which he, as master or employer, owes to his servants, or any part or portion of such duties, the person so delegated, while so acting for his master or employer, shall be considered the vice principal and representative of the master. Chapter 173, § 2, Gen. Laws 1895.

§§ 53–54. [1] 149 U. S. 368, 13 Sup. Ct. 914.

[2] 112 U. S. 377, 5 Sup. Ct. 184. In support of its position in this case the court cites Little Miami R. Co. v. Stevens, 20 Ohio, 415; Cleveland, C. & C. R. Co. v. Keary, 3 Ohio St. 201; Louisville & N. R. Co. v. Collins, 2 Duv. (Ky.) 114.

which his engine was attached. His recovery in the lower court was affirmed, it being distinctly held that the conductor and engineer were not fellow servants. The opinion of the court, written by Mr. Justice Field, who also wrote a dissenting opinion in the Baugh Case, clearly holds the individual train to be a distinct and separate department of the general service, of which department the conductor had the sole and exclusive charge. The court says: "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 owners." And again: "There is, in our judgment, a clear distinction to be made, in their relation to their common principal, between the 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." As abstract propositions of law, the foregoing statements are not open to objection, but the hypothesis deprives them of value when applied to the case under consideration. Is it true that the conductor has absolute direction and control of his train, as assumed in the opinion? Is he not subject to the limitations of time-tables, train dispatchers, special orders, and fixed rules? Has he any discretion as to the speed of the train, or at what stations it shall stop? It is to be observed that the language of the court is general, and not limited to the particular circumstances of this case.

In Baltimore & O. R. Co. v. Baugh the opinion in the Ross Case is fully discussed, and the extremity of its doctrine palpably curtailed. The court says: "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 charge of it, is as to it in the place of the master. But this is a very differ-

ent proposition from that which affirms that each separate piece of work in one of these 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. Even the conclusion enunciated in the Ross Case was not reached by a unanimous court, four of its members being of opinion that it was carrying the thought of a distinct department too far to hold it applicable to the management of a single train."

That the court gives no weight to the bare relation of superior and subordinate appears from the following excerpt from the same opinion: "But the danger from the negligence of one specially in charge of the particular work is as obvious and as great as from that of those who are simply co-workers with him in it. Each is equally with the other an ordinary risk of the employment. If he is paid for one, he is paid for the other; if he assumes the one, he assumes the other. Therefore, so far as the matter of the master's exemption from liability depends upon whether the negligence is one of the ordinary risks of the employment, and, thus assumed by the employé, it includes all co-workers to the same end, whether in control or not. But if the fact that the risk is or is not obvious does not control, what test or rule is there which determines? Rightfully, this: There must be some personal wrong on the part of the master,—some breach of positive duty on his part. If he discharges all that may be called positive duty, and is himself guilty of no neglect, it would seem as though he were absolved from all responsibility, and that the party who caused the injury should be himself alone responsible. It may be said that this is only passing from one difficulty to another, as it leaves still to be settled what is positive duty and what is personal neglect; and yet, if we analyze these matters a little, there will appear less difficulty in the question. Obviously, a breach of positive duty is personal neglect; and the question in any given case is, therefore, what is the positive duty of the master?"

Respecting the duty of the master to furnish and maintain reasonably safe premises, instrumentalities, and machinery for the performance of the work, this court is in harmony with New York rule. These are positive duties, and cannot be delegated by the master so as to relieve him from liability for their improper performance. The persons intrusted with their performance represent the master, and

are vice principals, and not fellow servants, as to those engaged in the use of the instrumentalities thus furnished.[3]

Other states adhere to various combinations and adaptations of the foregoing principles in determining the relations of vice principal and fellow servant.[4]

[3] Northern Pac. R. Co. v. Herbert, 116 U. S. 650, 6 Sup. Ct. 590; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914. See, also, on general subject of fellow servants and vice principals: Locomotive engineer not a fellow servant of hostler's helper engaged in switching engines in the railroad yard. Atchison, T. & S. F. R. Co. v. Mulligan, 14 C. C. A. 547, 67 Fed. 569. The duty of opening and closing a switch in the ordinary operation of a railroad is not one of the personal duties of the master. St. Louis, I. M. & S. Ry. Co. v. Needham, 11 C. C. A. 56, 63 Fed. 107. An engineer in temporary charge of a train cannot waive a rule prohibiting coupling, etc., without a stick. Richmond & D. R. Co. v. Finley, 12 C. C. A. 595, 63 Fed. 228. A telegraph operator and an engineer of train on same road are fellow servants, Baltimore & O. R. Co. v. Camp, 13 C. C. A. 233, 65 Fed. 952; but a train dispatcher is not a fellow servant of an engineer of a train on his division, Baltimore & O. R. Co. v. Camp, supra; Clyde v. Railroad Co., 69 Fed. 673; nor is a car inspector a fellow servant of a brakeman, Atchison, T. & S. F. R. Co. v. Myers, 11 C. C. A. 439, 63 Fed. 793; Terre Haute & I. R. Co. v. Mansberger, 12 C. C. A. 574, 65 Fed. 196. Section men and laborers on repair trains are fellow servants, and employer is not liable to one for injuries caused by negligence of another, though such other has control over a gang of men. Thom v. Pittard, 10 C. C. A. 352, 62 Fed. 232. Negligence of conductor in transmitting order of train master to yard master, whereby brakeman was injured, is the negligence of fellow servant. Martin v. Railway Co., 65 Fed. 384. Mine inspector not fellow servant of miner. Gowen v. Bush, 22 C. C. A. 196, 76 Fed. 349. Mate of vessel not fellow servant of workman on wharf. Hermann v. Mill Co., 71 Fed. 853. Engine hostler and car accountant not fellow servants. Northern Pac. R. Co. v. Craft, 16 C. C. A. 175, 69 Fed. 124. Section foreman and section hands are fellow servants. Northern Pac. R. Co. v. Charless, 162 U. S. 359, 16 Sup. Ct. 848. Foreman in charge, and personally assisting laborers, a fellow servant. Coulson v. Leonard, 77 Fed. 538.

[4] ALABAMA: Smoot v. Railroad Co., 67 Ala. 13; Mobile & O. R. Co. v. Thomas, 42 Ala. 672; Mobile & M. R. Co. v. Smith, 59 Ala. 245; Tyson v. Railroad Co., 61 Ala. 554; Mobile & O. R. Co. v. George, 94 Ala. 199, 10 South. 145; Kansas City, M. & B. R. Co. v. Crocker, 95 Ala. 412, 11 South. 262; Alabama G. S. R. Co. v. Davis (Ala.) 24 South. 862; Buckalew v. Railroad Co., 112 Ala. 146, 20 South. 606; Postal Tel. Cable Co. v. Hulsey, 115 Ala. 193, 22 South. 854. ARIZONA: Hobson v. Railroad Co., 11 Pac. 545; Southern Pac. Co. v. McGill, 44 Pac. 302. ARKANSAS: St. Louis, I. M. & S. Ry.

CONCURRENT AND CONTRIBUTORY NEGLIGENCE.

55. Although the servant assumes the risk of the negligence of his fellow servants, he does not assume that of his master; and, if the master's negligence concurs with that of a fellow servant to produce the injury complained of, the servant may recover therefor, provided the servant's own negligence does not proximately contribute to the injurious result.

Co. v. Rice, 51 Ark. 467, 11 S. W. 699; St. Louis, I. M. & S. Ry. Co. v. Gaines, 46 Ark. 555; Bloyd v. Railway Co., 58 Ark. 66, 22 S. W. 1089; St. Louis S. W. Ry. Co. v. Henson, 61 Ark. 302, 32 S. W. 1079; Hunter v. Bridge, 29 C. C. A. 206, 85 Fed. 379; St. Louis, I. M. & S. Ry. Co. v. Rickman, 45 S. W. 56. CALIFORNIA: Civ. Code, § 1970; McLean v. Mining Co., 51 Cal. 255; McKune v. Railroad Co., 66 Cal. 302, 5 Pac. 482; Beeson v. Mining Co., 57 Cal. 20; Stephens v. Doe, 73 Cal. 27, 14 Pac. 378, approving McLean v. Mining Co., supra; Trask v. Railroad Co., 63 Cal. 96; Burns v. Sennett, 44 Pac. 1068; Foley v. Horseshoe Co., 115 Cal. 184, 47 Pac. 42; Donnelly v. Bridge Co., 117 Cal. 417, 49 Pac. 559. COLORADO: Wells v. Coe, 9 Colo. 159, 11 Pac. 50; Orman v. Mannix, 17 Colo. 564, 30 Pac. 1037. The principle of the "Ross Case" is approved in the following: Colorado M. Ry. Co. v. Naylon, 17 Colo. 501, 30 Pac. 249; Denver, S. P. & P. R. Co. v. Discoll, 12 Colo. 520, 21 Pac. 708; Grant v. Varney, 21 Colo. 329, 40 Pac. 771; Colorado Coal & Iron Co. v. Lamb, 6 Colo. App. 255, 40 Pac. 251; Denver Tramway Co. v. O'Brien, 8 Colo. App. 74, 44 Pac. 766. CONNECTICUT: Darrigan v. Railroad Co., 52 Conn. 285; Wilson v. Linen Co., 50 Conn. 433; McElligott v. Randolph, 61 Conn. 157, 22 Atl. 1094; Sullivan v. Railroad Co., 62 Conn. 209, 25 Atl. 711. DELAWARE: Foster v. Pusey, 8 Houst. 168, 14 Atl. 545; Wheatley v. Railroad Co., 1 Marv. 305, 30 Atl. 660. FLORIDA: Parrish v. Railroad Co., 28 Fla. 251, 9 South. 696. GEORGIA: Code 1882, §§ 2083, 2202, 3036; Baker v. Railroad Co., 68 Ga. 699; Western & A. R. Co. v. Adams, 55 Ga. 279; Keith v. Coal Co., 81 Ga. 49, 7 S. E. 166; McGovern v. Manufacturing Co., 80 Ga. 227, 5 S. E. 492; Augusta Factory v. Barnes, 72 Ga. 217; Central R. Co. v. De Bray, 71 Ga. 406; Atlanta Cotton Factory Co. v. Speer, 69 Ga. 137; Georgia Railroad & Banking Co. v. Miller, 90 Ga. 571, 16 S. E. 939; Cates v. Itner, 104 Ga. 679, 30 S. E. 884; Boswell v. Barnhart, 96 Ga. 521, 23 S. E. 414; Taylor v. Marble Co., 99 Ga. 512, 27 S. E. 768; Blackman v. Electric Co., 102 Ga. 64, 29 S. E. 120. INDIANA: Krueger v. Railway Co., 111 Ind. 51, 11 N. E. 957; Pennsylvania Co. v. Whitcomb, 111 Ind. 212, 12 N. E. 380; Indiana Car Co. v. Parker, 100 Ind. 181; Atlas Engine Works v. Randall, Id. 293; Louisville, N. A. & C. Ry. Co. v. Buck, 116 Ind. 566, 19 N. E. 453; Jus-

It has already been stated that the master cannot avail himself of the defense of fellow servant, if the negligent employé causing the injury had been carelessly or improperly selected or hired, and, furthermore, that this defense cannot be urged whenever the offending

tice v. Pennsylvania Co., 130 Ind. 321, 30 N. E. 303; Clarke v. Same, 132 Ind. 199, 31 N. E. 808 (see, also, cases cited in Bailey, Mast. Liab. p. 279, etc.); Neutz v. Coke Co., 139 Ind. 411, 38 N. E. 324, 39 N. E. 147; City of Lebanon v. McCoy, 12 Ind. App. 500, 40 N. E. 700; Indiana, I. & I. Ry. Co. v. Snyder, 140 Ind. 647, 39 N. E. 912; Ohio & M. Ry. Co. v. Stein, 140 Ind. 61, 39 N. E. 246; Louisville, N. A. & C. Ry. Co. v. Isom, 10 Ind. App. 691, 38 N. E. 423; Hodges v. Wheel Co. (Sup.) 52 N. E. 391; Perigo v. Brewing Co. (App.) 52 N. E. 462; Peirce v. Oliver, 18 Ind. App. 87, 47 N. E. 485; American Telephone & Telegraph Co. v. Bower, 20 Ind. App. 32, 49 N. E. 182; Louisville, N. A. & C. Ry. Co. v. Heck, 151 Ind. 292, 50 N. E. 988. IOWA: The liability of railways for negligence in their operation is regulated by statute (Code 1873, § 1307); but the statute has received a rather limited construction as to what constitues the "operation" of a railroad. Stroble v. Railway Co., 70 Iowa, 555, 31 N. W. 63; Foley v. Railway Co., 64 Iowa, 644, 21 N. W. 124; Malone v. Railway Co., 65 Iowa, 417, 21 N. W. 756. The plaintiffs in following cases held to have been engaged in "operating," within the statute: Schroeder v. Railroad Co., 47 Iowa, 375; McKnight v. Construction Co., 43 Iowa, 406; Frandsen v. Railroad Co., 36 Iowa, 372; Deppe v. Same, Id. 52; Pyne v. Railroad Co., 54 Iowa, 223, 6 N. W. 281. Otherwise in the following: Malone v. Railway Co., 65 Iowa, 417, 21 N. W. 756; Potter v. Railroad Co., 46 Iowa, 399; Foley v. Same, 64 Iowa, 644, 21 N. W. 124; Luce v. Railway Co., 67 Iowa, 75, 24 N. W. 600; Stroble v. Railway Co., 70 Iowa, 555, 31 N. W. 63. Mere superiority of grade is immaterial, Peterson v. Mining Co., 50 Iowa, 673; but a person charged with the exercise of primary duties represents the master, Brann v. Railroad Co., 53 Iowa, 595, 6 N. W. 5; Theleman v. Moeller, 73 Iowa, 108, 34 N. W. 765; Hathaway v. Railway Co., 92 Iowa, 337, 60 N. W. 651; Blazenic v. Coal Co., 102 Iowa, 706, 72 N. W. 292; Fosburg v. Fuel Co., 93 Iowa, 54, 61 N. W. 400; Hathaway v. Railway Co., 92 Iowa, 337, 60 N. W. 651. KANSAS: Hannibal & St. J. Ry. Co. v. Fox, 31 Kan. 586, 3 Pac. 320; Atchison, T. & S. F. R. Co. v. McKee, 37 Kan. 592, 15 Pac. 484; St. Louis & S. F. Ry. Co. v. Weaver, 35 Kan. 412, 11 Pac. 408; Missouri Pac. Ry. Co. v. Dwyer, 36 Kan. 58, 12 Pac. 352; Walker v. Gillett, 59 Kan. 214, 52 Pac. 442. KENTUCKY: Louisville & N. R. Co. v. Collins, 2 Duv. 117; Louisville, C. & L. R. Co. v. Cavens' Adm'r, 9 Bush, 566; Illinois Cent. R. Co. v. Hilliard, 37 S. W. 75; Cincinnati, N. O. & T. P. Ry. Co. v. Palmer, 98 Ky. 382, 33 S. W. 199; Ashland Coal, Iron & Railway Co. v. Wallace's Adm'r, 42 S. W. 744; Edmondson v. Railway Co., 49 S. W. 200, 448. LOUISIANA: The Ross Case followed: Towns v. Railway Co., 37 La. Ann. 632, 55 Am. Rep. 508; Faren

employé was at the time of the injury engaged in the discharge of a primary duty owed by the master to all his servants, or was, in other words, a vice principal; but the true rule is much broader and more

v. Sellers, 39 La. Ann. 1011, 3 South. 363; Mattise v. Manufacturing Co., 46 La. Ann. 1535, 16 South. 400. MAINE: Doughty v. Log Driving Co., 76 Me. 143; Shanny v. Androscoggin Mills, 66 Me. 426; Wormell v. Railroad Co., 79 Me. 397, 10 Atl. 49. MARYLAND: Wonder v. Railroad Co., 32 Md. 411; Hanrathy v. Railway Co., 46 Md. 280; Yates v. Iron Co., 69 Md. 370, 16 Atl. 280; Baltimore Elevator Co. v. Neal, 65 Md. 438, 5 Atl. 338; Norfolk & W. R. Co. v. Hoover, 79 Md. 253, 29 Atl. 994. MISSISSIPPI: Code 1892, § 3559; New Orleans, J. & G. N. R. Co. v. Hughes, 49 Miss. 258; Howd v. Railroad Co., 50 Miss. 178; Illinois Cent. R. Co. v. Jones, 16 South. 300; MISSOURI: Dayharsh v. Railroad Co., 103 Mo. 570, 15 S. W. 554; Miller v. Railway Co., 109 Mo. 350, 19 S. W. 58; Moore v. Railway Co., 85 Mo. 588; Smith v. Railway Co., 92 Mo. 359, 4 S. W. 129; Foster v. Railway Co., 115 Mo. 165, 21 S. W. 916. Track repairer and engineer are not fellow servants, Schlereth v. Railway Co., 115 Mo. 87, 21 S. W. 1110; but brakeman upon one and fireman upon another freight train are fellow servants, Relyea v. Railroad Co., 112 Mo. 86, 20 S. W. 480; Sheehan v. Prosser, 55 Mo. App. 569; Musick v. Packing Co., 58 Mo. App. 322; Jones v. Railway Co., 125 Mo. 666, 28 S. W. 883; Rodney v. Railroad Co., 127 Mo. 676, 28 S. W. 887; Card v. Eddy, 129 Mo. 510, 28 S. W. 753, 979; Donahoe v. City of Kansas City, 136 Mo. 657, 38 S. W. 571; Bradley v. Railway Co., 138 Mo. 293, 39 S. W. 763. MONTANA: Regulated by statute. Comp. St. 1888, p. 817, § 697. NEBRASKA: Chicago, St. P., M. & O. Ry. Co. v. Lundstrom, 16 Neb. 254, 20 N. W. 200; Burlington & M. R. R. Co. v. Crockett, 19 Neb. 138, 26 N. W. 921; Sioux City & P. R. Co. v. Smith, 22 Neb. 775, 36 N. W. 285; Chicago, B. & Q. R. Co. v. Howard, 45 Neb. 570, 63 N. W. 872; Omaha & R. V. Ry. Co. v. Crow, 54 Neb. 747, 74 N. W. 1066; Chicago, B. & Q. R. Co. v. Kellogg, 54 Neb. 127, 74 N. W. 454; Omaha & R. V. Ry. Co. v. Krayenbuhl, 48 Neb. 553, 67 N. W. 447; Union Pac. R. Co. v. Doyle, 50 Neb. 555, 70 N. W. 43; Clark v. Hughes, 51 Neb. 780, 71 N. W. 776. NEW HAMPSHIRE: Jaques v. Manufacturing Co., 66 N. H. 482, 22 Atl. 552. NEW JERSEY: Rogers Locomotive & M. Works v. Hand, 50 N. J. Law, 464, 14 Atl. 766; McAndrews v. Burns, 39 N. J. Law, 117; Ewan v. Lippincott, 47 N. J. Law, 192. The separate department rule does not obtain, and those engaged in making instrumentalities may well be fellow servants of those who are to use them. Rogers Locomotive & M. Works v. Hand, 50 N. J. Law, 464, 14 Atl. 766; Harrison v. Railway Co., 31 N. J. Law, 293. Nor does mere superiority of grade affect the relation. O'Brien v. Dredging Co., 53 N. J. Law, 291, 21 Atl. 324; Hardy v. Railroad Co., 57 N. J. Law, 505, 31 Atl. 281; Ingebretsen v. Steamship Co. (Err. & App.) 31 Atl. 619. NEW MEXICO: Cerrillos Coal R. Co. v. Deserant, 49 Pac. 807. NORTH CAROLINA: Ross Case, 112 U. S. 377, 5 Sup. Ct. 184, followed; Mason v. Rail-

comprehensive than this, and it may be stated generally that whenever the master has been guilty of the breach of a personal duty to a

road Co., 111 N. C. 482, 16 S. E. 698; Patton v. Railroad Co., 96 N. C. 455, 1 S. E. 863. Superiority of grade no test. Webb v. Railroad Co., 97 N. C. 387, 2 S. E. 440; Logan v. Railroad Co., 116 N. C. 940, 21 S. E. 959; Shadd v. Railroad Co., 96 N. C. 968, 21 S. E. 554; Pleasants v. Railroad Co., 121 N. C. 492, 28 S. E. 267. NORTH DAKOTA: The rule of the federal courts is quite closely followed. Ell v. Railroad Co., 1 N. D. 336, 48 N. W. 222. Primary duties cannot be delegated so as to relieve the master of liability. Ell v. Railroad Co., supra. OREGON: Miller v. Southern Pac. Co., 20 Or. 285, 26 Pac. 70; Carlson v. Railway Co., 21 Or. 450, 28 Pac. 497. Switchman is fellow servant of train operatives. Miller v. Southern Pac. Co., 20 Or. 285, 26 Pac. 70. The question of superiority of grade does not appear to be fully settled. Knahtla v. Railway Co., 21 Or. 136, 27 Pac. 91; Fisher v. Railway Co., 22 Or. 533, 30 Pac. 429; Mast v. Kern, 54 Pac. 950. RHODE ISLAND: Separate department rule does not obtain. Brodeur v. Valley Falls Co., 16 R. I. 448, 17 Atl. 54. Station agent held to be fellow servant of brakeman injured through negligence of former. Gaffney v. Railroad Co., 15 R. I. 456, 7 Atl. 284, following Brown v. Railway Co., 31 Minn. 553, 18 N. W. 834, and Hodgkins v. Railroad Co., 119 Mass. 419; Parker v. Railroad Co., 18 R. I. 773, 30 Atl. 849; Morgridge v. Telephone Co., 39 Atl. 328. SOUTH CAROLINA: Master is not relieved of responsibility by delegating primary duties. Calvo v. Railroad Co., 23 S. C. 526; Couch v. Railroad Co., 22 S. C. 557; Coleman v. Railroad Co., 25 S. C. 446. Doctrine of Ross Case is fully indorsed. Boatwright v. Railroad Co., 25 S. C. 128; Whaley v. Bartlett, 42 S. C. 454, 20 S. E. 745; Wilson v. Railway Co., 51 S. C. 79, 28 S. E. 91. TENNESSEE: Separate department theory recognized as to railroads. Nashville & C. R. Co. v. Carroll, 6 Heisk. 347; Knoxville Iron Co. v. Dobson, 7 Lea, 367. Superiority of grade is, in some degree, a test, Knoxville Iron Co. v. Dobson, 7 Lea, 367; Louisville & N. R. Co. v. Lahr, 86 Tenn. 335, 6 S. W. 663; East Tennessee & W. N. C. R. Co. v. Collins, 85 Tenn. 227, 1 S. W. 883; a crew who negligently loaded a car with lumber are fellow servants of those who operate the train, Louisville & N. R. Co. v. Gower, 85 Tenn. 465, 3 S. W. 824; conductor being in charge of train, engineer is fellow servant of brakeman, East Tennessee V. & G. Ry. Co. v. Smith, 89 Tenn. 114, 14 S. W. 1077; and brakemen, brake repairers, and car inspectors are fellow servants, Nashville, C. & St. L. Ry. Co. v. Foster, 10 Lea, 351; Nashville, C. & St. L. R. Co. v. Gann (Sup.) 47 S. W. 493; National Fertilizer Co. v. Travis (Sup.) 49 S. W. 832; Knox v. Railway Co. (Sup.) 47 S. W. 491. TEXAS: Doctrine not well settled in this state. International & G. N. Ry. Co. v. Ryan, 82 Tex. 565, 18 S. W. 221; Gulf, C. & S. F. R. Co. v. Wells (Sup.) 16 S. W. 1025; Missouri Pac. Ry. Co. v. Williams, 75 Tex. 4, 12 S. W. 835; Texas & P. Ry. Co. v. Reed, 88 Tex. 439, 31 S. W. 1058; San Antonio & A. P. Ry. Co. v. McDonald (Civ. App.) 31 S. W. 72; San Antonio & A. P. Ry. Co. v. Kel-

servant, whereby injury has resulted, he cannot defend by saying that the negligence of a fellow servant also contributed to produce the

ler, 11 Tex. Civ. App. 569, 32 S. W. 847; Texas & N. O. Ry. Co. v. Bingle (Civ. App.) 41 S. W. 90; San Antonio & A. P. Ry. Co. v. Taylor (Civ. App.) 35 S. W. 855; Gulf, C. & S. F. Ry. Co. v. Warner, 89 Tex. 475, 35 S. W. 364; Southern Pac. Co. v. Ryan (Civ. App.) 29 S. W. 527; International & G. N. Ry. Co. v. Sipole, Id. 686; San Antonio & A. P. Ry. Co. v. Bowles (Civ. App.) 30 S. W. 89; Same v. Reynolds, Id. 846; Texas & N. O. R. Co. v. Tatman, 10 Tex. Civ. App. 434, 31 S. W. 333; Gulf, C. & S. F. Ry. Co. v. Calvert, 11 Tex. Civ. App. 297, 32 S. W. 246; San Antonio & A. P. Ry. Co. v. Harding, 11 Tex. Civ. App. 497, 33 S. W. 373; Sanner v. Railway Co. (Civ. App.) 43 S. W. 533; Terrell Compress Co. v. Arrington (Civ. App.) 48 S. W. 59; Houston & T. C. R. Co. v. Patterson, Id. 747; Same v. Stuart, Id. 799. UTAH: Anderson v. Mining Co., 16 Utah, 28, 50 Pac. 815; Dryburg v. Milling Co., 55 Pac. 367. VERMONT: Respondeat superior does not apply where an order is negligently given by a servant in command to an inferior servant. Davis v. Railroad Co., 55 Vt. 84. The master is jealously held to the performance of his primary duties, the early decision in Hard v. Railroad Co., 32 Vt. 473, being disapproved. VIRGINIA: Norfolk & W. R. Co. v. Donnelly's Adm'r, 88 Va. 853, 14 S. E. 692; Richmond & D. R. Co. v. Norment, 84 Va. 167, 4 S. E. 211; Moon's Adm'r v. Railroad Co., 78 Va. 745; Ayer's Adm'x v. Railroad Co., 84 Va. 679, 5 S. E. 582; Johnson's Adm'x v. Railroad Co., 84 Va. 713, 5 S. E. 707; Richmond & D. R. Co. v. Williams, 86 Va. 165, 9 S. E. 990; Norfolk & W. R. Co. v. Brown, 91 Va. 668, 22 S. E. 496; McDonald's Adm'r v. Railroad Co., 95 Va. 98, 27 S. E. 821; Norfolk & W. R. Co. v. Houchins' Adm'r, 95 Va. 398, 28 S. E. 578; Richmond Locomotive Works v. Ford, 94 Va. 627, 27 S. E. 509; Moore Lime Co. v. Richardson's Adm'r, 95 Va. 326, 28 S. E. 334. WASHINGTON: Sayward v. Carlson, 1 Wash. St. 29, 23 Pac. 830; Zintek v. Mill Co., 6 Wash. 178, 32 Pac. 997; Ogle v. Jones, 16 Wash. 319, 47 Pac. 747; McDonough v. Railway Co., 15 Wash. 244, 46 Pac. 334; Bateman v. Railway Co., 54 Pac. 996; Hughes v. Improvement Co., 55 Pac. 119. WEST VIRGINIA: If the inferior servant is substantially under the control of the superior, they are not fellow servants. Madden's Adm'r v. Railroad Co., 28 W. Va. 610. A car checker and engineer operating switch engine in same yard are fellow servants, Beuhring's Adm'r v. Railway Co., 37 W. Va. 502, 16 S. E. 435; but brakeman and conductor on different trains are not fellow servants, Daniel's Adm'r v. Railway Co., 36 W. Va. 397, 15 S. E. 162; Johnson v. Railway Co., 36 W. Va. 73, 14 S. E. 432; Flannegan v. Railway Co., 40 W. Va. 436, 21 S. E. 1028; Jackson v. Railroad Co., 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258. WISCONSIN: The master cannot delegate primary duties so as to escape liability, Brabbits v. Railway Co., 38 Wis. 289; and a suitable place for doing the work must be not only provided, but properly maintained, Bessex v. Railway Co., 45 Wis. 477; and must use ordinary care in selection of servants, Heine v. Railway Co., 58 Wis.

injury.[1] If a machine is defective or improper for the intended use, the employer is liable for injury to an employé caused thereby, although the negligence of a fellow servant may have contributed to the result.[2] If the servant is, however, responsible for the selection of an improper instrument, other and suitable ones being available, it follows, as of course, that he cannot recover, as no fault rests on the master.[3]

531, 17 N. W. 420. The Wisconsin doctrine closely follows the New York rule. On the general subject, see Johnson v. Bank, 79 Wis. 414, 48 N. W. 712; Dwyer v. Express Co., 82 Wis. 307, 52 N. W. 304; McClarney v. Railway Co., 80 Wis. 277, 49 N. W. 963; Cadden v. Barge Co., 88 Wis. 409, 60 N. W. 800; Eingartner v. Steel Co., 94 Wis. 70, 68 N. W. 664; Smith v. Railway Co., 91 Wis. 503, 65 N. W. 183; Prybilski v. Railway Co., 98 Wis. 413, 74 N. W. 117; Jarnek v. Dock Co., 97 Wis. 537, 73 N. W. 62; McMahon v. Mining Co., 101 Wis. 102, 76 N. W. 1098. WYOMING: The few decisions in this state seem to incline strongly to the rule of the federal court. McBride v. Railway Co., 3 Wyo. 247, 21 Pac. 687.

§ 55. [1] Franklin v. Railroad Co., 37 Minn. 409, 34 N. W. 898; Craver v. Christian, 36 Minn. 413, 31 N. W. 457; Grand Trunk Ry. Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493; Stringham v. Stewart, 100 N. Y. 516, 3 N. E. 575; Elmer v. Locke, 135 Mass. 575; Pullman Palace-Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285; Browning v. Railway Co., 124 Mo. 55, 27 S. W. 644; Denver & R. G. R. Co. v. Sipes (Colo. Sup.) 55 Pac. 1093; International & G. N. R. Co. v. Bonatz (Tex. Civ. App.) 48 S. W. 767; Missouri, K. & T. Ry. Co. of Texas v. Hannig (Tex. Civ. App.) 49 S. W. 116; Wheatley v. Railroad Co., 1 Marv. 305, 30 Atl. 660; Lago v. Walsh, 98 Wis. 348, 74 N. W. 212; Jensen v. The Joseph B. Thomas, 81 Fed. 578; Wright v. Southern Pac. Co., 14 Utah, 383, 46 Pac. 374; Handley v. Mining Co., 15 Utah, 176, 49 Pac. 295.

[2] Young v. Railway Co., 46 Fed. 160, affirmed in 1 C. C. A. 428, 49 Fed. 723. See, also, Rogers v. Leyden, 127 Ind. 50–53, 26 N. E. 210; Richmond & D. R. Co. v. George, 88 Va. 223, 13 S. E. 429; Northwestern Fuel Co. v. Danielson, 6 C. C. A. 636, 57 Fed. 915–919; Browning v. Railway Co., 124 Mo. 55, 27 S. W. 644; Steinke v. Match Co., 87 Wis. 477, 58 N. W. 842; Franklin v. Railroad Co., 37 Minn. 409, 34 N. W. 898; Gardner v. Railroad Co., 150 U. S. 349, 14 Sup. Ct. 140; Leonard v. Kinnare, 174 Ill. 532, 51 N. E. 688; International & G. N. R. Co. v. Zapp (Tex. Civ. App.) 49 S. W. 673; Chicago & N. W. Ry. Co. v. Gillison, 173 Ill. 264, 50 N. E. 657; Lauter v. Duckworth, 19 Ind. App. 535, 48 N. E. 864; Stucke v. Railroad Co., 50 La. Ann. 172, 23 South. 342; Troxler v. Railway Co., 122 N. C. 902, 30 S. E. 117.

[3] Thyng v. Railroad Co., 156 Mass. 13, 30 N. E. 169; Hefferen v. Railroad Co., 45 Minn. 471, 48 N. W. 1.

SAME—SERVANT'S OWN NEGLIGENCE AS PROXIMATE CAUSE.

56. In any event the servant cannot recover from the master if his own negligence proximately caused the injury complained of.

In considering the reciprocal duties of master and servant, and the involved doctrine of fellow servant, it must not be overlooked that the law of contributory negligence is in no degree abated, and may always be shown as a complete bar to recovery. Thus, the fact that a stop block at the end of a trestle was defective will not render the company liable for the death of an engineer who ran his engine off the end of the trestle, when the accident was caused by running the engine at such a rate of speed that no block would have been effective.[1]

§ 56. [1] Louisville & N. R. Co. v. Stutts, 105 Ala. 368, 17 South. 29; Central Railroad & Banking Co. v. Brantley, 93 Ga. 259, 20 S. E. 98; City of Lebanon v. McCoy, 12 Ind. App. 500, 40 N. E. 700; Nelling v. Railroad Co., 98 Iowa, 554, 63 N. W. 568, 67 N. W. 404; Light v. Railway Co., 93 Iowa, 83, 61 N. W. 380; Duval v. Hunt, 34 Fla. 85, 15 South. 876. A fireman falling asleep in the roundhouse with foot on track, Price v. Railroad Co., 77 Mo. 508; conductor failing to stop his train in time to prevent collision, Chicago & N. W. R. Co. v. Snyder, 117 Ill. 376, 7 N. E. 604; Clark v. Railroad Co., 80 Hun, 320, 30 N. Y. Supp. 126; brakeman uncoupling cars contrary to rules, Lockwood v. Railway Co., 55 Wis. 50, 12 N. W. 401; Robinson v. Manufacturing Co., 143 Mass. 528, 10 N. E. 314; Crabell v. Coal Co., 68 Iowa, 751, 28 N. W. 56.

CHAPTER IV.

LIABILITY OF MASTER TO THIRD PERSONS.

NATURE OF MASTER'S LIABILITY.

57. The master is liable for the negligence of his servant occurring within the course of his employment; but not

(a) When the negligence concerns matters foreign to the general business; nor

(b) When the business is transacted by an independent contractor.

The liability of the master to third persons for the negligent or wrongful acts of those in his employment is based on the broad principle of the general security of society and business. As every one is responsible for the results of his own negligence, a person may not devest himself of liability by deputizing another to act for him, and then disclaiming the consequence of his acts, if they result in injury to the person, property, or reputation of another. In the early case of Quarman v. Burnett,[1] Parke, B., was of the opinion that he was properly held liable "who selected him as his servant, from the knowledge of, or belief in, his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey."

§ 57. [1] 6 Mees. & W. 499. See, also, Hern v. Nichols, 1 Salk. 289. And in Lane v. Cotton, 12 Mod. 473, the liability of the master for injuries inflicted by his servant on a stranger was placed on the ground that the stranger had had no hand in selecting the servant.

Thus, where a servant was ordered to shovel snow from a roof, his master was held liable to a third person for his carelessness in performing the work.[2]

And the broad principle of this rule of law cannot be narrowed or thwarted by permitting the master to plead that the servant was acting contrary to specific instructions or outside the definite bounds of his authority. To permit this defense would be to abrogate the doctrine of respondeat superior. And so, where the defendants sent their servant to make a test of a boiler under a pressure not to exceed 150 pounds, and he, acting partly on the request of the purchaser and partly on his own judgment, raised the pressure to 198 pounds, and then held down the lever of the safety valve so that the boiler exploded and injured a passer-by, it was held that, although the servant's action was foolhardy and contrary to express instructions, it was nevertheless committed within the scope of defendants' business, and they were liable.[3] Although a strict enforcement of the rule frequently appears to work a hardship on one who has used every precaution in the choice of his servants, it is, nevertheless, so generally ingrafted in the conduct of all lines of business and society that the importance of its maintenance can hardly be overestimated.[4]

[2] Althorf v. Wolfe, 22 N. Y. 355; where a driver in defendant's employment carelessly ran over plaintiff, a pedestrian, Groth v. Washburn, 89 N. Y. 615; where an apprentice borrowed his employer's team to take a ride, and carelessly injured plaintiff, Sherwood v. Fischer, 3 Hun (N. Y.) 606.

[3] Ochsenbein v. Shapley, 85 N. Y. 214; and where wheat was consigned to Albany, and the master of the boat, on reaching that point, was directed by consignees to proceed to a point further on, before reaching which the cargo was injured, Gibbs v. Van Buren, 48 N. Y. 661; Quinn v. Power, 87 N. Y. 535. The doctrine of "particular command," as a test of the master's liability, was in force in the time of Edward I., and is thus stated by Bacon: "In committing of lawful authority to another, a party may limit it as strictly as it pleaseth him; and if the party authorized do transgress his authority, though it be but in circumstance expressed, yet it shall be void in the whole act." Bac. Max. 16. See, also, Jag. Torts, p. 249.

[4] The historic origin of the rule is uncertain, but is ascribed by Chancellor Kent to the Roman law. "The true explanation of the doctrine seems to be historical, dating back to the period of the Roman law, when servants were slaves, for whom paterfamilias was responsible as part of his general responsibility for the family which he represented and governed." 2 Kent, Comm. (12th Ed.) 260, note 1.

RELATIONSHIP.

58. To establish the master's liability, it is essential

(a) That the relation of principal and agent exist at the time of the wrongful act.

(b) That the wrongful act be committed fairly within the scope of the general business for which the servant is engaged.

The relationship may be the result of definite agreement or may be inferable from the circumstances of a given case, but its establishment by some means is a sine qua non to the application of the doctrine of respondeat superior.[1] And, when the privity is destroyed, it follows, as a corollary, that the responsibility of the master terminates.[2] And if one knowingly and customarily avails himself of the services of another, although he has not employed him and does not pay him, he will be liable as an employer for his negligence in the business in which he serves him. Thus, where the defendant railroad used the roundhouse of another company, and a servant of the latter was accustomed to bring defendant's engines out when required, while so engaged he was held to be in the service of the defendant, which was liable for his negligence while so employed.[3]

The cases are somewhat conflicting and unsatisfactory in defining the employer's liability when the injury is caused by the negligence of one employed by a servant without the authority, sanction, or knowledge of the master. In at least some of the cases ordinarily cited to affirm the master's liability in such circumstances, examination discloses that a quasi custom or quasi knowledge was established

§ 58. [1] Thorpe v. Railroad Co., 76 N. Y. 402; Dwinelle v. Same, 120 N. Y. 117, 24 N. E. 319; Pennsylvania Co. v. Roy, 102 U. S. 451; Wood v. Cobb, 13 Allen (Mass.) 58; Kimball v. Cushman, 103 Mass. 194; Ward v. Fibre Co., 154 Mass. 419, 28 N. E. 299; Welsh v. Parrish, 148 Pa. St. 599, 24 Atl. 86; Corcoran v. Railroad Co., 6 C. C. A. 231, 56 Fed. 1014.

[2] A discharged employé maliciously misplaced a switch. East Tennessee, V. & G. R. Co. v. Kane, 92 Ga. 187, 18 S. E. 18; Illinois Cent. R. Co. v. Andrews, 78 Ill. App. 80; Healey v. Lothrop, 171 Mass. 263, 50 N. E. 540.

[3] Missouri, K. & T. Ry. Co. v. McGlamory (Tex. Civ. App.) 34 S. W. 359; Denver & R. G. R. Co. v. Gustafson, 21 Colo. 393, 41 Pac. 505; Wellman v. Miner, 19 Misc. Rep. 644, 44 N. Y. Supp. 417.

by the evidence,[4] while in a few instances the liability is unqualifiedly asserted [5] or denied.[6] If the injury is caused by the impertinent interference of a stranger, without the request or consent of the servant, it is evident that the master cannot be held responsible.[7]

While in many cases the existence of the relationship is undisputed, it frequently happens that some difficulty is experienced in determining the proper person to be charged with liability as master. In such cases, reference must be had to the contract of service as well as to the particular circumstances. When a contractor let his servant and team to the city by the day, although it appeared that he was under the exclusive control of the city, his master was nevertheless held liable for damages caused by the horse kicking a loose shoe through an adjacent window while his driver was beating him.[8] In determining who is the master, the question of choice or selection of the servant is important, although not decisive.[9] The master, in hiring out his servant, may so completely part with his authority and control over him as to be released from the responsibility, which is thereby shifted to his immediate employer.[10] The matter of selec-

[4] Gleason v. Amsdell, 9 Daly (N. Y.) 393; Simons v. Monier, 29 Barb. (N. Y.) 419.

[5] Suydam v. Moore, 8 Barb. (N. Y.) 358; Althorf v. Wolfe, 22 N. Y. 355; Ryan v. Boiler Works, 68 Mo. App. 148; Smaltz v. Boyce, 109 Mich. 382, 69 N. W. 21; Booth v. Mister, 7 Car. & P. 66.

[6] Jewell v. Railway Co., 55 N. H. 84.

[7] Edwards v. Jones, 67 How. Prac. 177.

[8] Huff v. Ford, 126 Mass. 24; Quinn v. Construction Co., 46 Fed. 506. See, also, Wyllie v. Palmer, 137 N. Y. 248, 33 N. E. 381; Colvin v. Peabody, 155 Mass. 104, 29 N. E. 59. And, in a contract to manufacture and ship goods, the designation of a certain person to care for the goods does not make him an agent of both parties, so as to relieve the shipper from liability for his negligence or incompetency. Paige v. Roeding, 96 Cal. 388, 31 Pac. 264.

[9] A person employed by master's servant without his knowledge or authority is not his servant, Mangan v. Foley, 33 Mo. App. 250; and the person so employed assumes the risks of his employment, Blair v. Railroad Co., 60 Mich. 124, 26 N. W. 855; Jewell v. Railway Co., 55 N. H. 84; Gahagan v. Aermoter Co., 67 Minn. 252, 69 N. W. 914; Hess v. Mining Co., 178 Pa. St. 239, 35 Atl. 990.

[10] Brown v. Smith, 86 Ga. 274, 12 S. E. 411; Burke v. De Castro, 11 Hun (N. Y.) 354; Sweeny v. Murphy, 32 La. Ann. 628; McCauley v. Casualty Co., 16 Misc. Rep. 574, 38 N. Y. Supp. 773; Buckingham v. Vincent, 23 App. Div. 238, 48 N. Y. Supp. 747.

tion is but one element to be considered in the determination of the question. It is necessary to go further, and ascertain who was in the exercise of full control and supervision of his movements at the time of the misconduct, and especially whose interest and will he represented and in whose place he stood.[11]

This brings us to the consideration of the relation which exists in a well-defined class of cases where the owner hires or leases some specific piece of property, as a team, a boat, or an engine, and furnishes servants to operate or care for it. In such cases, the lessee acquires a limited authority or control over such servants, but it is directed only to results, not to the means or the manner of the accomplishment, and they are, almost uniformly, held to remain the servants of the lessor, who is responsible for their negligence. Thus, a stevedore, undertaking to unload a ship at defendants' dock, leased from defendants, for the purpose of handling the cargo, a portable engine, with engineer and power to operate it. Through the carelessness of the engineer in lowering a "sling" of boxes, plaintiff was injured, and defendants were held liable as masters.[12]

It is very evident that, for all torts committed at his express direction, or which he has subsequently assented to, the master is liable; as if the master directs his servant to perpetrate a fraud, maintain a nuisance, commit a trespass, or convert to his own use the property of another.[13] When these torts are the direct result of deliberate

[11] Corbin v. American Mills, 27 Conn. 274; Wyllie v. Palmer, 137 N. Y. 248, 33 N. E. 381; Paige v. Roeding, 96 Cal. 388, 31 Pac. 264; Quinn v. Construction Co., 46 Fed. 506; Higgins v. Telegraph Co., 8 Misc. Rep. 433, 28 N. Y. Supp. 676. In fixing the responsibility for the negligence where the injury occurred in the management or use of some specific piece of property, as a vehicle or machine, it is sufficient, prima facie, to prove the ownership, the presumption arising that the owner exercised control of his property. Norris v. Kohler, 41 N. Y. 42; McCoun v. Railroad Co., 66 Barb. (N. Y.) 338; Joyce v. Capel, 8 Car. & P. 370.

[12] Coyle v. Pierrepont, 37 Hun (N. Y.) 379, overruling 33 Hun (N. Y.) 311; Currier v. Henderson, 85 Hun, 300, 32 N. Y. Supp. 953; Byrne v. Railroad Co., 9 C. C. A. 666, 61 Fed. 605; Crockett v. Calvert, 8 Ind. 127; Ames v. Jordan, 71 Me. 540; Union Steamship Co. v. Claridge, 6 Reports, 434; Id. [1894] App. Cas. 185; Dalyell v. Tyrer, El., Bl. & El. 899. But see, per contra, Burke v. De Castro, 11 Hun (N. Y.) 354; Thiry v. Malting Co., 37 App. Div. 391, 56 N. Y. Supp. 85; Samullian v. Machine Co., 168 Mass. 12, 46 N. E. 98.

[13] Southerne v. Howe, 2 Rolle, 5–26; State v. Smith, 78 Me. 260, 4 Atl. 412;

intention on the master's part, he is chargeable with responsibility in a like degree as if he had performed the acts in person. The doctrine of identification of master and servant is exemplified. And the ratification by the master of his servant's torts rests on the same principle.[14]

A servant is hired to assist in the prosecution and furtherance of his master's business, and, to make the master liable for his negligent act, it must be committed in the line of the general employment.[15] If the act is foreign to the purpose for which he was hired, or occurs in the transaction of a matter not reasonably incident to the business, the employer is not responsible.[16] Thus, where a boy was invited by defendant's teamster to ride on the dump cart which he was driving, and by request took the reins, the driver going to sleep, and fell off and was injured, it was held that defendant was not liable, as the invitation of the teamster was outside the scope of his employment.[17]

Ketcham v. Newman (1894) 141 N. Y. 205, 36 N. E. 197; Carman v. Railroad Co., 4 Ohio St. 399; Hobdy v. Margotto, 4 Lack. Leg. News, 17; Little Rock Traction & Electric Co. v. Walker (Ark.) 45 S. W. 57; Robinson v. Railway Co., 94 Wis. 345, 68 N. W. 961.

[14] International & G. N. Ry. Co. v. Miller, 9 Tex. Civ. App. 104, 28 S. W. 233; Fletcher v. Railroad Co., 168 U. S. 135, 18 Sup. Ct. 35; East St. Louis Connecting Ry. Co. v. Reames, 173 Ill. 582, 51 N. E. 68; Eagle Const. Co. v. Wabash R. Co., 71 Mo. App. 626; Stranahan Bros. Catering Co. v. Coit, 55 Ohio St. 398, 45 N. E. 634.

[15] Lovingston v. Bauchens, 34 Ill. App. 544; Osborne v. McMasters, 40 Minn. 103, 41 N. W. 543; Tuel v. Weston, 47 Vt. 634; Singer Mfg. Co. v. Rahn, 132 U. S. 518, 10 Sup. Ct. 175; Camp v. Hall, 39 Fla. 535, 22 South. 792; Clack v. Supply Co., 72 Mo. App. 506; Todd v. Havlin, Id. 565; Knowles v. Bullene, 71 Mo. App. 341; McDonald v. Franchere, 102 Iowa, 496, 71 N. W. 427; Holmes v. Railroad Co., 49 La. Ann. 1465, 22 South. 403; Gray v. Railroad Co., 168 Mass. 20, 46 N. E. 397.

[16] Brown v. Engineering Co., 166 Mass. 75, 43 N. E. 1118; Hartman v. Muelbach, 2 Mo. App. Rep'r, 956; Illinois Cent. R. Co. v. Andrews, 78 Ill. App. 80; Penny v. Railroad Co., 34 App. Div. 10, 53 N. Y. Supp. 1043; Robinson v. McNeill, 18 Wash. 163, 51 Pac. 355; Barabasz v. Kabat, 86 Md. 23, 37 Atl. 720; International & G. N. R. Co. v. Yarbrough (Tex. Civ. App.) 39 S. W. 1096; Winkler v. Fisher, 95 Wis. 355, 70 N. W. 477; Rudgeair v. Traction Co., 180 Pa. St. 333, 36 Atl. 859.

[17] Driscoll v. Scanlon, 165 Mass. 348, 43 N. E. 100. Also, where an engineer, intending a joke, squirted hot instead of cold water on plaintiff, whom he had invited to ride in the engine. International & G. N. R. Co. v. Cooper, 88 Tex. 607, 32 S. W. 517.

But mere deviation from instructions,[18] or mistake in judgment,[19] or slight excess of authority,[20] is not sufficient to relieve the master from responsibility.

Receivers of railroads and other corporations are responsible, to the extent of the trust funds or assets, for the negligence of those employed by them to carry on the business; [21] and trustees and others occupying fiduciary positions are likewise accountable for the conduct of their assistants and employés. But in certain cases, where the hiring of the servant is compulsory, the employé does not become an agent so as to render the employer accountable for his negligence or misconduct, unless the employer is permitted to some extent to exercise a choice in the matter of his selection. Such an instance is found in the compulsory acceptance of the first pilot to board an incoming vessel within certain distance limitations.[22] In like manner, a receiver appointed in involuntary proceedings is not a servant of the corporation so as to render it responsible for his own negligence or that of the servants whom he employs to assist him in the management of the business.[23]

Negligence Leading to Willful Injury.

It not infrequently happens that a servant, by mere carelessness, places himself in a position where he cannot escape or protect his master's property without committing deliberate injury to the person or property of another. In these circumstances, although he has no authority to commit a willful tort, a proper regard for the interest of his master raises an implied authority to commit the wrongful act;

[18] Postal Telegraph Cable Co. v. Brantley, 107 Ala. 683, 18 South. 321; Powell v. Deveney, 3 Cush. (Mass.) 300; Com. v. New York, N. H. & H. R. Co., 112 Mass. 412.

[19] Eichengreen v. Railroad Co., 96 Tenn. 229, 34 S. W. 219.

[20] Brevig v. Railway Co., 64 Minn. 168, 66 N. W. 401. Or when the authority is subsequently ratified. Dempsey v. Chambers, 154 Mass. 330, 28 N. E. 279.

[21] Murphy v. Holbrook, 20 Ohio St. 137; Dalton v. Receivers, 4 Hughes, 180, Fed. Cas. No. 3,550.

[22] General Steam Nav. Co. v. British & C. S. Nav. Co., L. R. 3 Exch. 330. But see Fletcher v. Braddick, 2 Bos. & P. (N. R.) 182. But otherwise when the master can exercise an option. Martin v. Temperley, 4 Q. B. 298; Yates v. Brown, 8 Pick. (Mass.) 23.

[23] Metz v. Railroad Co., 58 N. Y. 61.

as if the servant drive his master's team so carelessly that he arrives at a position from which he can extricate himself and team in no other way than by deliberately driving into plaintiff's horse and wagon.[24]

INDEPENDENT CONTRACTOR.

59. An independent contractor is one who, exercising his own volition and judgment as to means and methods, undertakes to achieve a definite result.

60. The employer is not responsible for the negligence of the independent contractor or his subagents while the work is in progress, unless

(a) He is negligent in the selection of the contractor; or unless

(b) The object of the contract is unlawful; or unless

(c) He has omitted to perform an absolute, personal duty.

As a general proposition, it may be said that the liability of the master for torts committed by his servants is based on the theory of selection and control, either actual or implied; that he may choose who shall do his work, direct how it shall be accomplished, and retain or discharge the workmen, at his option; and, as has already been stated, if these essential principles of agency are lacking, the doctrine of respondeat superior does not apply. If I send my horse to the smith to be shod, although he and his helpers do my work, it is evident that they are not my "servants," within the accepted legal sense of the word, and that I am not responsible for any injury that may come to others through their negligent manner of doing my work; and, if I engage a carpenter to make and deliver to me a box of certain dimensions, it is still quite clear that I cannot be compelled to respond in damages for his carelessness in executing my order. In each of these cases the contract is for a specific thing. If the horse is returned properly shod, or the box finished according to specifications, it is immaterial where, how, or by whom the actual work is done. Those are intermediate considerations, over which the

[24] Wolfe v. Mersereau, 4 Duer (N. Y.) 473; Price v. Simon (N. J. Sup.) 40 Atl. 689.

employer exercises neither volition nor control. In such conditions the person so undertaking to achieve a certain result, free from dictation or interference, is called, for purposes of convenience, an independent contractor.[1]

If the work has been completed and accepted by the employer, his immunity from responsibility for any dangerous elements that it may contain ceases, and his liability is determined by the rules of law ordinarily applicable to the breach of the duties of ownership and control.[2] Likewise, if the contractor abandons the work.[3] And if the employer interferes with the performance of the work, or assumes to assist therein, he may thereby incur liability.[4] If the employer re-

§§ 59–60. [1] Spoue v. Hemmingway, 14 Pick. (Mass.) 1; Singer Mfg. Co. v. Rahn, 132 U. S. 518, 10 Sup. Ct. 175; Waters v. Fuel Co., 52 Minn. 474, 55 N. W. 52; Powell v. Construction Co., 88 Tenn. 692, 13 S. W. 691; Lawrence v. Shipman, 39 Conn. 586; Crenshaw v. Ullman, 113 Mo. 633, 20 S. W. 1077; Cuff v. Railroad Co., 35 N. J. Law, 17; Long v. Moon, 107 Mo. 334, 17 S. W. 810; Brannock v. Elmore, 114 Mo. 55, 21 S. W. 451; Scarborough v. Railway Co., 94 Ala. 497, 10 South. 316; Hawver v. Whalen, 49 Ohio St. 69, 29 N. E. 1049; Charlebois v. Railroad Co., 91 Mich. 59, 51 N. W. 812; City & S. Ry. Co. v. Moores, 80 Md. 348, 30 Atl. 643; Harris v. McNamara, 97 Ala. 181, 12 South. 103; Savannah & W. R. Co. v. Phillips, 90 Ga. 829, 17 S. E. 82; Welsh v. Parrish, 148 Pa. St. 599, 24 Atl. 86; Haley v. Lumber Co., 81 Wis. 412, 51 N. W. 321, 956; New Albany Forge & Rolling Mill v. Cooper, 131 Ind. 363, 30 N. E. 294; Piette v. Brewing Co., 91 Mich. 605, 52 N. W. 152. As to relation of tenant, as independent contractor, to his landlord, see Curtis v. Kiley, 153 Mass. 123, 26 N. E. 421; City of Independence v. Slack, 134 Mo. 66, 34 S. W. 1094; Frassi v. McDonald, 122 Cal. 400, 55 Pac. 139, 772; McNamee v. Hunt, 30 C. C. A. 653, 87 Fed. 298; Jefferson v. Jameson & Morse Co., 165 Ill. 138, 46 N. E. 272; Leavitt v. Railroad Co., 89 Me. 509, 36 Atl. 998; Drennan v. Smith, 115 Ala. 396, 22 South. 442; Roswell v. Prior, 12 Mod. 635; Cheetham v. Hampson, 4 Term R. 318; Leslie v. Pounds, 4 Taunt. 649. A question for the court. Emmerson v. Fay, 94 Va. 60, 26 S. E. 386.

[2] Donovan v. Transit Co., 102 Cal. 245, 36 Pac. 517; Read v. Fire District (R. I.) 40 Atl. 760.

[3] Savannah & W. R. Co. v. Phillips, 90 Ga. 829, 17 S. E. 82.

[4] Burgess v. Gray, 1 Man., G. & S. 578; Fisher v. Rankin, 78 Hun, 407, 29 N. Y. Supp. 143; Norwalk Gaslight Co. v. Borough of Norwalk, 63 Conn. 495, 28 Atl. 32; Woodman v. Railroad Co., 149 Mass. 335, 21 N. E. 482; King v. Railroad Co., 66 N. Y. 181; Eaton v. Railway Co., 59 Me. 520, 532, 534; Clark v. Fry, 8 Ohio St. 358; Robinson v. Webb, 11 Bush (Ky.) 464; Hughes v. Railway Co., 39 Ohio St. 461; Chicago Economic Fuel Gas Co. v. Myers,

serves the right of dismissing the contractor, such reservation is merely an element to be considered in determining whether, viewing the contract as a whole, the relation of independent contractor existed.[5]

SAME—REASONABLE CARE IN SELECTION OF CONTRACTOR.

61. The master may be responsible for the negligent conduct of an independent contractor, if he has failed to use reasonable care in selecting him.

It is quite evident that the employer may be guilty of negligence in intrusting the work to an unskilled or incompetent person, and in such event he is liable for resulting injury.[1] Difficulty arises, however, in determining what degree of care in the selection is sufficient to exonerate the employer from the charge of negligence, and the cases afford no satisfactory rule. It would seem that each case must be decided upon its own circumstances, the character of the work, and the corresponding degree of skill required in its accomplishment, the probable attendant dangers, and the general reputation of the contractor for skill and efficiency.[2]

168 Ill. 139, 48 N. E. 66. But see Weber v. Railway Co., 20 App. Div. 292, 47 N. Y. Supp. 7; Burke v. Ireland, 26 App. Div. 487, 50 N. Y. Supp. 369; Bohrer v. Harness Co., 19 Ind. App. 489, 45 N. E. 668.

[5] Morgan v. Bowman, 22 Mo. 538; City of Chicago v. Joney, 60 Ill. 383; New Albany Forge & Rolling Mill v. Cooper, 131 Ind. 363, 30 N. E. 294; Bayer v. Railroad Co., 68 Ill. App. 219.

§ 61. [1] Berg v. Parsons, 84 Hun, 60, 31 N. Y. Supp. 1091; Norwalk Gaslight Co. v. Borough of Norwalk, 63 Conn. 495, 28 Atl. 32. See, also, Ardesco Oil Co. v. Gilson, 63 Pa. St. 146; Sturges v. Society, 130 Mass. 414; Brannock v. Elmore, 114 Mo. 55, 21 S. W. 451; Cuff v. Railroad Co., 35 N. J. Law, 17; Conners v. Hennessey, 112 Mass. 96.

[2] See "Negligence of Master in Selecting Competent Co-employés," ante, p. 97. In an action to recover damages for defendant's want of care in employing an incompetent contractor to blast stone near plaintiff's house, the evidence does not show that defendant made sufficient inquiries as to the contractor's competency, where it appears that he inquired only of a lawyer's clerk, and that he claimed to have seen some work that the contractor had done reasonably well, it not appearing that defendant was informed that the contractor had ever done any work of the kind for which defendant had employed him. Berg v. Parsons, 84 Hun, 60, 31 N. Y. Supp. 1091.

SAME—LIABILITY WHEN THE OBJECT OF THE CONTRACT IS UNLAWFUL.

62. When the thing contracted to be done is tortious or unlawful, merely doing it by another person, under any form of contract, will not relieve the employer from responsibility.[1]

Thus, when a company, without the necessary municipal authority, employed a contractor to open trenches in the streets of a city, and a person was injured by falling over a heap of stones left by the contractor, the company was liable for the contractor's unlawful act.[2] Or, if the contract in its purview contemplates an act necessarily injurious to the rights or property of another, the contractee is liable for resulting damage; as where a canal company contracted for the repair of its canal with soil to be taken from certain land belonging to another, the removal of which was, of necessity, injurious to the stranger's property.[3]

SAME—ABSOLUTE PERSONAL DUTIES.

63. The employer cannot avoid responsibility for the negligent conduct of his contractor

(a) Where a positive duty is imposed by contract or general law.

(b) Where an obligation is imposed by statute.

(c) Where the work to be done is intrinsically dangerous.

§ 62. [1] Ellis v. Gas Consumers' Co., 23 Law J. Q. B. 42; Blessington v. City of Boston, 153 Mass. 409, 26 N. E. 1113; Sturges v. Society, 130 Mass. 414; Curtis v. Kiley, 153 Mass. 123, 26 N. E. 421; Woodman v. Railroad Co., 149 Mass. 335, 21 N. E. 482; Babbage v. Powers, 130 N. Y. 281, 29 N. E. 132. When the main act is lawful, and the contractor incidentally commits an unlawful act, the employer is not liable. Wilson v. White, 71 Ga. 506.

[2] Ellis v. Gas Consumers' Co., 23 Law J. Q. B. 42, 2 El. & Bl. 767.

[3] Williams v. Irrigation Co., 96 Cal. 14, 30 Pac. 961; Crenshaw v. Ullman, 113 Mo. 633, 20 S. W. 1077.

Positive General Duty.

While, in the large majority of cases, there is no reason, founded on public policy or on the relations of the parties, why the employer should be liable to third parties for the negligence of the contractor, there are nevertheless certain duties of so grave a nature that the responsibility for their performance cannot be avoided by delegation.

Where a person is bound to perform an act as a duty, or is held to a certain standard of conduct, he cannot escape responsibility by intrusting its performance to another; and if the person so intrusted fails to perform such act, or conform to such standard of conduct, whether he bore the relation of contractor or servant, the person on whom the duty rests is liable for his negligence, and it is immaterial whether the obligation is imposed by contract or general law.[1] Thus, the duty rests on a municipal corporation to keep its streets in a safe and passable condition, and where a contractor with the city failed to place proper guards about an excavation, thereby causing injury to a passer-by, the city was held liable.[2] And, in an action against a railroad company by a passenger for injuries resulting from an obstruction of the track by work being done thereon, it is no defense that defendant had placed the work in the hands of an independent contractor, and that his negligence had caused the obstruction.[3] It is a precept of law that, when the performance of a duty rests upon one absolutely, he cannot shift it to the shoulders of another, but is still liable for its nonperformance, although the fault be directly attributable to an independent contractor. This is equally true of common-law duties. Thus, the occupant of a house on whom de-

§ 63. [1] Mattise v. Manufacturing Co., 46 La. Ann. 1535, 16 South. 400; City & S. Ry. Co. v. Moores, 80 Md. 348, 30 Atl. 643; Storrs v. City of Utica, 17 N. Y. 104; Colgrove v. Smith, 102 Cal. 220, 36 Pac. 411; Williams v. Irrigation Co., 96 Cal. 14, 30 Pac. 961; Pye v. Faxon, 156 Mass. 471, 31 N. E. 640; Hole v. Railroad Co., 6 Hurl. & N. 488.

[2] Storrs v. City of Utica, 17 N. Y. 104; City of Ironton v. Kelley, 38 Ohio St. 50; Wilson v. City of Troy, 60 Hun, 183, 14 N. Y. Supp. 721; Id., 135 N. Y. 96, 32 N. E. 44; City of Sterling v. Schiffmacher, 47 Ill. App. 141; City of Beatrice v. Reid, 41 Neb. 214, 59 N. W. 770; Kollock v. City of Madison, 84 Wis. 458, 54 N. W. 725; Hepburn v. City of Philadelphia, 149 Pa. St. 335, 24 Atl. 279; Ray v. City of Poplar Bluff, 70 Mo. App. 252.

[3] Carrico v. Railway Co., 39 W. Va. 86, 19 S. E. 571. See, also, Donovan v. Transit Co., 102 Cal. 245, 36 Pac. 516; Lancaster Ave. Imp. Co. v. Rhoads, 116 Pa. St. 377, 9 Atl. 852.

volved the duty of caring for a lamp which overhung the highway, and who employed an independent contractor to make repairs upon it, was liable for damages caused by its falling on a passer-by.[4]

Obligations Imposed by Statute.

When the obligation is raised by statute or ordinance, the responsibility for its performance is absolute. "But when certain powers and privileges have been specifically conferred by the public upon an individual or corporation, for private emolument, in consideration of which certain duties affecting public health or the safety of public travel have been expressly assumed, the individual in receipt of the emoluments cannot be relieved of liability by committing the performance of these duties to another. In such cases liability cannot be evaded by showing that the injury resulted from the fault or neglect of a third person employed to perform these public duties." [5] And where a building is being constructed on a city lot, and the excavation in the sidewalk is not protected as required by ordinance, the owner of the lot is liable to persons injured by falling therein, although the work is being done by an independent contractor.[6]

Work Intrinsically Dangerous.

There is still another class of cases where the contract calls for the performance of work intrinsically dangerous. Although in these cases the thing to be done may be lawful, it is none the less opposed to the spirit and policy of the law to permit the person who has assumed the imposed duty to escape liability by shifting it to a contractor. Thus, blasting of necessity involves danger to all who are

[4] Tarry v. Ashton, 1 Q. B. Div. 314; Gleeson v. Railway Co., 140 U. S. 435, 11 Sup. Ct. 859. It is immaterial what time the accident happened,—whether before, after, or during the work. Pig. Torts, 96. And see Khron v. Brock, 144 Mass. 516, 11 N. E. 748. As to party walls and similar cases, see Ketcham v. Newman, 141 N. Y. 205, 36 N. E. 197; Bower v. Peate, 1 Q. B. Div. 321.

[5] Mr. Justice Clark in Lancaster Ave. Imp. Co. v. Rhoads, 116 Pa. St. 377, 9 Atl. 852; Wood, Mast. & Serv. pp. 621–624; Ketcham v. Newman, 141 N. Y. 205, 36 N. E. 197; Smith v. Traders' Exchange, 91 Wis. 360, 64 N. W. 1041; Taylor, B. & H. Ry. Co. v. Warner (Tex. Civ. App.) 31 S. W. 66; Hole v. Railroad Co., 6 Hurl. & N. 488.

[6] Spence v. Schultz, 103 Cal. 208, 37 Pac. 220; Crenshaw v. Ullman, 113 Mo. 633, 20 S. W. 1077; Savannah & W. R. Co. v. Phillips, 90 Ga. 829, 17 S. E. 82; Lancaster v. Insurance Co., 92 Mo. 460, 5 S. W. 23.

in the immediate vicinity, and when the owner of premises within the city employs a contractor to do work thereon which necessitates blasting he is liable for injuries caused thereby to a third person.[7]

When the work to be done is itself lawful, and is likely to be attended with injurious consequences, it is manifestly difficult to draw a clear line of distinction, or formulate a general rule determining just what degree of danger is necessary to place the responsibility on the employer. It would seem, however, that if the contemplated work is of such a nature that in the exercise of ordinary care it could be done with safety, although, in the absence of such care, it would be attended with danger, and probable injury, to third persons, the contractor alone would be responsible.[8] Where alterations in a building were being made by a contractor, and a wall, weakened by age and decay, fell, and injured a third person, the owner was not liable, for the work was not intrinsically dangerous, and could have been done with safety had due care been used.[9]

Liability for Negligence of Subcontractors.

The same rules apply in determining responsibility for acts of a subcontractor as in the case of a contractor.[10] If the relation of master and servant exists between the contractor and subcontractor, the former is liable for the negligence of the latter, otherwise the responsibility rests solely on the subcontractor. And this general rule is subject to the same exceptions that modify it in its application

[7] James' Adm'r v. McMinimy, 93 Ky. 471, 20 S. W. 435. Burning piles of brush is not intrinsically a dangerous work. Shute v. Princeton Tp., 58 Minn. 337, 59 N. W. 1050; Carlson v. Stocking, 91 Wis. 432, 65 N. W. 58; Brennan v. Schreiner (Super. N. Y.) 20 N. Y. Supp. 130; Stone v. Railroad Corp., 19 N. H. 427; City of Tiffin v. McCormack, 34 Ohio St. 638. But see Tibbetts v. Railroad Co., 62 Me. 437; Brannock v. Elmore, 114 Mo. 55, 21 S. W. 451; McCafferty v. Railroad Co., 61 N. Y. 178; Booth v. Railroad Co., 140 N. Y. 267, 35 N. E. 592; French v. Vix, 143 N. Y. 90, 37 N. E. 612; Mahoney v. Dankwart (Iowa) 79 N. W. 134.

[8] Engel v. Eureka Club, 137 N. Y. 100, 32 N. E. 1052; Conners v. Hennessey, 112 Mass. 96; McCafferty v. Railroad Co., 61 N. Y. 178; Butler v. Hunter, 7 Hurl. & N. 826.

[9] Engel v. Eureka Club, 137 N. Y. 100, 32 N. E. 1052.

[10] Cuff v. Railroad Co., 35 N. J. Law, 17; New Orleans & N. E. R. Co. v. Reese, 61 Miss. 581; The Harold, 21 Fed. 428; Hawke v. Brown, 28 App. Div. 37, 50 N. Y. Supp. 1032; Rapson v. Cubitt, 9 Mees. & W. 710; Knight v. Fox, 5 Exch. 721; Overton v. Freeman, 11 C. B. 867.

between employer and contractor. Thus, if one authorizes the doing of an unlawful act, the responsibility therefor attaches to him, no matter what subcontractor or deputy may have actually committed the wrong or injury; as, if one, without special authority, makes an excavation in the sidewalk of a public street, whereby a pedestrian is injured, he is liable, although the injury was caused by the negligence of a subcontractor in not properly guarding the excavation.[11]

WILLFUL TORTS OF SERVANTS.

64. The master is liable for the willful misconduct of his servant

(a) When committed within the course of the employment.

(b) When committed without the scope of the employment, if the misconduct is the proximate cause of the nonperformance of some duty owed by the master to the aggrieved person.

Not only is the master responsible for the negligence of his servant, as already stated, but he is liable for damages caused by his acts of willful misconduct, within certain limitations. When the act is committed at the express command or direction of the master, the responsibility of the latter is clearly to be seen. Thus, if the master directs his servant to commit a trespass, maintain a nuisance, perpetrate a fraud, or convert property of another to his own use.[1] And if the authority or command is contingent on the happening of a certain event, or is otherwise qualified, and the serv-

[11] Creed v. Hartmann, 29 N. Y. 591. See, also, Overton v. Freeman, 11 C. B. 867. When both contractor and subcontractor are negligent, and the damage cannot be distinguished, each is liable for the whole. Van Steenburgh v. Tobias, 17 Wend. (N. Y.) 562; Partenheimer v. Van Order, 20 Barb. (N. Y.) 479.

§ 64. [1] Southerne v. Howe, 2 Rolle, 5–26. See, also, State v. Smith, 78 Me. 260, 4 Atl. 412; Ketcham v. Newman, 141 N. Y. 205, 36 N. E. 197; Carman v. Railway Co., 4 Ohio St. 399; Searle v. Parke (N. H.) 34 Atl. 744. Liability of master for criminal acts. Dyer v. Munday [1895] 1 Q. B. 742, 14 Reports, 306; Lloyd v. Business College, 13 Ohio Cir. Ct. R. 358, 7 Ohio Dec. 318.

ant, disregarding the limitation, commits the tort, the master is still responsible; as if the guard of an omnibus, being instructed to remove disorderly persons, should violently eject an inoffensive passenger.[2] And it is generally sufficient to charge the master if the servant acts on the belief that the circumstances calling for the exercise of the authority have arisen.[3]

More difficulty is experienced in attributing the tort of the servant to the master in cases where not only was the conduct purely voluntary on the servant's part, but in direct violation of his orders; as where defendant directed his superintendent to test a steam boiler up to 150 pounds pressure, and no further, and the latter, in a spirit of recklessness, attempted to test it up to 200 pounds, thereby causing it to burst, and injure plaintiff, a bystander.[4] The law in this and similar cases would seem to be the outgrowth of public policy, rather than the logical expression of an equitable rule, and can be justified only by reasoning as to the actual authority with which the servant is vested, and which alone rendered the misconduct and injury possible. "To visit a man with heavy damages for the negligence of his servant, when he is able to show that he exercised all possible care and precaution in the selection of him, is apt to strike the common mind as unjust." [5]

Master's Benefit.

However unwarranted or extreme the misconduct of the servant may be, if it was directly connected with the general business, and prompted by a desire to promote the interests of his master in the line of his employment, the responsibility reverts to the superior; as in the case of a driver who, in order to feed his horses, and enable him to complete the journey he was making for his master, converted hay for his horses' use.[6] And where a brakeman, in the

[2] Seymour v. Greenwood, 7 Hurl. & N. 355, 6 Hurl. & N. 359; Passenger R. Co. v. Young, 21 Ohio St. 518; Southern Ry. Co. v. Wideman (Ala.) 24 South. 764; Bayley v. Railroad Co., L. R. 8 C. P. 148.

[3] Croft v. Alison, 4 Barn. & Ald. 590; Eckert v. Transfer Co., 2 Mo. App. 36; McCauley v. Hutkoff, 20 Misc. Rep. 97, 45 N. Y. Supp. 85.

[4] Ochsenbein v. Shapley, 85 N. Y. 214.

[5] Hays v. Millar, 77 Pa. St. 238, 242. See, also, Postal Telegraph Cable Co. v. Brantley, 107 Ala. 683, 18 South. 321.

[6] Potulni v. Saunders, 37 Minn. 517, 35 N. W. 379; Walker v. Johnson, 28 Minn. 147, 9 N. W. 632; Levi v. Brooks, 121 Mass. 501; Voegeli v. Granite

course of his duty of keeping the cars free from intruders, kicked a boy, who fell from the train against a pile of wood, and thence under the wheels, and was injured, the defendant railroad was liable.[7] But in exercising his discretion in the use of force the servant must use no more than is necessary, nor in any other way needlessly exaggerate the injury or damage.[8]

On the other hand, if the servant, influenced by personal motive, whim, or passion, for a purpose foreign to the service in which he is engaged, willfully inflicts injury on the person or property of another, it is his personal tort, not the master's. Thus, where plaintiff was crossing a street-car track, and the driver of a car cursed him, and said, "I can smash you, anyhow," and then let go the brake, and injured him.[9] And, in general, his authority and position must not be used by the servant as a mere pretext for willful misconduct and injury to others.[10]

Co., 49 Mo. App. 643; People v. Roby, 52 Mich. 577, 18 N. W. 365; Pittsburgh, C. & St. L. Ry. Co. v. Kirk, 102 Ind. 399, 1 N. E. 849; but see Staples v. Schmid, 18 R. I. 224, 26 Atl. 193–196; Crocker v. Railroad Co., 24 Conn. 249; Knight v. Luce, 116 Mass. 586; Youmans v. Paine, 86 Hun, 479, 35 N. Y. Supp. 50; Postal Telegraph Cable Co. v. Brantley, 107 Ala. 683, 18 South. 321; McDonald v. Franchere, 102 Iowa, 496, 71 N. W. 427; Nelson Business College Co. v. Lloyd (Ohio Sup.) 54 N. E. 471. But see Little Rock Traction & Electric Co. v. Walker (Ark.) 45 S. W. 57, where a street-car company was held not liable for arrest and prosecution of passenger.

[7] Rounds v. Railroad Co., 64 N. Y. 129. See, also, Johnson v. Railroad Co., 58 Iowa, 348, 12 N. W. 329.

[8] Jones v. Glass, 35 N. C. 305; Pennsylvania R. Co. v. Vandiver, 42 Pa. St. 365; Sanford v. Railroad Co., 23 N. Y. 343; Gallena v. Railroad Co., 13 Fed. 116; State v. Kinney, 34 Minn. 311, 25 N. W. 705. And a direction by defendant to tear down plaintiff's fence warrants no inferred authority to commit an assault on the person of plaintiff. Wagner v. Haak, 170 Pa. St. 495, 32 Atl. 1087.

[9] Wood v. Railway Co., 52 Mich. 402, 18 N. W. 124. But see Eckert v. Transfer Co., 2 Mo. App. 36. And, generally, see Wright v. Wilcox, 19 Wend. (N. Y.) 343; Pennsylvania Co. v. Toomey, 91 Pa. St. 256 (but see McClung v. Dearborne, 134 Pa. St. 396, 19 Atl. 698); Illinois Cent. R. Co. v. Downey, 18 Ill. 259; De Camp v. Railroad Co., 12 Iowa, 348; Marion v. Railroad Co., 59 Iowa, 428, 13 N. W. 415; Moore v. Sanborne, 2 Mich. 519; Sutherland v. Ingalls, 63 Mich. 620, 30 N. W. 342; Kaiser v. McLean, 20 App. Div. 326, 46 N. Y. Supp. 1038.

[10] Mali v. Lord, 39 N. Y. 381; Foster v. Bank, 17 Mass. 479; Henry v. Railroad Co., 139 Pa. St. 289, 21 Atl. 157, but see Burns v. Railroad Co., 4 App.

SAME—TORTS OUTSIDE SCOPE OF EMPLOYMENT.

65. Where the servant, acting without the scope of his employment, commits a willful tort, whereby an injury is done to a person to whom the master owes a duty, the latter is still liable.

In the prior consideration of the liability of the master for his servant's torts reference has been had to the relationship existing between the master and servant only, but it is to be observed that the privity between the master and the aggrieved party should also be considered. It not infrequently happens that the servant, acting willfully and maliciously, and outside the scope of his employment, injures one to whom the master owes a special duty. In such cases the master is liable, his responsibility resting purely on the failure to perform the duty, the servant's misconduct being the immediate cause of such failure. Instances of this kind occur most frequently in the case of common carriers, who owe an absolute duty of protection to their passengers from insult and injury by their employés.[1] Thus, in the case of a passenger who was attacked by the driver of a street car, without provocation, and wantonly beaten and bruised.[2] But the same rule exists in other vocations, where the duty owed the aggrieved person is not of so high a character as that of the common carrier to the passenger. A patron of a the-

Div. 426, 38 N. Y. Supp. 856; Johanson v. Fuel Co. (Minn.) 75 N. W. 719; Feneran v. Manufacturing Co., 20 App. Div. 574, 47 N. Y. Supp. 284.

§ 65. [1] Stewart v. Railroad Co., 90 N. Y. 588, overruling Isaacs v. Railroad Co., 47 N. Y. 122; Richberger v. Express Co., 73 Miss. 161, 18 South. 922; Gray v. Railroad Co., 168 Mass. 20, 46 N. E. 397; Southern Ry. Co. v. Wideman (Ala.) 24 South. 764; Spade v. Railroad Co. (Mass.) 52 N. E. 747; Haver v. Railroad Co. (N. J. Err. & App.) 41 Atl. 916; Texas & P. Ry. Co. v. Humphries (Tex. Civ. App.) 48 S. W. 201.

[2] Fisher v. Railway Co., 34 Hun (N. Y.) 433; Craker v. Railroad Co., 36 Wis. 657; Bryant v. Rich, 106 Mass. 180; Philadelphia & R. R. Co. v. Derby, 14 How. (U. S.) 468; Goddard v. Railway Co., 57 Me. 202; McKinley v. Railroad Co., 44 Iowa, 314; Sherley v. Billings, 8 Bush (Ky.) 147 (per contra Little Miami R. Co. v. Wetmore, 19 Ohio St. 110); Palmeri v. Railway Co., 133 N. Y. 261, 30 N. E. 1001; Warner v. Pacific Co., 113 Cal. 105, 45 Pac. 187. See, also, consideration of this matter by Thos. S. Gates in Texas & P. Ry. Co. v. Scoville, 62 Fed. 730, 34 Am. Law Reg. 120.

ater has a right to be protected while in the theater, and if the ticket agent call out to any one of the audience to "put him out" the proprietor will be liable for his wrongful ejectment.[3] A merchant owes a duty to customers whom he has invited to enter his store or premises, and is responsible for willful and malicious arrests [4] and assaults [5] upon them by his servants; and, even where an insane servant killed a person who was in the master's office on business, the master was liable.[6]

Hours of Employment not a Test of Liability.

While it is true that the master is not liable for the tort of his servant committed after the employment is ended,[7] the hours of employment do not constitute a satisfactory or decisive test of liability. For, on the one hand, the servant may commit an independent tort during the hours of work,[8] and, on the other hand, he may do something outside of working hours, either negligent or willful, which will render his master liable.[9]

[3] Drew v. Peer, 93 Pa. St. 234. And see, also, Dickson v. Waldron, 135 Ind. 507, 34 N. E. 506, and 35 N. E. 1.

[4] Geraty v. Stern, 30 Hun (N. Y.) 426; Clack v. Supply Co., 72 Mo. App. 506; Knowles v. Bullene, 71 Mo. App. 341; Stranahan Bros. Catering Co. v. Coit, 55 Ohio St. 398, 45 N. E. 634 (but see Mali v. Lord, 39 N. Y. 381).

[5] Mallach v. Ridley (Sup.) 9 N. Y. Supp. 922.

[6] Christian v. Railway Co., 90 Ga. 124, 15 S. E. 701. Duty of railroad company to one standing on its platform. Ohio & M. Ry. Co. v. Simms, 43 Ill. App. 260. And if in a saloon an intoxicated person, in the presence of the proprietor, attach a burning piece of paper to his drunken companion's clothes, the proprietor is liable for damages resulting. Rommel v. Schambacher, 120 Pa. St. 579, 11 Atl. 779; Brazil v. Peterson, 44 Minn. 212, 46 N. W. 331.

[7] Yates v. Squires, 19 Iowa, 26; Baird v. Pettit, 70 Pa. St. 477–483; Hurst v. Railroad Co., 49 Iowa, 76; Baltimore & O. R. Co. v. State, 33 Md. 542–554. But see Ewald v. Railway Co., 70 Wis. 420, 36 N. W. 12.

[8] Hower v. Ulrich, 156 Pa. St. 410, 27 Atl. 37.

[9] Noblesville & E. Gravel Road Co. v. Gause, 76 Ind. 142; Broderick v. Depot Co., 56 Mich. 261, 22 N. W. 802; Morier v. Railway Co., 31 Minn. 351, 17 N. W. 952; Rosenbaum v. Railroad Co., 38 Minn. 173, 36 N. W. 447; Wink v. Weiler, 41 Ill. App. 336; Evansville & R. R. Co. v. Maddux, 134 Ind. 571, 33 N. E. 345.

INDEPENDENT TORTS.

66. For the independent, individual torts of his servants the master is not liable.[1] The question of what conduct is within and what is without the course of employment is ordinarily one of fact for the jury.

But when one who is in fact a servant commits a tort, it is not clear what amount of deviation from the course of his employment is sufficient to interrupt the relation so as to relieve the master from liability. In the earlier cases a very slight deviation was held sufficient to exonerate the master, but they are no longer generally followed in this respect. Strong distinctions appear in the different classes of cases. Thus, a carrier may be liable for forbidden assaults by his agents upon passengers, to whom he owes a peculiar duty,[2] but when the duty is performed the liability ceases, and an assault upon a passenger after he has left the train creates no responsibility upon the railroad company.[3] Nor is the company responsible for a purely personal encounter between its employés and persons between whom and the corporation there is no privity.[4] But a master is liable for the act of his clerk in assaulting another because he refused to pay for a bicycle,[5] or of his bartender in ejecting a person from his saloon.[6] The driving cases are analogous. If the driver, abandoning his master's service, engages in a journey wholly foreign to the employment, and for a purpose exclusively his own, the master is not

§ 66. [1] Hower v. Ulrich, 156 Pa. St. 410, 27 Atl. 37.

[2] Baltimore & O. R. Co. v. Barger, 80 Md. 23, 30 Atl. 560. Although the assault was committed in resenting an insult. Texas & P. Ry. Co. v. Williams, 10 C. C. A. 463, 62 Fed. 440; Savannah, F. & W. Ry. Co. v. Quo, 103 Ga. 125, 29 S. E. 607; Williams v. Gill, 122 N. C. 967, 29 S. E. 879; Louisville & N. R. Co. v. Donaldson (Ky.) 43 S. W. 439.

[3] Central Ry. Co. v. Peacock, 69 Md. 257, 14 Atl. 709; Hanson v. Railway Co., 75 Ill. App. 474.

[4] Gilliam v. Railroad Co., 70 Ala. 268; Candiff v. Railway Co., 42 La. Ann. 477, 7 South. 601. See, also, Cofield v. McCabe, 58 Minn. 218, 59 N. W. 1005; Golden v. Newbrand, 52 Iowa, 59, 2 N. W. 537.

[5] Baylis v. Cycle Co. (City Ct. Brook.) 14 N. Y. Supp. 933.

[6] Fortune v. Trainor, 65 Hun, 619, 19 N. Y. Supp. 598; Brazil v. Peterson, 44 Minn. 212, 46 N. W. 331.

liable for his acts while so engaged.[7] But where a driver, delivering porter by the barrel, to a customer, at his request drove to a store to get him a faucet, and by reckless driving injured plaintiff, it was for the jury to determine whether or not the driver was acting within the scope of his authority.[8]

Substantially the same distinction holds in cases of false arrest. It was formerly held in New York that the test of liability was the command of the master, either actual or implied.[9] This rule did not obtain for any great length of time. It was soon recognized that it was the course of employment, not the command of the master, which determined the liability, and that the master would be liable although the conduct of the servant exceeded the authority.[10] The distinction between what is and what is not in the due course of employment is well illustrated by the following cases: A ticket agent, having caused the arrest of one who had paid him good money, but whom he suspected of being a counterfeiter, it was held that his conduct was merely in the capacity of a citizen, and not in that of an employé of the railroad company.[11] But where a dispute arose as to the amount of change which had been given to the purchaser by the ticket agent, and the latter followed her to the platform, charged her with passing counterfeit money, detained her, and called her vile names, it was

[7] Mitchell v. Crassweller, 13 C. B. 237; Aycrigg's Ex'rs v. Railroad Co., 30 N. J. Law, 460; Douglass v. Stephens, 18 Mo. 362; Thorp v. Minor, 109 N. C. 152, 13 S. E. 702; Moore v. Sanborne, 2 Mich. 520; Courtney v. Baker, 60 N. Y. 1; Cavanagh v. Dinsmore, 12 Hun, 465; Stone v. Hills, 45 Conn. 44; Mott v. Ice Co., 73 N. Y. 543; Joel v. Morison, 6 Car. & P. 501; Rayner v. Mitchell, 2 C. P. Div. 357; Storey v. Ashton, L. R. 4 Q. B. 476.

[8] Guinney v. Hand, 153 Pa. St. 404, 26 Atl. 20. Servant deviating from his established route on his own account, and leaving his team unhitched, master is liable for injuries caused by team running away. Ritchie v. Waller, 63 Conn. 155, 28 Atl. 29; Quinn v. Power, 87 N. Y. 535; Flint v. Transportation Co., 34 Conn. 554; Mulvehill v. Bates, 31 Minn. 364, 17 N. W. 959; Joslin v. Ice Co., 50 Mich. 516, 15 N. W. 887.

[9] Mali v. Lord, 39 N. Y. 381; Lafitte v. Railroad Co., 43 La. Ann. 34, 8 South. 701.

[10] Lynch v. Railroad Co., 90 N. Y. 77; Smith v. Munch, 65 Minn. 256, 68 N. W. 19; Eichengreen v. Railroad Co., 96 Tenn. 229, 34 S. W. 219.

[11] Mulligan v. Railway Co., 129 N. Y. 506, 29 N. E. 952; Davis v. Houghtellin, 33 Neb. 582, 50 N. W. 765; Allen v. Railroad Co., L. R. 6 Q. B. 65; Edwards v. Railway Co., L. R. 5 C. P. 445.

held that the agent's conduct was in the line of his employment; that he was endeavoring to protect its interests, and recover its property; that the tort was not his individual wrong, and that the company was liable.[12]

Each case must be determined in the light of the attendant facts, and whether the particular conduct is within the course of the employment is ordinarily a question of fact for the jury.[13] Where, however, there is no evidence forming a reasonable basis for the conclusion that the particular conduct was in the course of the employment, the court should take the case from the jury.[14]

Real and Personal Property—No Distinction in Principle.

It was formerly supposed that the duty resting upon the owner of real estate was of a higher order than any connected with personalty, and that for the negligence of one employed thereon for the owner's benefit he would be held to a more strict accounting. This distinction between owners of real estate and owners of personalty is no longer recognized.[15]

[12] Palmeri v. Railway Co., 133 N. Y. 261, 30 N. E. 1001; Fortune v. Trainor, 65 Hun, 619, 19 N. Y. Supp. 598; Smith v. Webster, 23 Mich. 298; Oakland City Agricultural & Industrial Soc. v. Bingham, 4 Ind. App. 545, 31 N. E. 383; Barden v. Felch, 109 Mass. 154; Cameron v. Express Co., 48 Mo. App. 99; Kolzem v. Railroad Co. (Com. Pl.) 1 Misc. Rep. 148, 20 N. Y. Supp. 700; Duggan v. Railroad Co., 159 Pa. St. 248, 28 Atl. 182; Staples v. Schmid, 18 R. I. 224, 26 Atl. 193.

[13] Smith v. Spitz, 156 Mass. 319, 31 N. E. 5; Guinney v. Hand, 153 Pa. St. 404, 26 Atl. 20; Brunner v. Telegraph Co., 151 Pa. St. 447, 25 Atl. 29; Lang v. Railroad Co., 80 Hun, 275, 30 N. Y. Supp. 137; Tinker v. Railroad Co., 71 Hun, 431, 24 N. Y. Supp. 977, distinguishing Mulligan v. Railway Co., 129 N. Y. 506, 29 N. E. 952; Pittsburgh, Ft. W. & C. Ry. Co. v. Maurer, 21 Ohio St. 421; Dells v. Stollenwerk, 78 Wis. 339, 47 N. W. 431; Robinson v. Railway Co., 94 Wis. 345, 68 N. W. 961.

[14] Towanda Coal Co. v. Heeman, 86 Pa. St. 418; Bank of New South Wales v. Owston, 4 App. Cas. 270.

[15] Reedie v. Railway Co. (1849) 4 Exch. 243; Bush v. Steinman (1799) 1 Bos. & P. 404; Quarman v. Burnett (1840) 6 Mees. & W. 499; McCafferty v. Railroad Co., 61 N. Y. 178, distinguishing Storrs v. City of Utica, 17 N. Y. 104; Water Co. v. Ware, 16 Wall. 566; Hay v. Cohoes Co., 2 N. Y. 159.

CHAPTER V.

COMMON CARRIER OF PASSENGERS.

DEFINITION.

67. Any person, partnership, or corporation whose general business, either in whole or in part, consists in the transportation of passengers for hire or benefit of any kind, is a common carrier. They are:

(a) Public carriers, who are bound to accept for transportation, without discrimination as to compensation or service, all proper persons who are not for any reason liable to injure other passengers;[1] or

(b) Private carriers, who carry only incidentally or under special contracts.

§ 67. [1] Eads v. Railway Co., 43 Mo. App. 536; but need not carry one with contagious disease, Paddock v. Railroad Co., 37 Fed. 841; nor on Sunday, Walsh v. Railway Co., 42 Wis. 23; nor an insane person, Meyer v. Railway Co., 4 C. C. A. 221, 54 Fed. 116; Atchison, T. & S. F. R. Co. v. Weber, 33 Kan. 543, 6 Pac. 877; nor a person so intoxicated as to be disgusting or annoying to other passengers, Pittsburgh, C. & St. L. Ry. Co. v. Vandyne, 57 Ind. 576; Vinton v. Railroad Co., 11 Allen (Mass.) 304.

In its ordinary significance, the term "common carrier" is applied to public carriers only, but it is no less applicable to any person or company which transports people for hire. It is of the former class, so largely in the majority, that this chapter mainly treats. The duties and liabilities of a private carrier are greatly abridged. He is bound to carry those only whom he may select, and his duty towards them is discharged by the exercise of ordinary care only. Where railroad contractors, operating a construction train, take on a passenger for hire as a mere favor, they are responsible only for the exercise of such skill and care in its management and operation as ordinarily prudent and cautious men would exercise under similar circumstances.[2] In such a case the court said of the contractors: "They did not hold themselves out as capable of carrying passengers safely, they had no arrangements for passenger service, and they were not required to make provisions for the protection of the road, such as are usually adopted and exacted of railroad companies."[3] If, however, the carriage of persons upon construction trains is customary, persons having no knowledge of a contrary rule of the company would have a right to rely on the supposed authority of the conductor in charge to grant permission to ride thereon.[4]

THE RELATION OF PASSENGER AND CARRIER.

68. The relation of passenger and carrier begins when the person intending passage has entered the vehicle or has entered upon the grounds or premises of the carrier in the customary manner for the purpose of embarkation within a reasonable time.[1]

The relation of passenger and carrier must usually be inferred from circumstances. A person about to take passage upon a train

[2] Shoemaker v. Kingsbury, 12 Wall. 369.

[3] Shoemaker v. Kingsbury, 12 Wall. 369.

[4] St. Joseph & W. R. Co. v. Wheeler, 35 Kan. 185, 10 Pac. 461. But see Evansville & R. R. Co. v. Barnes, 137 Ind. 306, 36 N. E. 1092. Logging company a carrier. Albion Lumber Co. v. De Nobra, 19 C. C. A. 168, 72 Fed. 739.

§ 68. [1] Chicago & E. I. R. Co. v. Chancellor, 60 Ill. App. 525. A reasonable time. Harris v. Stevens, 31 Vt. 79. Intention to take a train by person waiting in station makes him a passenger. Grimes v. Pennsylvania Co., 36 Fed. 72.

does not formally deliver his body over to the conductor or other agent of the company; he merely conducts himself, directs his movements, in a manner usual with those about to undertake a journey in similar circumstances. The point to be determined is whether the would-be traveler has so conducted himself in the circumstances that the carrier must be deemed to have accepted him as its passenger, and, if this point is affirmatively shown, it is immaterial that the contemplated journey has not been actually begun. There are, of course, certain reasonable limitations to such an inference of a contract; and so, where a person boarded a railway train after it had started, it was held that he did not thereby become a passenger until he had reached a safe place in the car.[2] But where the carrier provides a waiting room at its station, and a person, intending passage within a reasonable time, enters such room to await the train, he becomes, and is entitled to all the rights of, a passenger.[3] And when a person attempts to board an omnibus or street car which has slowed up or stopped in response to his signal, whether he is successful or not, he is none the less a passenger, while the attempt is being made with the knowledge and acquiescence of the carrier.[4] The implied invitation of the carrier to the public to become passengers upon its vehicles does not cover every time and place; the time must be proper, the place suitable, and the traveler must offer himself in an ordinarily prudent and reasonable manner; and where a would-be passenger ran, rapidly and carelessly, directly in front of an incoming train, it was held that he did not hold himself in read-

[2] Merrill v. Railroad Co., 139 Mass. 238, 1 N. E. 548; Sharrer v. Paxson, 171 Pa. St. 26, 33 Atl. 120.

[3] Gordon v. Railroad Co., 40 Barb. 546; Grimes v. Pennsylvania Co., 36 Fed. 72; Phillips v. Railway Co. (N. C.) 32 S. E. 388; Wells v. Railroad Co., 25 App. Div. 365, 49 N. Y. Supp. 510; St. Louis S. W. Ry. Co. v. Franklin (Tex. Civ. App.) 44 S. W. 701; St. Louis S. W. Ry. Co. v. Griffith, 12 Tex. Civ. App. 631, 35 S. W. 741.

[4] Brien v. Bennett, 8 Car. & P. 724; Smith v. Railway Co., 32 Minn. 1, 18 N. W. 827. But mere fact of signaling and intent of driver to stop car is not sufficient to establish the relation. Donovan v. Railway Co., 65 Conn. 201, 32 Atl. 350. See, also, Schepers v. Railroad Co., 126 Mo. 665, 29 S. W. 712; Jones v. Railroad Co., 163 Mass. 245, 39 N. E. 1019; Rogers v. Steamboat Co., 86 Me. 261, 29 Atl. 1069; Washington & G. R. Co. v. Patterson, 9 App. D. C. 423; Young v. Railroad Co. (Mass.) 50 N. E. 455; Chicago & E. I. R. Co. v. Chancellor, 60 Ill. App. 525.

iness to be taken as a passenger, nor present himself in a proper way.[5] But the actual purchase of a ticket or entrance into the vehicle of the carrier is not essential to the establishment of the relation of passenger and carrier.[6] Thus, a person who is injured while attempting to board a train under the direction of the servants of the carrier is a passenger, whether a ticket has been purchased or not;[7] and a person who enters the carrier's train, with its consent, before it is ready to start, is an accepted passenger.[8]

TERMINATION OF RELATION.

69. The relation of passenger and carrier is terminated by
(a) The arrival of the passenger at his destination;
(b) The transfer of the passenger to connecting carrier;
(c) The ejection of the passenger from the vehicle.

SAME—ARRIVAL OF PASSENGER AT DESTINATION.

70. The relation of passenger and carrier is ordinarily terminated only by the voluntary departure of the passenger from the vehicle and premises of the carrier at the end of the journey, provided such departure is made within a reasonable time and in the usual way.[1]

[5] Webster v. Railroad Co., 161 Mass. 298, 37 N. E. 165; Dodge v. Steamship Co., 148 Mass. 207, 19 N. E. 373.

[6] Rogers v. Steamboat Co., 86 Me. 261, 29 Atl. 1069; Allender v. Railroad Co., 37 Iowa, 264; Gordon v. Railroad Co., 40 Barb. 546. But see Gardner v. Northampton Co., 51 Conn. 143; Indiana Cent. Ry. Co. v. Hudelson, 13 Ind. 325.

[7] Warren v. Railroad Co., 8 Allen (Mass.) 227; McDonald v. Railroad Co., 26 Iowa, 124; Allender v. Railroad Co., 37 Iowa, 264; Norfolk & W. R. Co. v. Groseclose's Adm'r, 88 Va. 267, 13 S. E. 454. Per contra, Indiana Cent. Ry. Co. v. Hudelson, 13 Ind. 325.

[8] Hannibal & St. J. R. Co. v. Martin, 111 Ill. 219; Lent v. Railroad Co., 120 N. Y. 467, 24 N. E. 653. And see Poucher v. Railroad Co., 49 N. Y. 263; Gardner v. Railroad Co., 94 Ga. 538, 19 S. E. 757.

§§ 69–70. [1] Pittsburg, C. & St. L. Ry. Co. v. Martin (Super. Ct. Cin.) 2 Ohio N. P. 353; St. Louis S. W. Ry. Co. v. Griffith, 12 Tex. Civ. App. 631, 35 S. W. 741. Reasonable time. Chicago, K. & W. R. Co. v. Frazer, 55 Kan. 582, 40 Pac. 923; Smith v. Railway Co., 29 Or. 539, 46 Pac. 136, 780. If he de-

The passenger may, however, sever the relation at any intermediate point by abandoning the contract of carriage and surrendering his rights thereunder.[2] But the intention to abandon the contract must be reasonably certain, and leaving the conveyance for a temporary purpose,[3] or to pass from one vehicle to another,[4] or by rendering assistance to the carrier or his servants in case of an accident,[5] does not constitute a surrender of his rights as a passenger.

Getting Off at Stations.

Ordinarily the passenger does not surrender his rights as such at the termination of his journey by the mere act of getting off the train. He is still entitled to the care and protection of the carrier until he has had a reasonable opportunity to leave the station and premises.[6] At the terminus of the journey, as in transit, it is the duty of the carrier to use the highest degree of care in the execution of his contract. To this end he must stop the conveyance at the usual point of debarkation, and not at a distance on either side.[7]

barks at a place other than the station, and is injured while crossing the tracks, and without invitation, he is not a passenger. Buckley v. Railroad Co., 161 Mass. 26, 36 N. E. 583. One getting on wrong train, and walking back to station and falling into cattle guard, cannot recover. Finnegan v. Railway Co., 48 Minn. 378, 51 N. W. 122; Pittsburgh, C. & St. L. Ry. Co. v. Krouse, 30 Ohio St. 222; Imhoff v. Railway Co., 20 Wis. 344.

[2] Buckley v. Railroad Co., 161 Mass. 26, 36 N. E. 583. But see Johnson v. Railroad Co., 63 Md. 106.

[3] Parsons v. Railroad Co., 113 N. Y. 355, 21 N. E. 145; Keokuk Northern Line Packet Co. v. True, 88 Ill. 608; Watson v. Railroad Co., 92 Ala. 320, 8 South. 770; Dice v. Locks Co., 8 Or. 60; Jeffersonville, M. & I. R. Co. v. Riley, 39 Ind. 568. But see Johnson v. Railroad Co., 125 Mass. 75; Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420; McClure v. Railroad Co., 34 Md. 532; Denver Tramway Co. v. Reed, 4 Colo. App. 500, 36 Pac. 557.

[4] Northrup v. Assurance Co., 43 N. Y. 516; Hulbert v. Railroad Co., 40 N. Y. 145; Chicago & A. R. Co. v. Winters, 175 Ill. 293, 51 N. E. 901; Washington & G. R. Co. v. Patterson, 9 App. D. C. 423.

[5] Street Ry. Co. v. Bolton, 43 Ohio St. 224, 1 N. E. 333.

[6] Allerton v. Railroad Co., 146 Mass. 241, 15 N. E. 621. And compare Platt v. Railroad Co., 4 Thomp. & C. 406; Pittsburg, C. & St. L. Ry. Co. v. Martin, 2 Ohio N. P. 353, 3 Ohio Dec. 493; Atlanta Consol. St. Ry. Co. v. Bates, 103 Ga. 333, 30 S. E. 41. See, also, cases cited in section 70, note 1, ante.

[7] Louisville, N. A. & C. Ry. Co. v. Cook, 12 Ind. App. 109, 38 N. E. 1104; Brulard v. The Alvin, 45 Fed. 766; Miller v. Railway Co., 93 Ga. 630, 21 S. E. 153; Dudley v. Smith, 1 Camp. 167; International & G. N. Ry. Co. v. Terry,

To stop the train and announce a station is an invitation to alight at that point, and if such point is remote from the platform, or otherwise unsuitable, the carrier is liable for resultant injury to a properly debarking passenger.[8] While it is no part of the carrier's duty to assist passengers in alighting,[9] the stations should be announced,[10] and a reasonable length of time afforded for debarkation.[11]

62 Tex. 380; Illinois Cent. R. Co. v. Able, 59 Ill. 131; Illinois Cent. R. Co. v. Chambers, 71 Ill. 519; Reed v. Railway Co., 100 Mich. 507, 59 N. W. 144; East Tennessee, V. & G. R. Co. v. Lockhart, 79 Ala. 315; White Water R. Co. v. Butler, 112 Ind. 598, 14 N. E. 599; Alabama G. S. R. Co. v. Sellers, 93 Ala. 9, 9 South. 375; Georgia Railroad & Banking Co. v. McCurdy, 45 Ga. 288; Mobile & O. R. Co. v. McArthur, 43 Miss. 180; New Orleans, J. & G. N. R. Co. v. Hurst, 36 Miss. 660; Southern R. Co. v. Kendrick, 40 Miss. 374; Fordyce v. Dillingham (Tex. Civ. App.) 23 S. W. 550; Texas & P. Ry. Co. v. Mansell, Id. 549; West Chicago St. R. Co. v. Walsh, 78 Ill. App. 595.

[8] Columbus & I. C. Ry. Co. v. Farrell, 31 Ind. 408; Terre Haute & I. R. Co. v. Buck, 96 Ind. 346; Philadelphia, W. & B. R. Co. v. McCormick, 124 Pa. St. 427, 16 Atl. 848; Philadelphia & R. R. Co. v. Edelstein (Pa. Sup.) 16 Atl. 847; McNulta v. Ensch, 134 Ill. 46, 24 N. E. 631; Gulf, C. & S. F. Ry. Co. v. Sain (Tex. Civ. App.) 24 S. W. 958; International & G. N. R. Co. v. Smith (Tex. Sup.) 14 S. W. 642; Memphis & L. R. Ry. Co. v. Stringfellow, 44 Ark. 322; Richmond & D. R. Co. v. Smith, 92 Ala. 237, 9 South. 223; Houston & T. C. R. Co. v. Dotson (Tex. Civ. App.) 38 S. W. 642. But the mere calling of the name of a station will not, under all circumstances, be construed an invitation to alight. Central R. Co. of New Jersey v. Van Horn, 38 N. J. Law, 133; Smith v. Railway Co., 88 Ala. 538, 7 South. 119; England v. Railroad Co., 153 Mass. 490, 27 N. E. 1; Philadelphia, W. & B. R. Co. v. Anderson, 72 Md. 519, 20 Atl. 2; International & G. N. R. Co. v. Eckford, 71 Tex. 274, 8 S. W. 679; Louisville, N. A. & C. Ry. Co. v. Lucas, 119 Ind. 583, 21 N. E. 968; Richmond City Ry. Co. v. Scott, 86 Va. 902, 11 S. E. 404; Griffith v. Railway Co., 98 Mo. 168, 11 S. W. 559; Cockle v. Railway Co., L. R. 5 C. P. 457; Id., L. R. 7 C. P. 321; Lewis v. Railway Co., L. R. 9 Q. B. 66; Weller v. Railway Co., L. R. 9 C. P. 126; Bridges v. Railway Co., L. R. 7 H. L. 213.

[9] Nunn v. Railroad Co., 71 Ga. 710; Raben v. Railway Co., 73 Iowa, 579, 35 N. W. 645; Id., 74 Iowa, 732, 34 N. W. 621; Sevier v. Railroad Co., 61 Miss. 8; Texas & P. Ry. Co. v. Alexander (Tex. Civ. App.) 30 S. W. 1113. But a sleeping-car company is bound to awaken passengers. Pullman Palace-Car Co. v. Smith, 79 Tex. 468, 14 S. W. 993.

[10] Raben v. Railway Co., 73 Iowa, 579, 35 N. W. 645; Hurt v. Railway Co., 94 Mo. 255, 7 S. W. 1; Southern R. Co. v. Kendrick, 40 Miss. 374; Louisville, N. O. & T. R. Co. v. Mask, 64 Miss. 738, 2 South. 360.

[11] Keller v. Railroad Co., 27 Minn. 178, 6 N. W. 486; Raben v. Railway

SAME—TRANSFER OF PASSENGER TO CONNECTING CARRIER.

71. In the absence of special contract, the carrier's liability is at an end when he delivers the passenger for further transportation over the connecting line or route of another carrier.

The principles underlying the termination of liability by delivery to connecting carriers apply equally to carriers of passengers and carriers of goods, and will be found more fully and conveniently discussed under the latter head.[1]

When the obligation of the initial carrier is to transport only to the end of his line, his liability to the passenger ceases when that point is reached.[2] This much is beyond controversy. The difficulty lies in determining what constitutes a contract for carriage beyond the terminus of the initial carrier's line, so as to extend his liability beyond that point. That the initial carrier may so obli-

Co., 73 Iowa, 579, 35 N. W. 645; Hurt v. Railway Co., 94 Mo. 255, 7 S. W. 1; Straus v. Railroad Co., 75 Mo. 185; Mississippi & T. R. Co. v. Gill, 66 Miss. 39, 5 South. 393; Fairmount & A. S. P. Ry. Co. v. Stutler, 54 Pa. St. 375; Pennsylvania R. Co. v. Kilgore, 32 Pa. St. 292; Mulhado v. Railroad Co., 30 N. Y. 370; Ferry v. Railway Co., 118 N. Y. 497, 23 N. E. 822; Baker v. Railroad Co., 118 N. Y. 533, 23 N. E. 885; Wood v. Railway Co., 49 Mich. 370, 13 N. W. 779; Finn v. Railway Co., 86 Mich. 74, 48 N. W. 696; Kral v. Railway Co., 71 Minn. 422, 74 N. W. 166; Minor v. Railroad Co., 21 App. Div. 307, 47 N. Y. Supp. 307; Cable v. Railway Co., 122 N. C. 892, 29 S. E. 377; Pierce v. Gray, 63 Ill. App. 158; Luse v. Railway Co., 57 Kan. 361, 46 Pac. 768; Southern R. Co. v. Mitchell, 98 Tenn. 27, 40 S. W. 72. If one about to alight is injured by the premature starting of the train, he may recover. Washington & G. R. Co. v. Harmon's Adm'r, 147 U. S. 571, 13 Sup. Ct. 557; Hill v. Railway Co., 158 Mass. 458, 33 N. E. 582; Gilbert v. Railway Co., 160 Mass. 403, 36 N. E. 60; Onderdonk v. Railway Co., 74 Hun, 42, 26 N. Y. Supp. 310; Bernstein v. Railroad Co., 72 Hun, 46, 25 N. Y. Supp. 669; Chicago & A. R. Co. v. Arnol, 144 Ill. 261, 33 N. E. 204; Illinois Cent. R. Co. v. Taylor, 46 Ill. App. 141.

§ 71. [1] See post, pp. 290–296.

[2] Hartan v. Railroad Co., 114 Mass. 44; Pennsylvania R. Co. v. Connell, 112 Ill. 295; Kerrigan v. Railroad Co., 81 Cal. 248, 22 Pac. 677; Atchison, T. & S. F. R. Co. v. Roach, 35 Kan. 740, 12 Pac. 93.

gate himself is unquestioned,[3] and it is equally well settled that he may contract against any liability beyond the terminus of his own line.[4]

In the absence of an unequivocal, express contract, the weight of authority seems to be to the effect that a through ticket is merely evidence to be considered and weighed in connection with other circumstances,[5] although in some of the earlier cases, which have not been expressly overruled, it was held, following the rule in Muschamp v. Lancaster & P. J. Ry. Co.,[6] that the first carrier issuing a through ticket is prima facie liable for the entire distance.[7]

No matter what the contract of the first carrier may be, as to the point of termination of his liability, the right of the passenger to sue the particular carrier on whose line the injury is suffered is unaffected thereby.[8]

[3] Quimby v. Vanderbilt, 17 N. Y. 306; Van Buskirk v. Roberts, 31 N. Y. 661; Bussman v. Transit Co., 9 Misc. Rep. 410, 29 N. Y. Supp. 1066; Cary v. Railroad Co., 29 Barb. 35; Candee v. Railroad Co., 21 Wis. 589; Cherry v. Railroad Co., 1 Mo. App. Rep'r, 253; Nashville & C. R. Co. v. Sprayberry, 9 Heisk. (Tenn.) 852; Watkins v. Railroad Co., 21 D. C. 1. That such a contract is not ultra vires, see Buffett v. Railroad Co., 40 N. Y. 168; Bissell v. Railroad Co., 22 N. Y. 258; Chicago & A. R. Co. v. Dumser, 161 Ill. 190, 43 N. E. 698.

[4] Berg v. Railroad Co., 30 Kan. 561, 2 Pac. 639; Moore v. Railway Co. (Tex. Civ. App.) 45 S. W. 609.

[5] Hartan v. Railroad Co., 114 Mass. 44; Pennsylvania R. Co. v. Connell, 112 Ill. 295; Young v. Railroad Co., 115 Pa. St. 112, 7 Atl. 741; Nashville & C. R. Co. v. Sprayberry, 9 Heisk. (Tenn.) 852; Knight v. Railroad Co., 56 Me. 234; Hood v. Railroad Co., 22 Conn. 1. And see Brooke v. Railroad Co., 15 Mich. 332; Kessler v. Railroad Co., 61 N. Y. 538.

[6] 8 Mees. & W. 421.

[7] Illinois Cent. R. Co. v. Copeland, 24 Ill. 332; Najac v. Railroad Co., 7 Allen (Mass.) 329; Wilson v. Railroad Co., 21 Grat. (Va.) 654; Candee v. Railroad Co., 21 Wis. 589; Carter v. Peck, 4 Sneed (Tenn.) 203; Barkman v. Railroad Co., 89 Fed. 453; Omaha & R. V. Railway Co. v. Crow, 54 Neb. 747, 74 N. W. 1066. The English cases support this rule. Great Western Ry. Co. v. Blake, 7 Hurl. & N. 987; Mytton v. Railway Co., 4 Hurl. & N. 614.

[8] Schopman v. Railroad Corp., 9 Cush. (Mass.) 24; Chicago & R. I. R. Co. v. Fahey, 52 Ill. 81; Johnson v. Railroad Co., 70 Pa. St. 357. But see Furstenheim v. Railroad Co., 9 Heisk. (Tenn.) 238.

SAME—EJECTION OF PASSENGER.

72. The carrier may, in certain circumstances, eject the passenger from the vehicle, and thus terminate the relation, provided

(a) That the ejection is made at a suitable place, and

(b) That it is made with due regard for the passenger's safety, and that no more force is used to accomplish the purpose than is necessary.

Whenever the passenger becomes guilty of disorderly conduct, or it seems inevitable or probable that he will be guilty of rudeness or indecency, the carrier is justified in ejecting him from the vehicle.[1] And if the passenger is intoxicated, and uses boisterous, profane, or otherwise indecent language, it is not only the right, but the duty, of the carrier, towards other passengers, to eject him.[2] But mere drunkenness, if unaccompanied by specific acts of offensive conduct, does not ordinarily warrant expulsion.[3] If the passenger refuses to pay his fare,[4] or to otherwise comply with proper and reasonable reg-

§ 72. [1] Vinton v. Railroad Co., 11 Allen (Mass.) 304; Sullivan v. Railroad Co., 148 Mass. 119, 18 N. E. 678; Baltimore, P. & C. R. Co. v. McDonald, 68 Ind. 316; Peavy v. Railroad Co., 81 Ga. 485, 8 S. E. 70; Chicago City Ry. Co. v. Pelletier, 134 Ill. 120, 24 N. E. 770.

[2] Vinton v. Railroad Co., 11 Allen (Mass.) 304. And see, generally, as to drunken passengers, Missouri Pac. Ry. Co. v. Evans, 71 Tex. 361, 9 S. W. 325; Cincinnati, I., St. L. & C. R. Co. v. Cooper, 120 Ind. 469, 22 N. E. 340; Strand v. Railway Co., 67 Mich. 380, 34 N. W. 712; Murphy v. Railway Co., 118 Mass. 228; Chicago & A. R. Co. v. Randolph, 65 Ill. App. 208; Edgerly v. Railroad Co. (N. H.) 36 Atl. 558; Robinson v. Rockland, T. & C. St. Ry. Co., 87 Me. 387, 32 Atl. 994.

[3] Putnam v. Railroad Co., 55 N. Y. 108; Prendergast v. Compton, 8 Car. & P. 454.

[4] Ohio & M. R. Co. v. Muhling, 30 Ill. 9; Pittsburgh, C. & St. L. Ry. Co. v. Dewin, 86 Ill. 296; Great Western Ry. Co. v. Miller, 19 Mich. 305; Gibson v. Railroad Co., 30 Fed. 904; O'Brien v. Railroad Co., 15 Gray (Mass.) 20; State v. Campbell, 32 N. J. Law, 309; Wyman v. Railroad Co., 34 Minn. 210, 25 N. W. 349; Lillis v. Railway Co., 64 Mo. 464; Grogan v. Railway Co., 39 W. Va. 415, 19 S. E. 593. Cf. Ramsden v. Railroad Co., 104 Mass. 117; Trezona v. Railway Co., 107 Iowa, 22, 77 N. W. 486; McGhee v. Reynolds (Ala.) 23 South. 68; Illinois Cent. R. Co. v. Marlett (Miss.) 23 South. 583; Krueger v. Railway Co., 68 Minn. 445, 71 N. W. 683.

ulations, he forfeits his right to be carried;[5] or if he insists on using the vehicles of the carrier for the purpose of vending his wares.[6] But because a carrier has the right to reject an applicant for passage, as being of bad character or otherwise objectionable, it does not follow that, having accepted him, he retains an option to eject him at any time for a like reason.[7]

Tender after Refusal.

A tender of fare or an offer of compliance with regulations may nevertheless be effectually made by the recalcitrant passenger at any time before the carrier has actually begun to eject him, and the carrier is then bound to accept such proffer, and to permit him to continue his journey.[8] When, however, the carrier has already taken decisive steps towards his removal, as stopping the train, such a tender need not be accepted, and the ejection may be carried out.[9] In such cases, if the passenger has already paid the whole or a part of his fare, the amount paid must be refunded, before the right of ejection is complete.[10]

[5] Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420; McClure v. Railroad Co., 34 Md. 532; Denver Tramway Co. v. Reed, 4 Colo. App. 500, 36 Pac. 557; Noble v. Railroad Co., 4 Okl. 534, 46 Pac. 483; Decker v. Railroad Co., 3 Okl. 553, 41 Pac. 610; McMillan v. Railway Co., 172 Pa. St. 523, 33 Atl. 560.

[6] The D. R. Martin, 11 Blatchf. 233, Fed. Cas. No. 1,030; Com. v. Power, 7 Metc. (Mass.) 596; Barney v. Steamboat Co., 67 N. Y. 301.

[7] Pearson v. Duane, 4 Wall. 605.

[8] Hutch. Carr. (2d Ed.) § 591a; Ham v. Canal Co., 142 Pa. St. 617, 21 Atl. 1012; O'Brien v. Railroad Co., 80 N. Y. 236; Louisville & N. R. Co. v. Garrett, 8 Lea (Tenn.) 438; Texas & P. Ry. Co. v. Bond, 62 Tex. 442; South Carolina R. Co. v. Nix, 68 Ga. 572; Baltimore & O. R. Co. v. Norris, 17 Ind. App. 189, 49 N. E. 554.

[9] Hibbard v. Railroad Co., 15 N. Y. 455; O'Brien v. Railroad Co., 80 N. Y. 236; Pease v. Railroad Co., 101 N. Y. 367, 5 N. E. 37; Hoffbauer v. Railroad Co., 52 Iowa, 342, 3 N. W. 121; State v. Campbell, 32 N. J. Law, 309; Cincinnati, S. & C. R. Co. v. Skillman, 39 Ohio St. 444; Pickens v. Railroad Co., 104 N. C. 312, 10 S. E. 556; Clark v. Railroad Co., 91 N. C. 506; Atchison, T. & S. F. R. Co. v. Dwelle, 44 Kan. 394, 24 Pac. 500; Louisville, N. & G. S. R. Co. v. Harris, 9 Lea (Tenn.) 180; Galveston, H. & S. A. Ry. Co. v. Turner (Tex. Civ. App.) 23 S. W. 83; Harrison v. Fink, 42 Fed. 787; Guy v. Railway Co., 6 Ohio N. P. 3; Illinois Cent. R. Co. v. Bauer, 66 Ill. App. 124.

[10] Bland v. Railroad Co., 55 Cal. 570; Iseman v. Railroad Co., 52 S. C. 566, 30 S. E. 488; Lake Shore & M. S. R. Co. v. Orndorff, 55 Ohio St. 589, 45 N. E. 447. But see Hoffbauer v. Railroad Co., 52 Iowa, 342, 3 N. W. 121, contra,

The Ejection must be Made at a Suitable Place.

In those states where there is no statute requiring railroads, in cases of ejection, to put off the offending passenger at a station or near a dwelling house, the train may be stopped and the passenger required to get off at any point.[11]

Exercise of Reasonable Care.

In exercising the right of ejection, reasonable care must be taken that the person is not needlessly or wantonly exposed to injury or suffering. He must not be ejected in a dangerous place,[12] nor from a train in rapid motion.[13] No more force must be used than is essential for the purpose, and the carrier will be liable for any unnecessary or excessive force or willful injury.[14] Resistance by the passenger may, however, be overcome by a necessary amount of force.[15]

where the amount paid was no more than the carrier was entitled to for the distance the passenger was carried before being ejected. And compare Burnham v. Railroad Co., 63 Me. 298; Cheney v. Railroad Co., 11 Metc. (Mass.) 121.

[11] Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420; O'Brien v. Railroad Co., 15 Gray (Mass.) 20; Brown v. Railroad Co., 51 Iowa, 235, 1 N. W. 487; Wyman v. Railroad Co., 34 Minn. 210, 25 N. W. 349; Lillis v. Railway Co., 64 Mo. 464; Great Western Ry. Co. v. Miller, 19 Mich. 305; McClure v. Railroad Co., 34 Md. 532; Young v. Railway Co. (La.) 25 South. 69; Guy v. Railway Co., 6 Ohio N. P. 3; McCook v. Northup (Ark.) 45 S. W. 547; Burch v. Railroad Co., 3 App. D. C. 346; Boehm v. Railway Co., 91 Wis. 592, 65 N. W. 506.

[12] Gulf, C. & S. F. Ry. Co. v. Kirkbride, 79 Tex. 457, 15 S. W. 495; Louisville & N. R. Co. v. Ellis' Adm'r, 97 Ky. 330, 30 S. W. 979; Johnson v. Railroad Co., 104 Ala. 241, 16 South. 75; Edison v. Railway Co. (Miss.) 23 South. 369; Louisville & N. R. Co. v. Johnson, 108 Ala. 62, 19 South. 51. Ejection of one under physical disability. Young v. Railway Co. (La.) 25 South. 69.

[13] Sanford v. Railroad Co., 23 N. Y. 343; State v. Kinney, 34 Minn. 311, 25 N. W. 705; Brown v. Railroad Co., 66 Mo. 588; Gulf, C. & S. F. Ry. Co. v. Kirkbride, 79 Tex. 457, 15 S. W. 495; Fell v. Railroad Co., 44 Fed. 248; Bosworth v. Walker, 27 C. C. A. 402, 83 Fed. 58; Union Pac. Ry. Co. v. Mitchell, 56 Kan. 324, 43 Pac. 244.

[14] New Jersey Steamboat Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. 1039; Holmes v. Wakefield, 12 Allen (Mass.) 580; Pennsylvania R. Co. v. Vandiver, 42 Pa. St. 365; Bass v. Railroad Co., 36 Wis. 450; Mykleby v. Railway Co., 39 Minn. 54, 38 N. W. 763; Evansville & I. R. Co. v. Gilmore, 1 Ind. App. 468, 27 N. E. 992; Gulf, C. & S. F. Ry. Co. v. Kuenhle (Tex. App.) 16 S. W. 177;

[15] Townsend v. Railroad Co., 56 N. Y. 295.

Wrongful Ejection.

When a passenger is wrongfully expelled from a train, it is not necessary for the protection of his rights that he resist, in order that the carrier may be compelled to use force. It is amply sufficient if, at the demand of the conductor, he leaves the car under protest.[16]

If the attempt to remove the passenger is in itself wrongful, he may use a reasonable amount of force in resisting; but, even where the passenger is right and the conductor wrong, it has been held to be contributory negligence to resist the latter by engaging in an unnecessary trial of strength.[17] Of course, a party may resist when, in the circumstances, resistance is necessary for the protection of his life or to prevent serious injury, as when a train is in rapid motion.[18]

WHO ARE PASSENGERS—DEFINITION.

73. Generally speaking, a passenger is one, other than an employe, who, in accordance with the reasonable regulations of the carrier, has seasonably presented himself for transportation.

Not every one who rides upon the conveyances of a common carrier is entitled to exact the extraordinary degree of care which the

Knowles v. Railroad Co., 102 N. C. 59, 9 S. E. 7; Jardine v. Cornell, 50 N. J. Law, 485, 14 Atl. 590; Brown v. Railroad Co., 66 Mo. 588; Philadelphia, W. & B. R. Co. v. Larkin, 47 Md. 155. But see Pittsburgh, C., C. & St. L. Ry. Co. v. Russ, 6 C. C. A. 597, 57 Fed. 822.

[16] Southern Kan. Ry. Co. v. Rice, 38 Kan. 398, 16 Pac. 817. See, also, Pullman Palace-Car Co. v. Reed, 75 Ill. 125; Hall v. Railroad Co., 15 Fed. 57; Bradshaw v. Railroad Co., 135 Mass. 407; Townsend v. Railroad Co., 56 N. Y. 301; Pennsylvania R. Co. v. Connell, 112 Ill. 296; Ray v. Traction Co., 19 App. Div. 530, 46 N. Y. Supp. 521; Consolidated Traction Co. v. Taborn, 58 N. J. Law, 1, 32 Atl. 685.

[17] Brown v. Railroad Co., 7 Fed. 51, 65; Hall v. Railroad Co., 15 Fed. 57.

[18] Southern Kan. Ry. Co. v. Rice, 38 Kan. 398, 16 Pac. 817; Hall v. Railroad Co., 15 Fed. 57; Brown v. Railroad Co., 7 Fed. 51; Sanford v. Railroad Co., 23 N. Y. 343; English v. Canal Co., 66 N. Y. 454; Louisville, N. A. & C. Ry. Co. v. Wolfe, 128 Ind. 347, 27 N. E. 606. In the last two cases the passenger had paid his fare, and was ejected for refusal to pay again, and was in each instance permitted to recover for injuries due to his reasonable resistance.

carrier is bound to extend towards a passenger.[1] The common carrier may properly set apart and designate certain vehicles for the carriage of passengers and others for freight; and a railroad has the undoubted right to reserve particular cars for its exclusive use in the proper conduct of its business, and upon which it is not bound to carry passengers, as pay cars,[2] private cars, and hand cars.[3] And, if the company makes other suitable provision for transporting its passengers, it is not compelled to admit them to travel on its freight trains.[4] It follows that the relation of carrier and passenger does not exist between a railroad and one who, either surreptitiously or by force, obtains an entrance into a freight train.[5] It is, of course, otherwise if the company habitually permits or tacitly consents to the use of its freight trains by passengers, although such carriage is prohibited by the regulations of the road.[6] But when there is no coach attached to the train at all fitted or suitable for the carriage of passengers, or calculated to invite entrance, and the well-known regulations forbid such carriage, the burden of proof falls upon the person claiming damages to show an invitation or permission, either express or implied, to enter such train as a passenger.[7] "The presumption of law is that persons rid-

§ 73. [1] St. Joseph & W. R. Co. v. Wheeler, 35 Kan. 185, 10 Pac. 461.

[2] Southwestern R. Co. v. Singleton, 66 Ga. 252.

[3] Hoar v. Railroad Co., 70 Me. 65; Willis v. Railroad Co., 120 N. C. 508, 26 S. E. 784.

[4] Jenkins v. Railway Co., 41 Wis. 112; Gardner v. Northampton Co., 51 Conn. 143.

[5] Eaton v. Railroad Co., 57 N. Y. 382; Houston & T. C. Ry. Co. v. Moore, 49 Tex. 31; Arnold v. Railroad Co., 83 Ill. 273; Thomas v. Railway Co., 72 Mich. 355, 40 N. W. 463; Murch v. Railroad Corp., 29 N. H. 9; Hobbs v. Railway Co., 49 Ark. 357, 5 S. W. 586; Louisville & N. R. Co. v. Hailey, 94 Tenn. 383, 29 S. W. 367; San Antonio & A. P. Ry. Co. v. Lynch, 8 Tex. Civ. App. 513, 28 S. W. 252.

[6] Houston & T. C. Ry. Co. v. Moore, 49 Tex. 31; Lucas v. Railway Co., 33 Wis. 41; Dunn v. Railroad Co., 58 Me. 187; Alabama G. S. R. Co. v. Yarbrough, 83 Ala. 238, 3 South. 447; St. Joseph & W. R. Co. v. Wheeler, 35 Kan. 185, 10 Pac. 461; Burke v. Railway Co., 51 Mo. App. 491; Boehm v. Railway Co., 91 Wis. 592, 65 N. W. 506; Arkansas Midland Ry. Co. v. Griffith, 63 Ark. 491, 39 S. W. 550.

[7] Houston & T. C. Ry. Co. v. Moore, 49 Tex. 31; St. Louis S. W. Ry. Co. v. White (Tex. Civ. App.) 34 S. W. 1042.

ing upon trains of a railroad carrier which are manifestly not designed for the transportation of persons are not lawfully there; and, if they are permitted to be there by the consent of the carrier's employés, the presumption is against the authority of the employés to bind the carrier by such consent. But such presumption may be overthrown by special circumstances, as, where the railroad company would derive a benefit from the presence of drovers upon its cattle trains, and its employés in charge of such trains invite or permit drovers to accompany their cattle, the presumption against a license to the person thus carried may be overthrown." [8]

On the other hand, if a railroad company permits any of its freight trains to be used for carrying passengers, it is equivalent, so far as the public is concerned, to authorizing the conductors of all freight trains to receive passengers; [9] and, if such other conductors are not so authorized or are expressly forbidden to carry passengers, they are in the nature of secret limitations upon the apparent authority, and not binding upon third persons without actual notice.[10]

Although the ordinary passenger pays his fare in consideration of his carriage, the compensation may be indirect, and his purpose on the train other than that of mere transportation. Express messengers,[11] newsboys,[12] and postal clerks [13] are none the less pas-

[8] Waterbury v. Railroad Co., 17 Fed. 671.

[9] Dunn v. Railway Co., 58 Me. 187; St. Joseph & W. R. Co. v. Wheeler, 35 Kan. 185, 10 Pac. 461; Brown v. Railroad Co., 38 Kan. 634, 16 Pac. 942; Wagner v. Railway Co., 97 Mo. 512, 10 S. W. 486; Texas & P. Ry. Co. v. Black, 87 Tex. 160, 27 S. W. 118.

[10] Lawson v. Railway Co., 64 Wis. 447, 456, 24 N. W. 618; St. Joseph & W. R. Co. v. Wheeler, 35 Kan. 185, 10 Pac. 461; Illinois Cent. R. Co. v. Axley, 47 Ill. App. 307.

[11] Blair v. Railway Co., 66 N. Y. 313; Chamberlain v. Railroad Co., 11 Wis. 238. Cf. Pennsylvania Co. v. Woodworth, 26 Ohio St. 585; Yeomans v. Navigation Co., 44 Cal. 71; San Antonio & A. P. Ry. Co. v. Adams, 6 Tex. Civ. App. 102, 24 S. W. 839; Voight v. Railway Co., 79 Fed. 561.

[12] Com. v. Vermont & M. R. Co., 108 Mass. 7; Yeomans v. Navigation Co., 44 Cal. 71.

[13] Pennsylvania R. Co. v. Price, 96 Pa. St. 256; Nolton v. Railroad Corp., 15 N. Y. 444; Seybolt v. Railroad Co., 95 N. Y. 562; Hammond v. Railroad Co., 6 S. C. 130; Houston & T. C. R. Co. v. Hampton, 64 Tex. 427; Arrowsmith v. Railroad Co., 57 Fed. 165; Louisville & N. R. Co. v. Kingman (Ky.) 35 S. W. 264; Norfolk & W. R. Co. v. Shott, 92 Va. 34, 22 S. E. 811; International

sengers because they are carried under special contracts, and the liability of the carrier towards them cannot in any case be modified by such special contract, unless they are privy to it;[14] but the absolute duty of carrying the mails is imposed by United States statute, and cannot be modified by contract limiting or abrogating liability for injuries to agents engaged in the postal service.[15] Although traveling on Sunday may be illegal by statute, the carrier is not thereby relieved of liability.[16]

If the carrier receives into its vehicles the passengers of another carrier,[17] or furnishes motive power for their transportation,[18] they become the passengers of the carrier so transporting them; so, also, of the servants of another company.[19]

Employes as Passengers.

When an employé of the carrier is transported daily or frequently to and from his work in the vehicles of his master, without charge, even if his work is entirely unconnected with the operation of the road or system, while so traveling he is not a passenger, and his

& G. N. Ry. Co. v. Davis (Tex. Civ. App.) 43 S. W. 540; Collett v. Railway Co., 16 Q. B. 984.

[14] Blair v. Railway Co., 66 N. Y. 313; Pennsylvania Co. v. Woodworth, 26 Ohio St. 585; Yeomans v. Navigation Co., 44 Cal. 71; Hammond v. Railroad Co., 6 S. C. 130.

[15] Arrowsmith v. Railroad Co., 57 Fed. 165; Mellor v. Railway Co., 105 Mo. 455, 16 S. W. 849; Seybolt v. Railroad Co., 95 N. Y. 562. Cf. Pennsylvania R. Co. v. Price, 96 Pa. St. 256. See, also, Louisville & N. R. Co. v. Kingman (Ky.) 35 S. W. 264; Norfolk & W. R. Co. v. Shott, 92 Va. 34, 22 S. E. 811.

[16] Carroll v. Railroad Co., 58 N. Y. 126.

[17] Foulkes v. Railway Co., 4 C. P. Div. 267, 5 C. P. Div. 157; White v. Railroad Co., 115 N. C. 631, 20 S. E. 191; Reynolds v. Railway Co., 2 Rosc. N. P. Ev. 735; Dalyell v. Tyrer, 28 Law J. Q. B. 52; Martin v. Railway Co., L. R. 3 Exch. 9. And see Skinner v. Railway Co., 5 Exch. 787.

[18] Schopman v. Railroad Corp., 9 Cush. (Mass.) 24; Galveston, H. & S. A. Ry. Co. v. Parsley, 6 Tex. Civ. App. 150, 25 S. W. 64.

[19] Zeigler v. Railroad Co., 52 Conn. 543; Philadelphia, W. & B. R. Co. v. State, 58 Md. 372. Cf. Illinois Cent. R. Co. v. Frelka, 110 Ill. 498; Pennsylvania Co. v. Gallagher, 40 Ohio St. 637; In re Merrill, 54 Vt. 200; Lockhart v. Lichtenthaler, 46 Pa. St. 151, 159; Cumberland Val. R. Co. v. Myers, 55 Pa. St. 288; Brown v. Railway Co., 40 U. C. Q. B. 333; Vose v. Railway Co., 2 Hurl. & N. 728. And see Torpy v. Railway Co., 20 U. C. Q. B. 446; Lackawanna & B. R. Co. v. Chenewith, 52 Pa. St. 382.

rights are determined by the law of master and servant.[20] But, although he pays no fare, if he is traveling on his own business he is a passenger.[21] And, when the carrier either directly or indirectly receives compensation for his carriage, he is a passenger, and not a servant; as if the transportation is considered in fixing his wages, or a deduction is made therefrom on that account.[22] But when transportation is given an employé at irregular or infrequent intervals, as to a surveyor who was hired by the month, and was being carried from his home to the place of his work, it has been held that he can recover as a passenger for injuries suffered through the negligence of the carrier.[23]

Gratuitous Passengers.

The extraordinary duties which a common carrier owes to its passengers do not depend alone on the consideration paid for the service. They are imposed by law even when the service is gratuitous.[24] The leading case on this point is that of Philadelphia & R. R. Co. v. Derby.[25] The president of one railroad, riding on the invitation of the president of another over the latter's road, was injured by a collision, and was allowed to recover therefor; the court saying that

[20] Vick v. Railroad Co., 95 N. Y. 267; Gillshannon v. Railroad Corp., 10 Cush. (Mass.) 228; Seaver v. Railroad Co., 14 Gray (Mass.) 466; New York, L. E. & W. R. Co. v. Burns, 51 N. J. Law, 340, 17 Atl. 630; Ryan v. Railroad Co., 23 Pa. St. 384; O'Donnell v. Railroad Co., 59 Pa. St. 239; Russell v. Railroad Co., 17 N. Y. 134; Wright v. Railroad Co., 122 N. C. 852, 29 S. E. 100. Porter on palace car. Jones v. Railway Co., 125 Mo. 666, 28 S. W. 883. Contra, Hughson v. Railroad Co., 9 App. D. C. 98.

[21] Ohio & M. R. Co. v. Muhling, 30 Ill. 9; Doyle v. Railroad Co., 162 Mass. 66, 37 N. E. 770. But see Higgins v. Railroad Co., 36 Mo. 418.

[22] O'Donnell v. Railroad Co., 59 Pa. St. 239, in seeming opposition to Vick v. Railroad Co., 95 N. Y. 267; but in the latter case it did not appear that the consideration of transportation was material in making the contract.

[23] Ross v. Railroad Co., 5 Hun (N. Y.) 488, affirmed in 74 N. Y. 617.

[24] Todd v. Railroad Co., 3 Allen (Mass.) 18; Com. v. Vermont & M. R. Co., 108 Mass. 7; Littlejohn v. Railroad Co., 148 Mass. 478, 20 N. E. 103; Files v. Railroad Co., 149 Mass. 204, 21 N. E. 311; Philadelphia & R. R. Co. v. Derby, 14 How. 468; The New World v. King, 16 How. 469; Quimby v. Railroad Co., 150 Mass. 365, 368, 23 N. E. 205; Waterbury v. Railroad Co., 17 Fed. 671; Nolton v. Railroad Corp., 15 N. Y. 444; Perkins v. Railroad Co., 24 N. Y. 197; Jacobus v. Railway Co., 20 Minn. 125 (Gil. 110).

[25] 14 How. 468.

the defendant railroad owed plaintiff the duty of safe transportation, independent of any contract. The invitation to ride free must, however, be given by one in authority; otherwise, and especially if it is in known violation of rules, he is not a passenger.[26] But a child riding with her parents without payment of fare can claim the rights of a passenger, provided she is within the age at which the road permits children to ride free.[27] Stockmen in charge of stock to look after them in transit, traveling on drovers' passes, are entitled to protection and safe carriage, as ordinary passengers.[28]

It is held by some courts that the carrier may, by contract, limit his liability for the carriage of gratuitous passengers.[29]

Duty to Accept Passengers.

Those who hold themselves out to the public as common carriers of persons are bound to accept for transportation all proper persons who apply in the customary manner.[30] This does not mean that

[26] Hoar v. Railroad Co., 70 Me. 65; Eaton v. Railroad Co., 57 N. Y. 382; Houston & T. C. Ry. Co. v. Moore, 49 Tex. 31; Waterbury v. Railroad Co., 17 Fed. 671, and note; Ohio & M. Ry. Co. v. Allender, 59 Ill. App. 620; Wilcox v. Railway Co., 11 Tex. Civ. App. 487, 33 S. W. 379; Brevig v. Railway Co., 64 Minn. 168, 66 N. W. 401; De Palacios v. Railway Co. (Tex. Civ. App.) 45 S. W. 612; Galaviz v. Railroad Co. (Tex. Civ. App.) 38 S. W. 234.

[27] Austin v. Railway Co., 8 Best & S. 327, L. R. 2 Q. B. 442. In this case the child was 3 years and 3 months old, and should have paid half fare, yet a recovery was permitted.

[28] Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291; Florida Ry. & Nav. Co. v. Webster, 25 Fla. 394, 5 South. 714; Olson v. Railroad Co., 45 Minn. 536, 48 N. W. 445; Orcutt v. Railroad Co., 45 Minn. 368, 47 N. W. 1068; Missouri Pac. Ry. Co. v. Ivy, 71 Tex. 409, 9 S. W. 346; New York, C. & St. L. R. Co. v. Blumenthal, 160 Ill. 40, 43 N. E. 809; Omaha & R. V. Ry. Co. v. Crow, 47 Neb. 84, 66 N. W. 121; Saunders v. Southern Pac. Co., 13 Utah, 275, 44 Pac. 932; Chicago & A. R. Co. v. Winters, 175 Ill. 293, 51 N. E. 901; St. Louis S. W. Ry. Co. v. Nelson (Tex. Civ. App.) 44 S. W. 179; Louisville & N. R. Co. v. Bell (Ky.) 38 S. W. 8; Ft. Scott, W. & W. Ry. Co. v. Sparks, 55 Kan. 288, 39 Pac. 1032.

[29] See post, p. 212. Rogers v. Steamboat Co., 86 Me. 261, 29 Atl. 1069; Muldoon v. Railway Co., 10 Wash. 311, 38 Pac. 995.

[30] West Chester & P. R. Co. v. Miles, 55 Pa. St. 209; Sanford v. Railroad Co., 2 Phila. (Pa.) 107; Day v. Owen, 5 Mich. 520; Hollister v. Nowlen, 19 Wend. (N. Y.) 234; Hannibal R. R. v. Swift, 12 Wall. 262; Saltonstall v. Stockton, Taney, 11, Fed. Cas. No. 12,271; Indianapolis, P. & C. Ry. Co. v. Rinard, 46 Ind. 293; Lake Erie & W. R. Co. v. Acres, 108 Ind. 548, 9 N. E.

they must carry every person who is not positively dangerous or obnoxious to other passengers, but merely that carriers cannot consult personal prejudice or exercise nice discrimination in determining whom they will transport. They need not carry persons having contagious diseases,[31] nor those who are intoxicated and disorderly.[32] Neither are they obligated to carry criminals, or those going upon the train with the intent of committing an assault on a passenger. The would-be passenger must be free from unlawful intent, and the carrier is not bound to accept persons who intend using the trains for gambling purposes.[33] Likewise, if the presence of a person on a train or his arrival at the proposed destination would probably be productive of violence or disorder, he may be refused passage.[34]

Peddlers, Book Agents, Etc.

In the absence of specific contract, a passenger has no right to use the vehicles of the carrier for purposes of traffic, and the carrier may properly refuse to admit to its trains or vehicles those intending to come aboard for that purpose,[35] or may eject those who, being on the train or boat, engage in such traffic contrary to the regulations.[36]

453; Mershon v. Hobensack, 22 N. J. Law, 372; Baltimore & O. R. Co. v. Carr, 71 Md. 135, 17 Atl. 1052.

[31] Thurston v. Railroad Co., 4 Dill. 321, Fed. Cas. No. 14,019. Rule as to blind men: Zachery v. Railroad Co., 74 Miss. 520, 21 South. 246; Id., 75 Miss. 746, 23 South. 434.

[32] Putnam v. Railroad Co., 55 N. Y. 108; Pittsburgh & C. R. Co. v. Pillow, 76 Pa. St. 510; but not slight intoxication, Pittsburgh, C. & St. L. R. Co. v. Vandyne, 57 Ind. 576; Milliman v. Railroad Co., 66 N. Y. 642; Vinton v. Railroad Co., 11 Allen (Mass.) 304; Pittsburgh, Ft. W. & C. Ry. Co. v. Hinds, 53 Pa. St. 512; Flint v. Transportation Co., 34 Conn. 554; Freedon v. Railroad Co., 24 App. Div. 306, 48 N. Y. Supp. 584.

[33] Thurston v. Railroad Co., 4 Dill. 321, Fed. Cas. No. 14,019; Galveston, H. & S. A. Ry. Co. v. McMonigal (Tex. Civ. App.) 25 S. W. 341.

[34] Pearson v. Duane, 4 Wall. 605. But see, as to a prostitute, Brown v. Railroad Co., 7 Fed. 51.

[35] Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. No. 7,258; Com. v. Power, 7 Metc. (Mass.) 596; New Jersey Steam Nav. Co. v. Merchants' Bank of Boston, 6 How. 343; The D. R. Martin, 11 Blatchf. 233, Fed. Cas. No. 1,030; Barney v. Steamboat Co., 67 N. Y. 301; Smallman v. Whilter, 87 Ill. 545.

[36] The D. R. Martin, 11 Blatchf. 233, Fed. Cas. No. 1,030.

Limited Accommodations.

When the accommodations of the carrier are limited, he is not bound to receive passengers after the room is exhausted.[37] But if, having sold a person a ticket, the carrier is unable or fails to furnish him with suitable accommodations, he is liable for breach of contract.[38]

SAME—PREPAYMENT OF FARE.

74. The prepayment of fare may be demanded, as a condition precedent to accepting a person as a passenger.

As it is the business of the carrier to transport for hire, he is bound to carry only those who are able and willing to pay the fare, and prepayment may be demanded, as a condition precedent to accepting a person as a passenger.[1] But, in order that the passenger may be rightfully on the train for transportation, it is not necessary that he should have paid his fare before entering, or bought his ticket.[2] It is sufficient if he intends paying his fare when demand-

[37] Chicago & N. W. R. Co. v. Carroll, 5 Ill. App. 201; Evansville & C. R. Co. v. Duncan, 28 Ind. 441.

[38] The Pacific, 1 Blatchf. 569, Fed. Cas. No. 10,643; Evansville & C. R. Co. v. Duncan, 28 Ind. 441; Alabama & V. Ry. Co. v. Drummond, 73 Miss. 813, 20 South. 7; Hawcroft v. Railway Co., 8 Eng. Law & Eq. 362. A carrier is bound to furnish seats for passengers, and, on his failure to do so, the passenger may refuse to surrender his ticket and leave the train, but cannot insist on being carried if he retains his ticket. Hardenbergh v. Railway Co., 39 Minn. 3, 38 N. W. 625; Memphis & C. R. Co. v. Benson, 85 Tenn. 627, 4 S. W. 5; Davis v. Railroad Co., 53 Mo. 317; St. Louis, I. M. & S. Ry. Co. v. Leigh, 45 Ark. 368; Louisville, N. O. & T. Ry. Co. v. Patterson, 69 Miss. 421, 13 South. 697.

§ 74. [1] Day v. Owen, 5 Mich. 520; Tarbell v. Railroad Co., 34 Cal. 616; Nashville & C. R. Co. v. Messino, 1 Sneed (Tenn.) 220; McCook v. Northup (Ark.) 45 S. W. 547; Ker v. Mountain, 1 Esp. 27. A strict tender of fare is not necessary. Day v. Owen, supra; Pickford v. Railway Co., 8 Mees. & W. 372.

[2] Cleveland v. Steamboat Co., 68 N. Y. 306; Carpenter v. Railroad Co., 97 N. Y. 494; Ellsworth v. Railway Co. (Iowa) 63 N. W. 584; Houston & T. C. R. Co. v. Washington (Tex. Civ. App.) 30 S. W. 719; Cross v. Railway Co., 56 Mo. App. 664; Missouri, K. & T. Ry. Co. v. Simmons, 12 Tex. Civ. App. 500, 33 S. W. 1096.

ed, and is guilty of no deceit which prevents such demand being made;[3] and this is true even when the rules of the carrier require that tickets shall be bought before entering the train, by persons intending to take passage.[4]

When the carrier is in possession of knowledge which would warrant him in refusing to accept a person as a passenger, he should make his election, either to receive or refuse him, at the earliest possible moment. If, being in possession of such knowledge, he sells him a ticket, he cannot thereafter refuse him transportation.[5] If a ticket is inadvertently sold to such a person, the contract of carriage cannot, in any event, be rescinded without a repayment of the fare.[6]

SAME—CLASSIFICATION OF PASSENGERS.

75. A common carrier is bound to furnish equal accommodations to similar persons paying the same fare, but the charge may properly be graduated according to the service, and such regulations may be made and enforced as reasonably tend to the comfort and convenience of passengers generally.

While the carrier is obligated to accept for transportation all suitable persons who apply in the customary way, he may very properly regulate the character of the accommodations in accordance with a fixed scale of prices.[1] Such an arrangement is in entire accord with well-settled business principles, and adds to the comfort and convenience of all classes of travelers.[2] And it is not only reasonable, but eminently desirable, that proper provision be made for the comfort

[3] Columbus, C. & I. C. Ry. Co. v. Powell, 40 Ind. 37. Per contra, see Gardner v. Northampton Co., 51 Conn. 143.

[4] Doran v. Ferry Co., 3 Lans. (N. Y.) 105.

[5] Hannibal R. Co. v. Swift, 12 Wall. 262; Pearson v. Duane, 4 Wall. 605; Tarbell v. Railroad Co., 34 Cal. 616. But see Com. v. Power, 7 Metc. (Mass.) 596; The D. R. Martin, 11 Blatchf. 233, Fed. Cas. No. 4,092.

[6] Thurston v. Railroad Co., 4 Dill. 321, Fed. Cas. No. 14,019.

§ 75. [1] Wright v. Railway Co., 78 Cal. 360, 20 Pac. 740; St. Louis, A. & T. Ry. Co. v. Hardy, 55 Ark. 134, 17 S. W. 711; Nolan v. Railroad Co., 41 N. Y. Super. Ct. 541; Alabama & V. Ry. Co. v. Drummond, 73 Miss. 813, 20 South. 7.

[2] Day v. Owen, 5 Mich. 520; Westchester & P. R. Co. v. Miles, 55 Pa. St. 209.

and protection of women by affording them separate compartments, where they may be free from contact with, and annoyance by, the male passengers.[3] It follows, of course, that, if the carrier may make such regulations, he has the authority and the right to have them enforced. But all such classification must be reasonable, and dictated not by whim or prejudice, but by sound and judicious policy.[4] And while the carrier may not unjustly, or from mere caprice, discriminate between passengers on account of color, race, social position, or religious belief,[5] he may provide separate apartments for white and colored passengers, provided they are substantially alike, and comfortable.[6]

Trespassers not Passengers.

To entitle a person to recover for injuries inflicted during transportation by the negligence of the carrier, it is essential that he be rightfully on the train or vehicle, otherwise he is a trespasser to whom the carrier owes no duty except to abstain from willful injury.[7] And a person who attempts to defraud the carrier by the use

[3] Peck v. Railroad Co., 70 N. Y. 587; Memphis & C. R. Co. v. Benson, 85 Tenn. 627, 4 S. W. 5; Chicago & N. W. R. Co. v. Williams, 55 Ill. 185; Bass v. Railroad Co., 36 Wis. 450, 39 Wis. 636, and 42 Wis. 654; Brown v. Railroad Co., 7 Fed. 51. And see Marquette v. Railroad Co., 33 Iowa, 562. Sufficient accommodations for other passengers must be provided elsewhere. Bass v. Railroad Co., supra.

[4] Coger v. Packet Co., 37 Iowa, 145; Central R. Co. v. Green, 86 Pa. St. 427; Westchester & P. R. Co. v. Miles, 55 Pa. St. 209; Chicago & N. W. R. Co. v. Williams, 55 Ill. 185. But see Goines v. McCandless, 4 Phila. (Pa.) 255.

[5] Coger v. Packet Co., 37 Iowa, 145; Central R. Co. v. Green, 86 Pa. St. 427; Westchester & P. R. Co. v. Miles, 55 Pa. St. 209.

[6] Chicago & N. W. R. Co. v. Williams, 55 Ill. 185; Houck v. Railway Co., 38 Fed. 226; The Sue, 22 Fed. 843; Logwood v. Railroad Co., 23 Fed. 318; Murphy v. Railroad Co., Id. 637; Anderson v. Railroad Co., 62 Fed. 46. And see Gray v. Railroad Co., 11 Fed. 683; Louisville & N. R. Co. v. Com., 99 Ky. 663, 37 S. W. 79; Ohio Valley Railway's Receiver v. Lander (Ky.) 47 S. W. 344, 48 S. W. 145; Plessy v. Ferguson, 163 U. S. 537, 16 Sup. Ct. 1138. But see, also, Railroad Co. v. Brown, 17 Wall. 445.

[7] Gardner v. Northampton Co., 51 Conn. 143; Hendryx v. Railroad Co., 45 Kan. 377, 25 Pac. 893; Toledo, W. & W. Ry. Co. v. Brooks, 81 Ill. 245; Chicago & A. R. Co. v. Michie, 83 Ill. 427; Chicago, B. & Q. R. Co. v. Mehlsack, 131 Ill. 61, 22 N. E. 812; Bricker v. Railroad Co., 132 Pa. St. 1, 18 Atl. 983; Haase v. Navigation Co., 19 Or. 354, 24 Pac. 238; Condran v. Railway Co., 14 C. C. A. 506, 67 Fed. 522; Union Pac. Ry. Co. v. Nichols, 8 Kan. 505; Wa-

of a false ticket,[8] or a similar deceit,[9] is a trespasser; and the fraudulent use of a ticket or pass issued to another person deprives the user of the rights of a passenger.[10]

Rules and Regulations.

It is not only the right, but the duty, of the carrier to make and enforce reasonable rules and regulations to insure the safety, orderly conduct, and the comfort and convenience of its patrons.[11] To this end the following regulations have been held reasonable. Forbidding passengers on railroad trains to ride upon the platforms, baggage cars, or engines;[12] prohibiting the carriage of passengers on freight trains;[13] to quell disturbances, to preserve order and decorum, and hence to use sound discretion in ejecting from its vehicles all persons whose conduct is such as to render acts of indecency,

bash R. Co. v. Kingsley, 177 Ill. 558, 52 N. E. 931; Texas & N. O. R. Co. v. Demilley (Tex. Civ. App.) 41 S. W. 147.

[8] Toledo, W. & W. Ry. Co. v. Beggs, 85 Ill. 80; Lillis v. Railway Co., 64 Mo. 464; Brown v. Railway Co., Id. 536. And see Robertson v. Railroad Co., 22 Barb. (N. Y.) 91; Gulf, C. & S. F. Ry. Co. v. Campbell, 76 Tex. 174, 13 S. W. 19; McVeety v. Railway Co., 45 Minn. 268, 47 N. W. 809; Toledo, W. & W. Ry. Co. v. Brooks, 81 Ill. 245; Great Northern Ry. Co. v. Harrison, 10 Exch. 376.

[9] Union Pac. Ry. Co. v. Nichols, 8 Kan. 505. And see Higgins v. Railroad Co., 36 Mo. 418; Trezona v. Railway Co. (Iowa) 77 N. W. 486; McGhee v. Reynolds (Ala.) 23 South. 68; Illinois Cent. R. Co. v. Marlett, 75 Miss. 956, 23 South. 583.

[10] Toledo, W. & W. Ry. Co. v. Beggs, 85 Ill. 80; Way v. Railway Co., 64 Iowa, 48, 19 N. W. 828.

[11] Day v. Owen, 5 Mich. 520; Chicago & N. W. R. Co. v. Williams, 55 Ill. 185; Hoffbauer v. Railroad Co., 52 Iowa, 342, 3 N. W. 121; State v. Chovin, 7 Iowa, 204; Hibbard v. Railroad Co., 15 N. Y. 455; Vedder v. Fellows, 20 N. Y. 126; Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21; Du Laurans v. Railroad Co., 15 Minn. 49 (Gil. 29); Gleason v. Transportation Co., 32 Wis. 85; Bass v. Railroad Co., 36 Wis. 450; State v. Overton, 24 N. J. Law, 435; Brown v. Railroad Co., 4 Fed. 37, 7 Fed. 51; Ft. Scott, W. & W. Ry. Co. v. Sparks, 55 Kan. 288, 39 Pac. 1032. Reasonableness of rule requiring station to be kept open during certain hours. Louisville, N. A. & C. Ry. v. Wright, 18 Ind. App. 125, 47 N. E. 491.

[12] O'Donnell v. Railroad Co., 59 Pa. St. 239; Houston & T. C. R. Co. v. Clemmons, 55 Tex. 88; McMillan v. Railway Co., 172 Pa. St. 523, 33 Atl. 560; Montgomery v. Railway Co., 24 App. Div. 454, 48 N. Y. Supp. 849.

[13] See ante, p. 187; Galaviz v. Railroad Co. (Tex. Civ. App.) 38 S. W. 234; Houston, E. & W. T. Ry. Co. v. Norris (Tex. Civ. App.) 41 S. W. 708.

rudeness, or disturbance, either inevitable or probable.[14] And the duty of anticipating and preventing danger, disorder, and discomfort among its passengers is just as important as that of quelling any of these elements after they have actually begun.[15] But the carrier may not make foolish or unreasonable rules,—as forbidding passengers to pass from one car to another, or to change their seats.[16]

THE CONTRACT.

76. The contract of a public carrier of passengers will be discussed under the following heads:

(a) The ticket as evidence.

(b) Compensation.

(c) Liability to passengers.

(d) Limitations of liability.

SAME—THE TICKET AS EVIDENCE.

77. The prepayment of fare is a proper condition precedent to accepting a person for transportation, and the carrier may further require the purchase and presentation of a ticket before the passenger enters the vehicle.

The carrier may properly require the purchase and presentation of tickets before entering the car or other vehicle.[1] The ticket is a receipt for the payment of fare to the point designated thereon, and is merely evidence of the contract of carriage.[2] Its terms may be

[14] Vinton v. Railroad Co., 11 Allen (Mass.) 304; Sullivan v. Railroad Co., 148 Mass. 119, 18 N. E. 678; Baltimore, P. & C. R. Co. v. McDonald, 68 Ind. 316; Peavy v. Railroad Co., 81 Ga. 485, 8 S. E. 70; Chicago City Ry. Co. v. Pelletier, 134 Ill. 120, 24 N. E. 770; Robinson v. Railway Co., 87 Me. 387, 32 Atl. 994.

[15] Vinton v. Railroad Co., 11 Allen (Mass.) 304. But see Putnam v. Railroad Co., 55 N. Y. 108.

[16] State v. Overton, 24 N. J. Law, 435, 441. And see South Florida R. Co. v. Rhodes, 25 Fla. 40, 5 South. 633. Reasonableness a question for court. Gregory v. Railway Co., 100 Iowa, 345, 69 N. W. 532.

§§ 76–77. [1] Cleveland, C. & C. R. Co. v. Bartram, 11 Ohio St. 457.

[2] Rawson v. Railroad Co., 48 N. Y. 212; Quimby v. Vanderbilt, 17 N. Y.

varied by parol evidence.[3] As between the conductor and passenger, however, and the right of the latter to travel, the ticket produced must be conclusive evidence; and the passenger must produce it when called upon as the evidence of his right to the seat he claims.[4] This ruling is based on experience and necessity, but does not conclude the passenger in his right to recover under the actual contract, if the latter is inconsistent with that expressed in the ticket.[5] Thus, if the passenger has paid his fare to a point beyond that called for by the ticket, and was compelled to pay a second time for the additional distance, the excess could be recovered in a suitable action.[6]

306; Boice v. Railroad Co., 61 Barb. (N. Y.) 611; Barker v. Coflin, 31 Barb. (N. Y.) 556; Elmore v. Sands, 54 N. Y. 512; Johnson v. Railroad Corp., 46 N. H. 213; Gordon v. Railroad Co., 52 N. H. 596; State v. Overton, 24 N. J. Law, 435; Nevins v. Steamboat Co., 4 Bosw. (N. Y.) 225; Scott v. Railway Co., 144 Ind. 125, 43 N. E. 133; Henderson v. Stevenson, L. R. 2 H. L. Sc. 470.

[3] Van Buskirk v. Roberts, 31 N. Y. 661; Northern R. Co. v. Page, 22 Barb. (N. Y.) 130; Barker v. Coflin, 31 Barb. (N. Y.) 556; Nevins v. Steamboat Co., 4 Bosw. (N. Y.) 225; Rawson v. Railroad Co., 48 N. Y. 212; Elmore v. Sands, 54 N. Y. 512; Brown v. Railroad Co., 11 Cush. (Mass.) 97; Johnson v. Railroad Corp., 46 N. H. 213; Crosby v. Railroad Co., 69 Me. 418; Burnham v. Railway Co., 63 Me. 298. But see Hufford v. Railway Co., 53 Mich. 118, 18 N. W. 580.

[4] Mosher v. Railway Co., 23 Fed. 326; Hall v. Railroad Co., 15 Fed. 57; Petrie v. Railroad Co., 42 N. J. Law, 449; Atchison, T. & S. F. R. Co. v. Gants, 38 Kan. 608, 17 Pac. 54; McKay v. Railway Co., 34 W. Va. 65, 11 S. E. 737; Rose v. Railroad Co., 106 N. C. 168, 11 S. E. 526; Bradshaw v. Railroad Co., 135 Mass. 407; Hufford v. Railway Co., 53 Mich. 118, 18 N. W. 580; Townsend v. Railroad Co., 56 N. Y. 295; Chicago, B. & Q. R. Co. v. Griffin, 68 Ill. 499; McClure v. Railroad Co., 34 Md. 532; Shelton v. Railroad Co., 29 Ohio St. 214; Yorton v. Railway Co., 54 Wis. 234, 11 N. W. 482.

[5] Murdock v. Railroad Co., 137 Mass. 293; Muckle v. Railway Co., 79 Hun, 32, 29 N. Y. Supp. 732; Townsend v. Railroad Co., 56 N. Y. 295; Elliott v. Railroad Co., 53 Hun, 78, 6 N. Y. Supp. 363; Frederick v. Railroad Co., 37 Mich. 342; Lake Erie & W. Ry. Co. v. Fix, 88 Ind. 381; Pennsylvania Co. v. Bray, 125 Ind. 229, 25 N. E. 439; Pittsburgh, C., C. & St. L. Ry. Co. v. Berryman, 11 Ind. App. 640, 36 N. E. 728; St. Louis, A. & T. Ry. Co. v. Mackie, 71 Tex. 491, 9 S. W. 451; Appleby v. Railway Co., 54 Minn. 169, 55 N. W. 1117. But see Bradshaw v. Railroad Co., 135 Mass. 407.

[6] Frederick v. Railroad Co., 37 Mich. 342. In this case the plaintiff was not allowed to recover against the company, as the action was not properly brought. In delivering the opinion of the court, Marston, J., said: "Where

Provisions in the ticket to the following effect are binding on the passenger: That the ticket is not assignable;[7] that coupons are not good if detached;[8] that the ticket must be stamped for the return trip;[9] that it is good on certain trains only;[10] that the ticket must be used within a limited time[11] (but it is sufficient if the journey is

a passenger has purchased a ticket, and the conductor does not carry him according to its terms, or if the company, through the mistake of its agent, has given him the wrong ticket, so that he has been compelled to relinquish his seat, or pay his fare a second time in order to retain it, he would have a remedy against the company for a breach of the contract; but he would have to adopt a declaration differing essentially from the one resorted to in this case." See, also, Hufford v. Railway Co., 53 Mich. 118, 18 N. W. 580.

[7] Way v. Railway Co., 64 Iowa, 48, 19 N. W. 828; Post v. Railroad Co., 14 Neb. 110, 15 N. W. 225; Walker v. Railway Co., 15 Mo. App. 333; Drummond v. Southern Pac. Co., 7 Utah, 118, 25 Pac. 733; Levinson v. Railway Co. (Tex. Civ. App.) 43 S. W. 1032; Rahilly v. Railway Co., 66 Minn. 153, 68 N. W. 853; Spencer v. Lovejoy, 96 Ga. 657, 23 S. E. 836.

[8] Boston & M. R. Co. v. Chipman, 146 Mass. 107, 14 N. E. 940; Norfolk & W. R. Co. v. Wysor, 82 Va. 250; Louisville, N. & G. S. R. Co. v. Harris, 9 Lea (Tenn.) 180; Houston & T. C. R. Co. v. Ford, 53 Tex. 364. But see, where coupons are detached by mistake, Wightman v. Railway Co., 73 Wis. 169, 40 N. W. 689. And compare Chicago, St. L. & P. R. Co. v. Holdridge, 118 Ind. 281, 20 N. E. 837; Rouser v. Railway Co., 97 Mich. 565, 56 N. W. 937; Thompson v. Truesdale, 61 Minn. 129, 63 N. W. 259.

[9] Mosher v. Railway Co., 127 U. S. 390, 8 Sup. Ct. 1324; Boylan v. Railroad Co., 132 U. S. 146, 10 Sup. Ct. 50; Edwards v. Railway Co., 81 Mich. 364, 45 N. W. 827; Bowers v. Railroad Co., 158 Pa. St. 302, 27 Atl. 893; Central Trust Co. v. Railway Co., 65 Fed. 332; Southern Ry. Co. v. Barlow, 104 Ga. 213, 30 S. E. 732; Houston & T. C. Ry. Co. v. Arey (Tex. Civ. App.) 44 S. W. 894.

[10] Lake Shore & M. S. Ry. Co. v. Rosenzweig, 113 Pa. St. 519, 6 Atl. 545; Thorp v. Railroad Co., 61 Vt. 378, 17 Atl. 791; McRae v. Railroad Co., 88 N. C. 526.

[11] Hill v. Railroad Co., 63 N. Y. 101; Barker v. Coflin, 31 Barb. (N. Y.) 556; Boice v. Railroad Co., 61 Barb. (N. Y.) 611; Wentz v. Railway Co., 3 Hun (N. Y.) 241; Boston & L. R. Co. v. Proctor, 1 Allen (Mass.) 267; State v. Campbell, 32 N. J. Law, 309; Pennington v. Railroad Co., 62 Md. 95; Lewis v. Railroad Co., 93 Ga. 225, 18 S. E. 650; Johnson v. Railroad Corp., 46 N. H. 213; Rawitzky v. Railroad Co., 40 La. Ann. 47, 3 South. 387. But the limitation must be reasonable for the journey, Texas & P. Ry. Co. v. Dennis, 4 Tex. Civ. App. 90, 23 S. W. 400; by statute, Dryden v. Railway Co., 60 Me. 512; Boyd v. Spencer, 103 Ga. 828, 30 S. E. 841; Trezona v. Railway Co. (Iowa) 77 N. W. 486; Illinois Cent. R. Co. v. Marlett, 75 Miss. 956, 23 South.

begun within the time limited; it need not be finished before the time has expired;[12] and if there is no limitation, the ticket is good at any time).[13] In the absence of an agreement, the passenger cannot stop at an intermediate point, and afterwards continue to his destination on the same ticket.[14]

SAME—COMPENSATION.

78. The carrier is entitled to charge a reasonable compensation for the carriage of passengers, and may require it to be prepaid.

A reasonable compensation for the carriage of passengers is a proper charge,[1] but it must be uniform, and not the subject of unreasonable discrimination between passengers.[2] In the absence of statute [3] it is regulated by custom.[4] It has already been stated that

583; Missouri, K. & T. Ry. Co. of Texas v. Murphy (Tex. Civ. App.) 35 S. W. 66; Texas & N. O. R. Co. v. Powell, 13 Tex. Civ. App. 212, 35 S. W. 841.

[12] Auerbach v. Railroad Co., 89 N. Y. 281; Lundy v. Railroad Co., 66 Cal. 191, 4 Pac. 1193; Gulf, C. & S. F. Ry. Co. v. Wright, 10 Tex. Civ. App. 179, 30 S. W. 294; Evans v. Railway Co., 11 Mo. App. 463; Texas & P. Ry. Co. v. Dennis, 4 Tex. Civ. App. 90, 23 S. W. 400.

[13] Pennsylvania R. Co. v. Spicker, 105 Pa. St. 142. And see Dryden v. Railway Co., 60 Me. 512; Boyd v. Spencer, 103 Ga. 828, 30 S. E. 841; Louisville & N. R. Co. v. Turner, 100 Tenn. 213, 47 S. W. 223.

[14] Hamilton v. Railroad Co., 51 N. Y. 100; Beebe v. Ayres, 28 Barb. (N. Y.) 275; Terry v. Railroad Co., 13 Hun (N. Y.) 359; Cheney v. Railroad Co., 11 Metc. (Mass.) 121; Oil Creek & A. R. Ry. Co. v. Clark, 72 Pa. St. 231; Dietrich v. Railroad Co., 71 Pa. St. 432; Vankirk v. Railroad Co., 76 Pa. St. 66; Wyman v. Railroad Co., 34 Minn. 210, 25 N. W. 349; Pennsylvania R. Co. v. Parry, 55 N. J. Law, 551, 27 Atl. 914; Cleveland, C. & C. R. Co. v. Bartram, 11 Ohio St. 457; Drew v. Railroad Co., 51 Cal. 425; Breen v. Railroad Co., 50 Tex. 43; Johnson v. Railroad Co., 63 Md. 106; Roberts v. Koehler, 30 Fed. 94; Coombs v. Reg., 26 Can. Sup. Ct. 13; Robinson v. Southern Pac. Co., 105 Cal. 526, 38 Pac. 94, 722.

§ 78. [1] Spofford v. Railroad Co., 128 Mass. 326; McDuffee v. Railroad Co., 52 N. H. 430; Johnson v. Railroad Co., 16 Fla. 623.

[2] Johnson v. Railroad Co., 16 Fla. 623; Atwater v. Railroad Co., 48 N. J. Law, 55, 2 Atl. 803; Spofford v. Railroad Co., 128 Mass. 326. And see Hale, Bailm. & Carr. p. 335.

[3] Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155; Peik v. Railway Co., 94

[4] Spofford v. Railroad Co., 128 Mass. 326.

a regulation requiring the purchase and presentation of tickets before entering the cars is a reasonable one. The passenger is not obliged to tender the exact amount of his fare. The carrier must furnish change in a reasonable amount.[5] Although the conductor may require the surrender of the ticket,[6] he must, on demand, furnish a check or other evidence of payment. Should the passenger lose his ticket, he is entitled to a reasonable opportunity to find it;[7] but, failing to do so, he must pay again.[8]

SAME—LIABILITY TO PASSENGERS.

79. The carrier of passengers is bound to exercise the highest degree of care possible in the circumstances for the safety of the passenger.

Degree of Care.

While the public carrier of passengers is not, like the carrier of goods, an insurer of their safety, yet the degree of care demanded of

U. S. 164; Ruggles v. Illinois, 108 U. S. 526, 2 Sup. Ct. 832; Stone v. Trust Co., 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191; Dow v. Beidelman, 125 U. S. 680, 8 Sup. Ct. 1028; Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 702; Georgia Railroad & Banking Co. v. Smith, 128 U. S. 174, 9 Sup. Ct. 47; St. Louis & S. F. Ry. Co. v. Gill, 54 Ark. 101, 15 S. W. 18.

[5] Barrett v. Railway Co., 81 Cal. 296, 22 Pac. 859. Cf. Curtis v. Railway Co., 94 Ky. 573, 23 S. W. 363; Fulton v. Railway Co., 17 U. C. Q. B. 428. Tender of $5 bill for 5-cent fare not a reasonable tender. Muldowney v. Traction Co., 8 Pa. Super. Ct. 335, 43 Wkly. Notes Cas. 52; Barker v. Railroad Co., 151 N. Y. 237, 45 N. E. 550.

[6] Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420; Havens v. Railroad Co., 28 Conn. 69; Northern R. Co. v. Page, 22 Barb. (N. Y.) 130; Van Dusan v. Railway Co., 97 Mich. 439, 56 N. W. 848. But the carrier cannot take up the ticket and refuse to carry the passenger. Vankirk v. Railroad Co., 76 Pa. St. 66.

[7] Maples v. Railroad Co., 38 Conn. 557; Knowles v. Railroad Co., 102 N. C. 59, 9 S. E. 7; International & G. N. R. Co. v. Wilkes, 68 Tex. 617, 5 S. W. 491.

[8] Standish v. Steamship Co., 111 Mass. 512; Cresson v. Railroad Co., 11 Phila. (Pa.) 597; Crawford v. Railroad Co., 26 Ohio St. 580; Atwater v. Railroad Co., 48 N. J. Law, 55, 2 Atl. 803; International & G. N. R. Co. v. Wilkes, 68 Tex. 617, 5 S. W. 491. But see Pullman Palace-Car Co. v. Reed, 75 Ill. 125.

him is so great that it falls little short of a warranty.[1] The duty becomes more absolute in proportion to the risk, and the carrier must exercise as much care and diligence as an expert is accustomed to use.[2] In the case of Christie v. Griggs,[3] Mansfield, C. J., expresses the extent of the obligation to be that, "as far as human care and foresight could go, he would provide for their safe conveyance"; and this definition, or its equivalent, is very generally in use to-day. But in using this definition it must not be supposed that the law requires the carrier to exercise every device that the ingenuity of man can conceive. Such an interpretation would act as an effectual bar to the business of transporting people for hire. Thus, in operating trains, the carrier is not required to use iron or granite cross-ties because such ties are less liable to decay, and hence safer, than wood; nor upon freight trains is he obliged to use air brakes, bell pulls, and a brakeman upon each car.[4] It is sufficient if the carrier omits nothing essential or conducive to the safety of passengers

§ 79. [1] Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291; Chicago & A. R. Co. v. Byrum, 153 Ill. 131, 38 N. E. 578; Chicago, P. & St. L. Ry. Co. v. Lewis, 145 Ill. 67, 33 N. E. 960; Spellman v. Rapid-Transit Co., 36 Neb. 890, 55 N. W. 270; Gulf, C. & S. F. Ry. Co. v. Higby (Tex. Civ. App.) 26 S. W. 737; Douglass v. Railway Co., 91 Iowa, 94, 58 N. W. 1070; Bischoff v. Railway Co., 121 Mo. 216, 25 S. W. 908; Wilson v. Railroad Co., 26 Minn. 278, 3 N. W. 333; International & G. N. Ry. Co. v. Welch, 86 Tex. 203, 24 S. W. 391; Taylor v. Pennsylvania Co., 50 Fed. 755; Jackson v. Railway Co., 118 Mo. 199, 24 S. W. 192; Gulf, C. & S. F. Ry. Co. v. Stricklin (Tex. Civ. App.) 27 S. W. 1093; Dunn v. Railway Co., 58 Me. 187; Houston, E. & W. T. Ry. Co. v. Richards (Tex. Civ. App.) 49 S. W. 687; Fitchburg R. Co. v. Nichols, 29 C. C. A. 500, 85 Fed. 945; Illinois Cent. R. Co. v. Beebe, 174 Ill. 13, 50 N. E. 1019; Smedley v. Railway Co., 184 Pa. St. 620, 39 Atl. 544; St. Louis S. W. Ry. Co. v. McCullough (Tex. Civ. App.) 45 S. W. 324; Cincinnati, N. O. & T. P. Ry. Co. v. Vivion (Ky.) 41 S. W. 580. As to operation of horse-car lines, Noble v. Railway Co., 98 Mich. 249, 57 N. W. 126; Watson v. Railway Co., 42 Minn. 46, 43 N. W. 904; Keegan v. Railroad Co., 34 App. Div. 297, 54 N. Y. Supp. 391; Parker v. Railway Co., 69 Mo. App. 54; Stierle v. Railway Co., 156 N. Y. 70, 50 N. E. 419; Koehne v. Railway Co., 32 App. Div. 419, 52 N. Y. Supp. 1088; Brown v. Railway Co., 16 Wash. 465, 47 Pac. 890; Bartnik v. Railroad Co., 36 App. Div. 246, 55 N. Y. Supp. 266.

[2] Whart. Neg. §§ 627–637. But see Carrico v. Railway Co., 35 W. Va. 389, 14 S. E. 12.

[3] 2 Camp. 79.

[4] Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291.

which can be done or employed consistently with the most approved methods of transacting similar business.[5]

In Pennsylvania Co. v. Roy [6] the court said: "He [the carrier] is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill. And this caution and vigilance must necessarily be extended to all agencies or means employed by the carrier in the transportation of the passenger. Among the duties resting upon him is the important one of providing cars or vehicles adequate—that is, sufficiently secure as to strength and other requisites—for the safe conveyance of passengers. That duty the law enforces with great strictness. For the slightest negligence or fault in this regard, from which injury results to the passenger, the carrier is liable in damages."

Latent Defects.

To relieve the carrier from responsibility, a latent defect must be such only as no reasonable degree of skill and foresight could guard against.[7] He is not an insurer, and therefore is not liable for those defects in appliances which no human care or skill could either have detected or prevented.[8] A seeming limitation upon this rule as to latent defects exists in attributing the negligence of the manufacturer to the carrier, but it is for the negligence only of the manufacturer that the carrier is liable. If the defect in manufacture is one which could not have been discovered or avoided by known tests or

[5] Tuller v. Talbot, 23 Ill. 357; Pittsburg, C. & St. L. Ry. Co. v. Thompson, 56 Ill. 138; Dunn v. Railway Co., 58 Me. 187; Hegeman v. Railroad Corp., 13 N. Y. 9; Kansas Pac. Ry. Co. v. Miller, 2 Colo. 442; Pershing v. Railway Co., 71 Iowa, 561, 32 N. W. 488.

[6] 102 U. S. 451, 456.

[7] Ingalls v. Bills, 9 Metc. (Mass.) 1; Palmer v. Canal Co., 120 N. Y. 170, 24 N. E. 302. See, also, Frink v. Potter, 17 Ill. 406; Galena & C. U. R. Co. v. Fay, 16 Ill. 558; Sawyer v. Railroad Co., 37 Mo. 24; Derwort v. Loomer, 21 Conn. 245; Mobile & O. R. Co. v. Thomas, 42 Ala. 672; Anthony v. Railroad Co., 27 Fed. 724; Carter v. Railway Co., 42 Fed. 37; Frink v. Coe, 4 G. Greene (Iowa) 555; Western Ry. of Alabama v. Walker, 113 Ala. 267, 22 South. 182; Texas & P. Ry. Co. v. Buckalew (Tex. Civ. App.) 34 S. W. 165.

[8] Ingalls v. Bills, 9 Metc. (Mass.) 1; Palmer v. Canal Co., 120 N. Y. 170, 24 N. E. 302.

methods, either in use or process of manufacture, no liability will attach to either the carrier or the manufacturer; but, if the flaw was discoverable by the maker, his negligence in failing to detect it will be attributed to the carrier.[9] Hence it is now universally agreed that the duty to furnish a "roadworthy" vehicle is not absolute.[10]

Unavoidable Dangers.

In all modes of conveyance, whether by land or water, by electricity or steam, there are certain added dangers which cannot be entirely guarded against or overcome, and which the traveler must assume. "We are surrounded by dangers at home and abroad, and they are greater when we travel than when we remain stationary. In some modes of travel these dangers are greater than in others. They may be greater on water than on land; on a fast line of stages than on a slow one. And every passenger must make up his mind to meet the risks incident to the mode of travel he adopts which cannot be avoided by the utmost degree of care and skill in the preparation and management of the means of conveyance. This is the only guaranty given by the proprietor of the line.[11] Thus, when a steamboat was just leaving the dock, and a man fell overboard. As the cry was being raised, the passengers with one accord rushed to the side of the boat, and plaintiff was crowded through the gangway, which had not yet been closed, and fell into the water. It was held that the carrier could not reasonably anticipate and prevent such an accident.[12]

[9] Hegeman v. Railroad Corp., 13 N. Y. 9; Caldwell v. Steamboat Co., 47 N. Y. 282; Carroll v. Railroad Co., 58 N. Y. 126; Curtis v. Railroad Co., 18 N. Y. 534, 538; Perkins v. Railroad Co., 24 N. Y. 196, 219; Illinois Cent. R. Co. v. Phillips, 49 Ill. 234; Bartnik v. Railroad Co., 36 App. Div. 246, 55 N. Y. Supp. 266; Arkansas Midland Ry. Co. v. Griffith, 63 Ark. 491, 39 S. W. 550; Houston, E. & W. T. Ry. Co. v. Norris (Tex. Civ. App.) 41 S. W. 708; Richmond Railway & Electric Co. v. Bowles, 92 Va. 738, 24 S. E. 388. But see Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537.

[10] Readhead v. Railroad Co., L. R. 2 Q. B. 412, affirmed in L. R. 4 Q. B. 379; Carroll v. Railroad Co., 58 N. Y. 126; Witsell v. Railway Co., 120 N. C. 557, 27 S. E. 125; Christie v. Griggs, 2 Camp. 79.

[11] McKinney v. Neil, 1 McLean, 540, Fed. Cas. No. 8,865.

[12] Cleveland v. Steamboat Co., 68 N. Y. 306, 89 N. Y. 627, and 125 N. Y. 299, 26 N. E. 327; Houston, E. & W. T. Ry. Co. v. Richards (Tex. Civ. App.) 49 S. W. 687; Denver & R. G. R. Co. v. Andrews, 11 Colo. App. 204, 53 Pac. 518.

Neither will the carrier be liable for defective conditions which are observable, and which the passenger accepts as incident to that manner of transportation; as the failure to place a chain across the rear of a caboose attached to a freight train, and which was not provided or equipped for passengers.[13]

Operation of Trains, etc.

The carrier is bound to exercise the highest degree of care, in view of all the circumstances, to avoid injury to passengers in the operation of its means of conveyance, avoiding a dangerous rate of speed,[14] sudden starts and stops,[15] or danger from curves.[16] It is the duty of the carrier to properly announce stations,[17] and to use due care with reference to the physical and mental condition of an accepted passenger. Hence the carrier must take care of one who is decrepit or otherwise incapacitated,[18] even if the incapacity arises

[13] Chicago, B. & Q. R. Co. v. Hazzard, 26 Ill. 373. See, also, San Antonio & A. P. Ry. Co. v. Robinson, 79 Tex. 608, 15 S. W. 584.

[14] Andrews v. Railway Co., 86 Iowa, 677, 53 N. W. 399; Chicago, P. & St. L. Ry. Co. v. Lewis, 145 Ill. 67, 33 N. E. 960; Pennsylvania Co. v. Newmeyer, 129 Ind. 401, 28 N. E. 860; Willmott v. Railway Co., 106 Mo. 535, 17 S. W. 490; Mexican Cent. Ry. Co. v. Lauricella, 87 Tex. 277, 28 S. W. 277; Chicago, R. I. & P. Ry. Co. v. Martin, 59 Kan. 437, 53 Pac. 461; Schmidt v. Railroad Co., 26 App. Div. 391, 49 N. Y. Supp. 777.

[15] Holmes v. Traction Co., 153 Pa. St. 152, 25 Atl. 640; Yarnell v. Railway Co., 113 Mo. 570, 21 S. W. 1; North Chicago St. R. Co. v. Cook, 145 Ill. 551, 33 N. E. 958; Bowdle v. Railway Co., 103 Mich. 272, 61 N. W. 529; Poole v. Railroad Co., 89 Ga. 320, 15 S. E. 321; Cassidy v. Railroad Co., 9 Misc. Rep. 275, 29 N. Y. Supp. 724; Hill v. Railway Co., 158 Mass. 458, 33 N. E. 582; Chicago & A. R. Co. v. Arnol, 144 Ill. 261, 33 N. E. 204. As to street cars when passengers are alighting: Cawfield v. Railway Co., 111 N. C. 597, 16 S. E. 703; Chicago, B. & Q. R. Co. v. Landauer, 36 Neb. 642, 54 N. W. 976; Robinson v. Railway Co., 157 Mass. 224, 32 N. E. 1; Washington & G. R. Co. v. Harmon's Adm'r, 147 U. S. 571, 13 Sup. Ct. 557; McCurrie v. Pacific Co., 122 Cal. 558, 55 Pac. 324; Pomeroy v. Railroad Co., 172 Mass. 92, 51 N. E. 523; Hassen v. Railroad Co., 34 App. Div. 71, 53 N. Y. Supp. 1069.

[16] Lynn v. Southern Pac. Co., 103 Cal. 7, 36 Pac. 1018; Francisco v. Railroad Co., 78 Hun, 13, 29 N. Y. Supp. 247; Brusch v. Railway Co., 52 Minn. 512, 55 N. W. 57.

[17] Pennsylvania Co. v. Hoagland, 78 Ind. 203; Pennsylvania R. Co. v. Aspell, 23 Pa. St. 147; Chicago, R. I. & T. Ry. Co. v. Boyles, 11 Tex. Civ. App. 522, 33 S. W. 247.

[18] Weightman v. Railway Co., 70 Miss. 563, 12 South. 586; Meyer v. Railway Co., 4 C. C. A. 221, 54 Fed. 116; Sawyer v. Dulany, 30 Tex. 479; Sheri-

from intoxication.[19] In the case of railroads, the roadbed and tracks are a part of the equipment, and in their construction and maintenance the carrier is held to the same extraordinary diligence as in the management of trains.[20] The duty of careful and frequent inspection is absolute.[21]

Liability for Negligence of Connecting Carrier.

The broad basis of public policy on which the liability of common carriers of passengers has been established requires that they should be held responsible for the negligence of any of the agencies which they may employ in the conduct of their business. Agreeably to this doctrine, if the railway carrier transports its passengers in the vehicles or over the tracks of any other line, it assumes and is responsible for any negligence of such other carrier which is material in causing injury to its own passengers.[22] Nor is the concurring negligence of any third party a defense in an action against the carrier, if the negligence of the latter in any degree contributed to cause the injury complained of.[23] When a passenger is injured by the colli-

dan v. Railroad Co., 36 N. Y. 39; Philadelphia City Pass. Ry. Co. v. Hassard, 75 Pa. St. 367; Allison v. Railroad Co., 42 Iowa, 274; Jeffersonville, M. & I. R. Co. v. Riley, 39 Ind. 568, 584; Indianapolis, P. & C. R. Co. v. Pitzer, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70; Croom v. Railway Co., 52 Minn. 296, 53 N. W. 1128; Spade v. Railroad Co., 172 Mass. 488, 52 N. E. 747; Haug v. Railway Co. (N. D.) 77 N. W. 97; International & G. N. R. Co. v. Gilmer (Tex. Civ. App.) 45 S. W. 1028.

[19] Fisher v. Railroad Co., 39 W. Va. 366, 19 S. E. 578.

[20] Knight v. Railroad Co., 56 Me. 234; Toledo, W. & W. R. Co. v. Apperson, 49 Ill. 480; Nashville & C. R. Co. v. Messino, 1 Sneed (Tenn.) 220. Expansion of rails improperly laid. Reed v. Railroad Co., 56 Barb. (N. Y.) 493; Arkansas Midland Ry. Co. v. Griffith, 63 Ark. 491, 39 S. W. 550; Lynch v. Railroad Co., 8 App. Div. 458, 40 N. Y. Supp. 775; Houston, E. & W. T. Ry. Co. v. Norris (Tex. Civ. App.) 41 S. W. 708.

[21] Taylor v. Railway Co., 48 N. H. 304; Holyoke v. Railway Co., Id. 541; Curtiss v. Railroad Co., 20 Barb. (N. Y.) 282, affirmed in 18 N. Y. 534; Toledo, P. & W. Ry. Co. v. Conroy, 68 Ill. 560.

[22] Buxton v. Railway Co., L. R. 3 Q. B. 549; Candee v. Railroad Co., 21 Wis. 589; Schopman v. Railroad Corp., 9 Cush. (Mass.) 24; Thomas v. Railway Co., L. R. 5 Q. B. 226; Great Western Railway Co. v. Blake, 7 Hurl. & N. 987. So, also, where the track ran over a public bridge. Birmingham v. Railroad Co. (Sup.) 14 N. Y. Supp. 13. And see Hannibal & St. J. R. Co. v. Martin, 111 Ill. 219.

[23] Eaton v. Railroad, 11 Allen (Mass.) 500.

sion of trains of different carriers, he may maintain his action against either or both.[24]

Wrongful Acts of Agents, Fellow Passengers, and Others.

As has been already stated, the carrier is liable for the wrongful acts of its agents or servants done within the course of their employment.[25] Although there is no privity existing between the carrier and passenger whereby the former becomes liable for the wrongful acts of the latter, yet, by reason of the circumstances and the authority which he is bound to exercise, the carrier must protect his passengers against the violence and improper conduct of fellow passengers or outsiders, so far as he is able to do so in the exercise of reasonable care and foresight.[26] And so, if a passenger receives an injury, which might have been reasonably anticipated, from one who is improperly received, or permitted to continue in the vehicle, the carrier is responsible.[27]

Stational Facilities.

In providing, equipping, and maintaining stational facilities and appliances the carrier is bound to exercise only ordinary care in view of the dangers to be apprehended.[28] Although the carrier is not

[24] Cuddy v. Horn, 46 Mich. 596, 10 N. W. 32; Flaherty v. Railway Co., 39 Minn. 328, 40 N. W. 160; Tompkins v. Railroad Co., 66 Cal. 163, 4 Pac. 1165; Colegrove v. Railroad Co., 20 N. Y. 492; Central Pass. Ry. Co. v. Kuhn, 86 Ky. 578, 6 S. W. 441; Holzab v. Railroad Co., 38 La. Ann. 185; Union Railway & Transit Co. v. Schacklett, 19 Ill. App. 145.

[25] See ante, pp. 167–171.

[26] Pittsburgh, Ft. W. & C. R. Co. v. Hinds, 53 Pa. St. 512; New Orleans, St. L. & C. R. Co. v. Burke, 53 Miss. 200; Felton v. Railroad Co., 69 Iowa, 577, 29 N. W. 618; Britton v. Railroad Co., 88 N. C. 536; Putnam v. Railroad Co., 55 N. Y. 108; Batton v. Railroad Co., 77 Ala. 591; Chicago & A. R. Co. v. Pillsbury, 123 Ill. 9, 14 N. E. 22; Pittsburgh & C. R. Co. v. Pillow, 76 Pa. St. 510.

[27] Putnam v. Railroad Co., 55 N. Y. 108; Flint v. Transportation Co., 34 Conn. 554; Pittsburgh, Ft. W. & C. Ry. Co. v. Hinds, 53 Pa. St. 512; Flint v. Transportation Co., 6 Blatchf. 158, Fed. Cas. No. 4,873; McDonnell v. Railroad Co., 35 App. Div. 147, 54 N. Y. Supp. 747; Exton v. Railroad Co. (N. J. Sup.) 42 A. 486; Wood v. Railroad Co. (Ky.) 42 S. W. 349; Bailey v. Railroad Co. (Ky.) 44 S. W. 105. Acts of third persons. Texas & P. Ry. Co. v. Jones (Tex. Civ. App.) 39 S. W. 124; Murphy v. Railway [1897] 2 Ir. 301.

[28] Kelly v. Railway Co., 112 N. Y. 443, 20 N. E. 383; Palmer v. Pennsylvania Co., 111 N. Y. 488, 18 N. E. 859; Moreland v. Railroad Co., 141 Mass.

held to so high a degree of care in these matters as in the act of transportation, it is still his duty to see that all reasonable precautions are taken to insure both the safety and comfort of persons who are on the premises as passengers. Approaches to the station and platforms must be properly built, and maintained in good order.[29] Ordinarily, the carrier is not bound to place platforms on both sides of the track;[30] and, if the platform is reasonably suitable, the carrier will not be liable to a passenger who is accidentally injured upon it.[31] The failure to properly light the approaches, platforms, and station,[32] to allow snow and ice[33] or other obstructions[34] to accumulate and remain thereon, have been held to constitute actionable negligence. And, even if the approaches are somewhat remote, the duty to maintain them in a safe condition still exists. Thus, the carrier was held liable for the death of one who, in approaching the

31, 6 N. E. 225; Chicago & G. T. Ry. Co. v. Stewart, 77 Ill. App. 66; Finseth v. Railway Co., 32 Or. 1, 51 Pac. 84.

[29] Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315; Hulbert v. Railroad Co., 40 N. Y. 145; Warren v. Railroad Co., 8 Allen (Mass.) 227; Union Pac. Ry. Co. v. Sue, 25 Neb. 772, 41 N. W. 801; Liscomb v. Transportation Co., 6 Lans. (N. Y.) 75; Pennsylvania Co. v. Marion, 123 Ind. 415, 23 N. E. 973; Toledo, W. & W. Ry. Co. v. Grush, 67 Ill. 262; Alabama G. S. Ry. Co. v. Coggins, 88 Fed. 455, 32 C. C. A. 1; Illinois Cent. R. Co. v. Treat, 75 Ill. App. 327; Louisville & N. R. Co. v. Keller (Ky.) 47 S. W. 1072; Ayers v. Railroad Co., 158 N. Y. 254, 53 N. E. 22; Trinity & S. Ry. Co. v. O'Brien (Tex. Civ. App.) 46 S. W. 389; Union Pac. R. Co. v. Evans, 52 Neb. 50, 71 N. W. 1062.

[30] Michigan Cent. R. Co. v. Coleman, 28 Mich. 440.

[31] Stokes v. Railroad Co., 107 N. C. 178, 11 S. E. 991; Walthers v. Railway Co., 72 Ill. App. 354.

[32] Nicholson v. Railway Co., 3 Hurl. & C. 534; Jamison v. Railroad Co., 55 Cal. 593; Peniston v. Railroad Co., 34 La. Ann. 777; Patten v. Railway Co., 32 Wis. 524, 36 Wis. 413; Beard v. Railroad Co., 48 Vt. 101; Buenemann v. Railway Co., 32 Minn. 390, 20 N. W. 379; Dice v. Locks Co., 8 Or. 60; Louisville & N. R. Co. v. Ricketts (Ky.) 37 S. W. 952.

[33] Memphis & C. R. Co. v. Whitfield, 44 Miss. 466; Weston v. Railroad Co., 42 N. Y. Super. Ct. 156; Seymour v. Railway Co., 3 Biss. 43, Fed. Cas. No. 12,685; Waterbury v. Railway Co., 104 Iowa, 32, 73 N. W. 341.

[34] Osborn v. Ferry Co., 53 Barb. (N. Y.) 629; Martin v. Railway Co., 16 C. B. 179. Holes in platform. Knight v. Railroad Co., 56 Me. 234; Chicago & N. W. Ry. Co. v. Fillmore, 57 Ill. 265; Liscomb v. Transportation Co., 6 Lans. (N. Y.) 75. Passengers obliged to cross tracks. Keating v. Railroad Co., 3 Lans. (N. Y.) 469; Baltimore & O. R. Co. v. State, 60 Md. 449; Klein v. Jewett, 26 N. J. Eq. 474.

station, was killed by falling off a bridge erected by the company as a means of more convenient access to its depot.[35]

The same rules apply to carriers by water in the provision and maintenance of suitable wharves [36] and gang planks.[37] If, however, the carrier has observed ordinary precautions for the safety of the passenger in and about its stations and approaches, its duty is performed, and it is not bound to anticipate or guard against the failure of the passenger to use ordinary care on his part.[38]

Liability of Lessees and Trustees.

A common carrier of passengers cannot escape liability for the nonperformance of its duties by transferring its business and properties to the hands of a lessee or trustee, unless it is done with legislative sanction.[39] It will, therefore, in the absence of such authority, be liable to passengers for injuries sustained by them through the negligence of a lessee [40] or trustee which it has selected,[41] or for the negligence of any other person or body of persons to whom it has delegated the transaction of its business or the performance of its duties,[42] even if such delegation is merely temporary, and for a specific purpose.[43] In such cases a joint or several action may also be maintained against the representative of the carrier.[44]

[35] Longmore v. Railway, 19 C. B. (N. S.) 183.

[36] Knight v. Railroad Co., 56 Me. 234; Bacon v. Steamboat Co., 90 Me. 46, 37 Atl. 328.

[37] Hrebrik v. Carr, 29 Fed. 298; Croft v. Steamship Co. (Wash.) 55 Pac. 42.

[38] Sturgis v. Railway Co., 72 Mich. 619, 40 N. W. 914; Bennett v. Railroad Co., 57 Conn. 422, 18 Atl. 668.

[39] Thomas v. Railroad Co., 101 U. S. 71; New York & M. L. R. Co. v. Winans, 17 How. 30; Nugent v. Railroad Co., 80 Me. 62, 12 Atl. 797; Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094; Gulf, C. & S. F. Ry. Co. v. Morris, 67 Tex. 692, 4 S. W. 156; Railway Co. v. Brown, 17 Wall. 450.

[40] International & G. N. R. Co. v. Dunham, 68 Tex. 231, 4 S. W. 472.

[41] Naglee v. Railroad Co., 83 Va. 707, 3 S. E. 369.

[42] Littlejohn v. Railroad Co., 148 Mass. 478, 20 N. E. 103; Peters v. Rylands, 20 Pa. St. 497.

[43] Chattanooga, R. & C. R. Co. v. Liddell, 85 Ga. 482, 11 S. E. 853.

[44] Davis v. Railroad Co., 121 Mass. 134; International & G. N. R. Co. v. Dunham, 68 Tex. 231, 4 S. W. 472; Ingersoll v. Railroad Co., 8 Allen (Mass.) 438.

80. LIABILITY FOR DELAY—A public carrier of passengers is bound to use due diligence in transporting them according to published schedule time, and is liable to them for damages occurring by reason of its failure in that respect.

The published time-table is a part of the contract made with all persons who apply for transportation in accordance therewith.[1] If changes are made in the time-table, the same publicity should be given to such alteration as to the original publication. If the original time-table was published in a newspaper, the mere posting of a notice in the carrier's office would not be sufficient notice of a change of time to excuse the carrier.[2] It has, however, been held that, even after the sale of the ticket, the carrier has the right, on giving reasonable notice, to vary the running time of its trains.[3] But, when the transportation has actually begun, the carrier must use due diligence to conform to schedule time, and will be liable to the passenger for damage caused by any delay arising through its negligence; otherwise, if it occurs through the act of God,[4] unless the carrier has made a special contract to carry within a definite time.[5]

Injuries to Persons not Passengers.

Towards all other persons, not passengers, with whom the carrier is brought in contact, he is bound to exercise no more than ordinary

§ 80. [1] Sears v. Railroad Co., 14 Allen (Mass.) 433; Savannah, S. & S. R. Co. v. Bonaud, 58 Ga. 180; Heirn v. McCaughan, 32 Miss. 17; Hawcroft v. Railway Co., 8 Eng. Law & Eq. 362; Hamlin v. Railway Co., 1 Hurl. & N. 408.

[2] Sears v. Railroad Co., 14 Allen (Mass.) 433.

[3] Id.

[4] Quimby v. Vanderbilt, 17 N. Y. 306; Williams v. Same, 28 N. Y. 217; Weed v. Railroad Co., 17 N. Y. 362; Van Buskirk v. Roberts, 31 N. Y. 661; Eddy v. Harris, 78 Tex. 661, 15 S. W. 107; Alabama & V. Ry. Co. v. Purnell, 69 Miss. 652, 13 South. 472; Cobb v. Howard, 3 Blatchf. 524, Fed. Cas. No. 2,924; Houston, E. & W. T. Ry. Co. v. Rogers (Tex. Civ. App.) 40 S. W. 201; Hamlin v. Railway Co., 1 Hurl. & N. 408; Hobbs v. Railway Co., L. R. 10 Q. B. 111.

[5] Walsh v. Railway Co., 42 Wis. 23. And see, also, Williams v. Vanderbilt, 28 N. Y. 217; Ward v. Same, 4 Abb. Dec. (N. Y.) 521; Watson v. Duykinck, 3 Johns. (N. Y.) 335; Dennison v. The Wataga, 1 Phila. (Pa.) 468; Brown v. Harris, 2 Gray (Mass.) 359; Porter v. The New England, 17 Mo. 290; West v. The Uncle Sam, 1 McAll. 505, Fed. Cas. No. 17,427.

care. Thus, persons coming to a railroad station to escort arriving or departing passengers do so on the implied invitation of the carrier, who owes them the duty of ordinary care only as to stational facilities.[6] Hackmen who bring passengers to the station are entitled to the same degree of care,[7] and employés of another carrier, rightfully there in the discharge of their duties.[8] And if the escort of a passenger is known to be on the train,[9] it is the duty of the carrier to protect him from sudden startings, and to give the customary signals.[10]

[6] McKone v. Railroad Co., 51 Mich. 601, 17 N. W. 74; Dowd v. Railway Co., 84 Wis. 105, 54 N. W. 24; Doss v. Railroad Co., 59 Mo. 27; Little Rock & Ft. S. Ry. Co. v. Lawton, 55 Ark. 428, 18 S. W. 543; Langan v. Railway Co., 72 Mo. 392; Stiles v. Railroad, 65 Ga. 370; Tobin v. Railroad Co., 59 Me. 183; Yarnell v. Railroad Co., 113 Mo. 570, 21 S. W. 1; Hamilton v. Railway Co., 64 Tex. 251. This case goes to the extreme length of holding that the facilities should be absolutely "safe," followed in Texas & P. Ry. Co. v. Best, 66 Tex. 116, 18 S. W. 224; Lucas v. Railroad Co., 6 Gray (Mass.) 64; Griswold v. Railroad Co., 64 Wis. 652, 26 N. W. 101; Missouri, K. & T. Ry. Co. v. Miller, 8 Tex. Civ. App. 241, 27 S. W. 905; Gautret v. Egerton, L. R. 2 C. P. 371.

[7] Tobin v. Railroad Co., 59 Me. 183.

[8] Catawissa R. Co. v. Armstrong, 49 Pa. St. 186; Philadelphia, W. & B. R. Co. v. State, 58 Md. 372; Illinois Cent. R. Co. v. Frelka, 110 Ill. 498; Zeigler v. Railroad Co., 52 Conn. 543; Pennsylvania Co. v. Gallagher, 40 Ohio St. 637; In re Merrill, 54 Vt. 200; Vose v. Railway Co., 2 Hurl. & N. 728. And see, as to consignees and their agents personally assisting in the reception and delivery of freight, Foss v. Railway Co., 33 Minn. 392, 23 N. W. 553; Holmes v. Railway Co., 4 Exch. 254; Watson v. Railway Co., 66 Iowa, 164, 23 N. W. 380; Illinois Cent. R. Co. v. Hoffman, 67 Ill. 287; Newson v. Railroad Co., 29 N. Y. 383; New Orleans, J. & G. N. R. Co. v. Bailey, 40 Miss. 395; Shelbyville L. B. R. Co. v. Lewark, 4 Ind. 471; Dufour v. Railroad Co., 67 Cal. 319, 7 Pac. 769; Mark v. Railway Co., 32 Minn. 208, 20 N. W. 131; Goldstein v. Railway Co., 46 Wis. 404, 1 N. W. 37; Burns v. Railroad Co., 101 Mass. 50; Rogstad v. Railway Co., 31 Minn. 208, 17 N. W. 287.

[9] Coleman v. Railroad Co., 84 Ga. 1, 10 S. E. 498; Griswold v. Railroad Co., 64 Wis. 652, 26 N. W. 101; McLarin v. Railroad Co., 85 Ga. 504, 11 S. E. 840.

[10] Doss v. Railroad Co., 59 Mo. 27; Johnson v. Railway Co., 53 S. C. 303, 31 S. E. 212; International & G. N. R. Co. v. Satterwhite (Tex. Civ. App.) 47 S. W. 41; Id., 38 S. W. 401; Missouri, K. & T. Ry. Co. v. Miller (Tex. Civ. App.) 39 S. W. 583.

SAME—LIMITATION OF LIABILITY.

81. The prevailing doctrine in this country denies the right of the common carrier of passengers to place any limitation upon his liability for the result of his negligence or that of his servants.

It is now well settled by the great weight of authority that the carrier of passengers cannot, even by special contract, relieve himself in any degree from liability for injuries caused to his passengers by the negligence of himself or his servants.[1] "Public policy forbids that he should be relieved by special agreement from that degree of diligence and fidelity which the law has exacted in the discharge of his duties."[2] In some courts a distinction has been made in the case of gratuitous passengers permitting a limitation, by express contract, of liability for anything less than gross negligence.[3] In commenting on this point, Mr. Justice Grier said: "And whether the consideration for such transportation be pecuniary or otherwise,

§ 81. [1] Cleveland, P. & A. R. Co. v. Curran, 19 Ohio St. 1; Jacobus v. Railway Co., 20 Minn. 125 (Gil. 110); Rose v. Railroad Co., 39 Iowa, 246; Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315; Indiana Cent. Ry. Co. v. Mundy, 21 Ind. 48; School Dist. in Medfield v. Boston, H. & E. R. Co., 102 Mass. 552; Empire Transp. Co. v. Wamsutta Oil-Refining & Mining Co., 63 Pa. St. 14; Flinn v. Railroad Co., 1 Houst. (Del.) 469; Virginia & T. R. Co. v. Sayers, 26 Grat. (Va.) 328; Sager v. Railroad Co., 31 Me. 228; Mobile & O. R. Co. v. Hopkins, 41 Ala. 486; Southern Exp. Co. v. Crook, 44 Ala. 469; Ohio & M. R. Co. v. Selby, 47 Ind. 471; Maslin v. Railway Co., 14 W. Va. 180; Gulf, C. & S. F. Ry. Co. v. McGown, 65 Tex. 640; Merchants' Dispatch & Transportation Co. v. Cornforth, 3 Colo. 281; Rice v. Railway Co., 63 Mo. 314; Grand Trunk Ry. Co. v. Stevens, 95 U. S. 655; Union Exp. Co. v. Graham, 26 Ohio St. 595; Carroll v. Railway Co., 88 Mo. 239; Clark v. Geer, 32 C. C. A. 295, 86 Fed. 447; Illinois Cent. R. Co. v. Beebe, 174 Ill. 13, 50 N. E. 1019; Louisville, N. A. & C. Ry. Co. v. Keefer, 146 Ind. 21, 44 N. E. 796; Louisville & N. R. Co. v. Bell (Ky.) 38 S. W. 3; Doyle v. Railroad Co., 166 Mass. 492, 44 N. E. 611; Baltimore & O. R. Co. v. McLaughlin, 19 C. C. A. 551, 73 Fed. 519.

[2] Davidson v. Graham, 2 Ohio St. 131. See Starr v. Railway Co., 67 Minn. 18, 69 N. W. 632.

[3] Arnold v. Railroad Co., 83 Ill. 273; Illinois Cent. R. Co. v. Read, 37 Ill. 484; Indiana Cent. R. Co. v. Mundy, 21 Ind. 48.

the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.'" [4] And in the leading case of New York Cent. R. Co. v. Lockwood,[5] it was also held that no distinction as to the degrees of negligence could be considered in determining the validity of contracts for the limitation of the carrier's liability; that a failure to exercise the degree of care requisite for the safety of the passenger in the circumstances of the case would constitute negligence, against which the carrier would not be permitted to contract.[6] In those courts where it is permitted the carrier to make such absolving contracts with gratuitous passengers, it is essential to their validity that they be clearly and unequivocally expressed.[7]

[4] Philadelphia & R. R. Co. v. Derby, 14 How. 468, at page 486. See, also, Williams v. Railroad Co. (Utah) 54 Pac. 991.

[5] 17 Wall. 357.

[6] See cases collected in Whart. Neg. § 589.

[7] Kenney v. Railroad Co., 125 N. Y. 422, 26 N. E. 626.

CHAPTER VI.

CARRIERS OF GOODS.

DEFINITION.

82. A common carrier is one who represents to the public that he will carry goods for hire for all persons, at all times.

Essential Characteristics.

In essential characteristics the carrier of goods resembles the carrier of passengers.[1] It should be observed, however, that the carrier of passengers remains such even in the gratuitous transportation of a passenger,[2] whereas, if no consideration is paid in a particular case for the carriage of goods, the carrier, although regularly engaged in the business of carrying goods for hire for the public generally, is not, in that particular case, a common carrier, but a gratuitous bailee.[3]

The employment of the carrier must be public and habitual, otherwise he will be no more than a special or private carrier, whose rights, duties, and liabilities are materially modified.[4] The test is said to be, "not whether he is carrying on a public employment, or whether he carries to a fixed place, but whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he has room, the goods of all persons indifferently, who send him goods to be carried." [5]

The following have been held to be common carriers: Express companies;[6] transportation companies;[7] canal companies;[8] stage

§ 82. [1] Hale, Bailm. & Carr. p. 304. And see "Carriers of Passengers," ante, pp. 175, 176.

[2] See ante, p. 190.

[3] Hale, Bailm. & Carr. p. 308; Citizens' Bank v. Nantucket Steamboat Co., 2 Story, 16, Fed. Cas. No. 2,730.

[4] 2 Story, Cont. (5th Ed.) § 919.

[5] Nugent v. Smith, 1 C. P. Div. 19, at page 27; Id., 423; Chattock v. Bellamy, 15 Reports, 340.

[6] United States Exp. Co. v. Backman, 28 Ohio St. 144; Buckland v. Express Co., 97 Mass. 124; Lowell Wire-Fence Co. v. Sargent, 8 Allen (Mass.) 189; Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174; Sweet v. Barney, 23 N. Y. 335; American Exp. Co. v. Hockett, 30 Ind. 250; Gulliver v. Express Co., 38 Ill. 503; Verner v. Sweitzer, 32 Pa. St. 208; Christenson v. Express Co., 15 Minn. 270 (Gil. 208); Sherman v. Wells, 28 Barb. (N. Y.) 403; Baldwin v. Express Co., 23 Ill. 197; Southern Exp. Co. v. Newby, 36 Ga. 635; Hayes v. Wells, Fargo & Co., 23 Cal. 185.

[7] Merchants' Dispatch Transp. Co. v. Bloch, 86 Tenn. 392, 6 S. W. 881. But a mere forwarding agent is not a common carrier. Roberts v. Turner, 12 Johns. (N. Y.) 232.

[8] Miller v. Navigation Co., 10 N. Y. 431; Hyde v. Navigation Co., 5 Term R. 389.

coaches and omnibuses, as to baggage carried;[9] hackmen and cab drivers;[10] railroad companies, as to baggage[11] and freight;[12] bargemen, lightermen, canal-boat men;[13] ferries;[14] rafts or flat boats;[15] steamboats and merchant ships;[16] railroad receivers[17] and trustees.[18]

[9] Verner v. Sweitzer, 32 Pa. St. 208; Bonce v. Railway Co., 53 Iowa, 278, 5 N. W. 177; Parmelee v. Lowitz, 74 Ill. 116; Dibble v. Brown, 12 Ga. 217; Parmelee v. McNulty, 19 Ill. 556. Cabs, drays, etc., see Story, Bailm. § 496; Richards v. Westcott, 2 Bosw. (N. Y.) 589; Powers v. Davenport, 7 Blackf. (Ind.) 497; McHenry v. Railroad Co., 4 Har. (Del.) 448. See, also, Sales v. Stage Co., 4 Iowa, 547; Hollister v. Nowlen, 19 Wend. (N. Y.) 234; Powell v. Mills, 30 Miss. 231.

[10] Lemon v. Chanslor, 68 Mo. 340; Bonce v. Railway Co., 53 Iowa, 278, 5 N. W. 177.

[11] Macrow v. Railway Co., L. R. 6 Q. B. 612; Hannibal R. Co. v. Swift, 12 Wall. 262.

[12] Norway Plains Co. v. Boston & M. R. Co., 1 Gray (Mass.) 263; Thomas v. Railroad Corp., 10 Metc. (Mass.) 472; Root v. Railroad Co., 45 N. Y. 524; Fuller v. Railroad Co., 21 Conn. 557, 570; Rogers Locomotive & Machine Works v. Erie R. Co., 20 N. J. Eq. 379; Noyes v. Railroad Co., 27 Vt. 110; Contra Costa Coal Mines R. Co. v. Moss, 23 Cal. 323.

[13] Bowman v. Teall, 23 Wend (N. Y.) 306, 309; Parsons v. Hardy, 14 Wend. (N. Y.) 215; De Mott v. Laraway, Id. 225. Compare Fish v. Clark, 49 N. Y. 122. And see Humphreys v. Reed, 6 Whart. (Pa.) 435; Fuller v. Bradley, 25 Pa. St. 120; Arnold v. Halenbake, 5 Wend. (N. Y.) 33.

[14] Wyckoff v. Ferry Co., 52 N. Y. 32; Le Barron v. Ferry Co., 11 Allen (Mass.) 312; Lewis v. Smith, 107 Mass. 334; White v. Winnisimmet Co., 7 Cush. (Mass.) 156; Fisher v. Clisbee, 12 Ill. 344; Pomeroy v. Donaldson, 5 Mo. 36; Whitmore v. Bowman, 4 G. Greene (Iowa) 148; Miller v. Pendleton, 8 Gray (Mass.) 547; Claypool v. McAllister, 20 Ill. 504; Sanders v. Young, 1 Head (Tenn.) 219; Wilson v. Hamilton, 4 Ohio St. 723; Harvey v. Rose, 26 Ark. 3; Powell v. Mills, 37 Miss. 691; Griffith v. Cave, 22 Cal. 535; Hall v. Renfro, 3 Metc. (Ky.) 52; Babcock v. Herbert, 3 Ala. 392.

[15] Steele v. McTyer's Adm'r, 31 Ala. 667.

[16] 2 Kent, Comm. 599; Harrington v. McShane, 2 Watts (Pa.) 443; Clark v. Barnwell, 12 How. 272; The Delaware, 14 Wall. 579; Hastings v. Pepper, 11 Pick. (Mass.) 41; Gage v. Tirrell, 9 Allen (Mass.) 299; Elliott v. Rossell, 10 Johns. (N. Y.) 1; Williams v. Branson, 5 N. C. 417; Crosby v. Fitch, 12 Conn. 410; Parker v. Flagg, 26 Me. 181; Swindler v. Hilliard, 2 Rich. Law (S. C.) 286; McGregor v. Kilgore, 6 Ohio, 358; Benett v. Steamboat Co., 6 C. B. 775; Crouch v. Railway Co., 14 C. B. 255, 284.

[17] Nichols v. Smith, 115 Mass. 332; Paige v. Smith, 99 Mass. 395; Blumenthal v. Brainerd, 38 Vt. 402.

[18] Rogers v. Wheeler, 2 Lans. (N. Y.) 486; Id., 43 N. Y. 598; Faulkner v. Hart, 44 N. Y. Super. Ct. 471; Sprague v. Smith, 29 Vt. 421. Truckmen are

But a company operating sleeping cars in connection with railway trains is not a common carrier, nor an innkeeper, as to goods or baggage of the passenger;[19] but such companies are liable for failure to use ordinary care in protecting their passengers from loss by theft.[20] So, also, in the case of steamships, packets, etc.[21] Where a railroad lets cars and furnishes tracks and motive power, it has been held that it is[22] and is not[23] a common carrier.

LIABILITY FOR LOSS OR DAMAGE.

83. In the absence of special contract varying the obligation, the common carrier is an insurer of the goods intrusted to him, and is liable for all loss or damage, except such as is caused by

(a) The act of God or the public enemy.

(b) The act of the shipper.

(c) Authority of law.

(d) Inherent nature of goods.

common carriers, Jackson Architectural Iron Works v. Hurlbut, 158 N. Y. 34, 52 N. E. 665; and street car companies, State v. Spokane St. Ry. Co., 19 Wash. 518, 53 Pac. 719.

[19] Pullman Palace-Car Co. v. Smith, 73 Ill. 360; Pullman Car Co. v. Gardner, 3 Penny. (Pa.) 78; Blum v. Car Co., 1 Flip. 500, Fed. Cas. No. 1,574; Woodruff Sleeping & Parlor & Coach Co. v. Diehl, 84 Ind. 474; Pullman Palace-Car Co. v. Lowe, 28 Neb. 239, 44 N. W. 226; Barrott v. Car Co., 51 Fed. 796; Pullman Palace-Car Co. v. Freudenstein, 3 Colo. App. 540, 34 Pac. 578.

[20] Lewis v. Car Co., 143 Mass. 267, 9 N. E. 615; Whitney v. Car Co., 143 Mass. 243, 9 N. E. 619; Pullman Palace-Car Co. v. Pollock, 69 Tex. 120, 5 S. W. 814.

[21] Clark v. Burns, 118 Mass. 275. Steamboat owners are common carriers, but are not responsible to passengers for loss of personal belongings which are not delivered to the designated officer of the boat for safe-keeping. The Crystal Palace v. Vanderpool, 16 B. Mon. (Ky.) 302; Abbott v. Bradstreet, 55 Me. 530.

[22] Mallory v. Railroad Co., 39 Barb. (N. Y.) 488; Hannibal R. Co. v. Swift, 12 Wall. 262.

[23] East Tennessee & G. R. Co. v. Whittle, 27 Ga. 535; Ohio & M. R. Co. v. Dunbar, 20 Ill. 624; Kimball v. Railroad Co., 26 Vt. 247. Logging railroad not a common carrier, Wade v. Lumber Co., 20 C. C. A. 515, 74 Fed. 517; nor towboat, Knapp, Stout & Co. v. McCaffrey, 178 Ill. 107, 52 N. E. 898; Emiliusen v. Railroad Co., 30 App. Div. 203, 51 N. Y. Supp. 606.

The warranty of the carrier is that he will safely and securely carry and deliver, and under the common law this is his obligation unless he has made a special contract with the customer, modifying the liability.[1] Hence proof of nondelivery of the goods at the destination establishes, prima facie, a breach of the warranty.[2] To sustain an action for loss, diminution,[3] or damage,[4] it is sufficient to show the difference in amount or quality at the time of shipping and the time of receipt by the consignee.

Custody of Shipper.

In order to impose this utmost liability on the carrier, it is essential that the goods should be placed and remain in the exclusive custody of the carrier. If the shipper or his personal representative accompanies them, and retains over them any degree of control or possession, the extraordinary liability of a common carrier does not attach.[5] Having elected not to intrust the care of his goods to the carrier, but to retain them in his own control, there is no basis of liability on which to charge the carrier. And so where one shipped goods by boat, put a guardian on board, who locked the hatches, and went with the goods, to see that they were delivered safely, the pro-

§ 83. [1] Coggs v. Bernard, 2 Ld. Raym. 909; Fish v. Chapman, 2 Ga. 349; Williams v. Grant, 1 Conn. 487; Merritt v. Earle, 29 N. Y. 115; Parsons v. Hardy, 14 Wend. (N. Y.) 215; Colt v. McMechen, 6 Johns. (N. Y.) 160; Wood v. Crocker, 18 Wis. 345; Welsh v. Railroad Co., 10 Ohio St. 65; Parker v. Flagg, 26 Me. 181; Blumenthal v. Brainerd, 38 Vt. 402; Hooper v. Wells, Fargo & Co., 27 Cal. 11; Adams Exp. Co. v. Darnell, 31 Ind. 20; Gulf, C. & S. F. Ry. Co. v. Levi, 76 Tex. 337, 13 S. W. 191; Daggett v. Shaw, 3 Mo. 264; Forward v. Pittard, 1 Term R. 27.

[2] Gilbart v. Dale, 5 Adol. & E. 543; Griffiths v. Lee, 1 Car. & P. 110.

[3] Hawkes v. Smith, Car. & M. 72.

[4] Higginbotham v. Railway Co., 10 Wkly. Rep. 358. Proof of injury is sufficient where the freight is live stock. "The shipper must show some 'injurious accident,' or some injury to the thing shipped, which could not have been the result of its inherent nature or defects, or which stimulated or accelerated the injury arising out of such inherent nature or defects." Hutch. Carr. § 768a; Pennsylvania R. Co. v. Rairordon, 119 Pa. St. 577, 13 Atl. 324; Hussey v. The Saragossa, 3 Woods, 380, Fed. Cas. No. 6,949. But see The America, 8 Ben. 491, Fed. Cas. No. 283; Lindsley v. Railway Co., 36 Minn. 539, 33 N. W. 7; Louisville & N. R. Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311; Columbus & W. Ry. Co. v. Kennedy, 78 Ga. 646, 3 S. W. 267.

[5] Tower v. Railroad Co., 7 Hill (N. Y.) 47. But see Hollister v. Nowlen, 19 Wend. (N. Y.) 234; Yerkes v. Sabin, 97 Ind. 141.

prietor of the boat was held not liable as a common carrier, there "not being any trust in the defendant, and the goods were not to be considered as ever having been in his possession, but in the possession of the company's servant.[6]

Burden of proof.

It is therefore evident that in an action for the loss or damage of goods, in the absence of special contract, proof of the fact of loss or injury is sufficient to establish a prima facie case of liability. The burden of proof then devolves on the defendant to show that the loss or injury was the result of one of the excepted causes before alluded to, viz. the act of God or the public enemy, the act of the shipper, the exercise of public authority, or the inherent nature of the goods, against which the carrier is not an insurer.[7] Where it is made to appear that one or more of these excepted causes was instrumental in producing the injury complained of, the carrier is, prima facie, not liable. To charge him with the loss, the burden of proof is then shifted to the shipper, to show that he was negligent.[8] On this latter point, however, many courts hold that it is incumbent on the carrier to show not only that the loss or injury was caused by an except-

[6] East India Co. v. Pullen, 2 Strange, 690.

[7] Davis v. Railway Co., 89 Mo. 340, 1 S. W. 327; Wallingford v. Railroad Co., 26 S. C. 258, 2 S. E. 19; Slater v. Railway Co., 29 S. C. 96, 6 S. E. 936; Grieve v. Railway Co., 104 Iowa, 659, 74 N. W. 192; Texas & P. Ry. Co. v. Payne (Tex. Civ. App.) 38 S. W. 366; Georgia Railroad & Banking Co. v. Keener, 93 Ga. 808, 21 S. E. 287; George v. Railway Co., 57 Mo. App. 358; The Majestic, 166 U. S. 375, 17 Sup. Ct. 597.

[8] Witting v. Railway Co., 101 Mo. 631, 14 S. W. 743; Davis v. Railway Co., 89 Mo. 340, 1 S. W. 327; Read v. Railroad Co., 60 Mo. 199 (cf. Hill v. Sturgeon, 28 Mo. 323); Steers v. Steamship Co., 57 N. Y. 1; Lamb v. Transportation Co., 46 N. Y. 271; Cochran v. Dinsmore, 49 N. Y. 249; Patterson v. Clyde, 67 Pa. St. 500; Colton v. Railroad Co., 67 Pa. St. 211; Farnham v. Railroad Co., 55 Pa. St. 53; Goldey v. Railroad Co., 30 Pa. St. 242 (cf. Pennsylvania R. Co. v. Miller, 87 Pa. St. 395; Hays v. Kennedy, 41 Pa. St. 378; Whitesides v. Russell, 8 Watts & S. [Pa.] 44); Little Rock, M. R. & T. R. Co. v. Corcoran, 40 Ark. 375; Little Rock, M. R. & T. R. Co. v. Harper, 44 Ark. 208; Kansas Pac. Ry. Co. v. Reynolds, 8 Kan. 623; Kallman v. Express Co., 3 Kan. 205; Kelham v. The Kensington, 24 La. Ann. 100; Smith v. Railroad Co., 64 N. C. 235; Hubbard v. Express Co., 10 R. I. 244; Louisville & N. R. Co. v. Manchester Mills, 88 Tenn. 653, 14 S. W. 314; Memphis & C. R. Co. v. Reeves, 10 Wall. 176; Western Transp. Co. v. Downer, 11 Wall. 129; Christie v. The Craigton, 41 Fed. 62; Reed v. Steamboat Co., 1 Marv. 193, 40 Atl. 955.

ed peril, but that he exercised reasonable care and skill in the circumstances.[9] Whatever may be the weight of authority regarding the burden of proof on this point, it is undisputed that even when the carrier is not an insurer he is bound to exercise ordinary care to carry safely and securely.[10] What is ordinary care in the various excepted perils, will be discussed later.

Reason of Rule.

"The law charges this person [the common carrier] thus intrusted to carry goods against all events but acts of God and of the enemies of the king. For, though the force be never so great,—as if an irresistible multitude of people should rob him,—nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, or combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point." [11]

"When goods are delivered to a carrier, they are usually no longer under the eye of the owner. He seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His wit-

[9] South & N. A. R. Co. v. Henlein, 52 Ala. 606; Steele v. Townsend, 37 Ala. 247; Berry v. Cooper, 28 Ga. 543; Chicago, St. L. & N. O. R. Co. v. Moss, 60 Miss. 1003; Same v. Abels, Id. 1017; Gaines v. Insurance Co., 28 Ohio St. 418; United States Exp. Co. v. Backman, Id. 144; Graham v. Davis, 4 Ohio St. 362; Union Exp. Co. v. Graham, 26 Ohio St. 595; Slater v. Railway Co., 29 S. C. 96, 6 S. E. 936; Swindler v. Hilliard, 2 Rich. Law (S. C.) 286; Baker v. Brinson, 9 Rich. Law (S. C.) 201; Missouri Pac. Ry. Co. v. Manufacturing Co., 79 Tex. 26, 14 S. W. 785; Ryan v. Railway Co., 65 Tex. 13; Brown v. Express Co., 15 W. Va. 812; Shriver v. Railroad Co., 24 Minn. 506; Chicago, B. & Q. R. Co. v. Manning, 23 Neb. 552, 37 N. W. 462.

[10] Marshall v. Railroad Co., 11 C. B. 655, 665, note; Gill v. Railroad Co., 42 Law J. Q. B. 89; Jackson Architectural Iron Works v. Hurlbut, 158 N. Y. 34, 52 N. E. 665; Hinton v. Railway Co. (Minn.) 75 N. W. 373; Faucher v. Wilson (N. H.) 38 Atl. 1002.

[11] Coggs v. Bernard, 2 Ld. Raym. 909, 918.

nesses must be the carrier's servants, and they, knowing they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has added to that responsibility of a carrier which immediately rises out of his contract to carry for a reward—namely, that of taking all reasonable care of it—the responsibility of an insurer. From his liability as an insurer the carrier is only to be relieved by two things, both so well known to all the country, when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, namely, the act of God and the king's enemies." [12]

Excepted Risks—Generally.

The exercise of ordinary care in a given set of circumstances is always a duty, and the breach of such a duty, followed by damage, is negligence. In the emergency, therefore, of any of the risks before mentioned, which except the carrier from his extraordinary liability as insurer, he is not entirely relieved from responsibility, but must still exercise due diligence, and use all available means, to protect the goods from loss or damage.[13] Failure on the part of the carrier to exercise such diligence in the face of the excepted risk is negligence; and if this negligence directly caused, or in connection with the excepted risk contributed to cause, the injury complained of, he is liable.[14] Moreover, it is the duty of the carrier to use reasonable care to guard against all risks, including the excepted ones; and if, failing to take reasonable precautions, the goods are damaged by reason of the excepted peril, the negligence is regarded as the proximate

[12] Riley v. Horne, 5 Bing. 217.

[13] Marshall v. Railway Co., 11 C. B. 655, 665, note; Miller v. Railway Co., 1 Mo. App. Rep'r, 474; Gill v. Railroad Co., 42 Law J. Q. B. 89.

[14] Craig v. Childress, Peck (Tenn.) 270; Day v. Ridley, 16 Vt. 48. But the care need be only reasonable. Nashville & C. R. Co. v. David, 6 Heisk. (Tenn.) 261; Morrison v. Davis, 20 Pa. St. 171; Railroad Co. v. Reeves, 10 Wall. 176; Black v. Railroad Co., 30 Neb. 197, 46 N. W. 428; Gillespie v. Railway Co., 6 Mo. App. 554; Nugent v. Smith, 1 C. P. Div. 423; The Generous, 2 Dod. 322. But see The Niagara v. Cordes, 21 How. 7; King v. Shepherd, 3 Story, 349, Fed. Cas. No. 7,804. See, also, Smith v. Railway Co., 91 Ala. 455, 8 South. 754; Milwaukee & St. P. Ry. Co. v. Kellogg, 94 U. S. 469; Blythe v. Railway Co., 15 Colo. 333, 25 Pac. 702; Baltimore & O. R. Co. v. Sulphur Spring Independent School Dist., 96 Pa. St. 65; Denny v. Railroad Co., 13 Gray (Mass.) 481.

cause of the injury, and the carrier is liable.[15] Therefore the carrier may not ship the goods in an unseaworthy vessel,[16] or attempt to cross a stream with an insufficient team,[17] or when a dangerous wind was blowing,[18] and defend against resulting loss by claiming that it was caused by the act of God.[19]

Ordinarily, as we have seen, the responsibility of the carrier is that of an insurer; otherwise, in the case of excepted risks, his liability is identical with that of the ordinary bailee for hire,—he must exercise the degree of diligence required by law to protect the goods intrusted to him from injury resulting from conditions which, in the exercise of ordinary care, might be ameliorated or averted.[20] In this aspect of his liability as a bailee, the carrier does not become liable for causes which, from their nature, cannot be known or averted. But it is his duty, from an inspection of bills of lading or otherwise, to acquaint himself with the character of the goods, and furnish the care and protection which their nature requires.[21] Live animals must be

[15] Wolf v. Express Co., 43 Mo. 421; Pruitt v. Railroad Co., 62 Mo. 527; Davis v. Railway Co., 89 Mo. 340, 1 S. W. 327; Elliott v. Rossell, 10 Johns. (N. Y.) 1; Thomas v. Lancaster Mills, 19 C. C. A. 88, 71 Fed. 481; Richmond & D. R. Co. v. White, 88 Ga. 805, 15 S. E. 802; Lang v. Railroad Co., 154 Pa. St. 342, 26 Atl. 370.

[16] Bell v. Reed, 4 Bin. (Pa.) 127.

[17] Campbel v. Morse, 1 Harp. (S. C.) 468.

[18] Cook v. Gourdin, 2 Nott & McC. (S. C.) 19.

[19] Williams v. Grant, 1 Conn. 487; Klauber v. Express Co., 21 Wis. 21; Cook v. Gourdin, 2 Nott & McC. (S. C.) 19; United States Exp. Co. v. Kountze, 8 Wall. 342; Savannah, F. & W. Ry. Co. v. Guano Co. (Ga.) 30 S. E. 555.

[20] Bird v. Cromwell, 1 Mo. 81; Chouteaux v. Leech, 18 Pa. St. 224; Chicago & A. R. Co. v. Davis, 159 Ill. 53, 42 N. E. 382; Notara v. Henderson, L. R. 5 Q. B. 346, L. R. 7 Q. B. 225. Applying water to hogs to prevent overheating. Illinois Cent. R. Co. v. Adams, 42 Ill. 474; Toledo, W. & W. R. Co. v. Thompson, 71 Ill. 434; Toledo, W. & W. Ry. Co. v. Hamilton, 76 Ill. 393. See, also, The Niagara v. Cordes, 21 How. 7; American Exp. Co. v. Smith, 33 Ohio St. 511. But a carrier is not bound to interrupt his voyage to preserve goods. The Lynx v. King, 12 Mo. 272.

[21] Butter shipped in warm weather must be protected from heat. Beard v. Railway Co., 79 Iowa, 518, 44 N. W. 800 (citing Hewett v. Railway Co., 63 Iowa, 611, 19 N. W. 790; Sager v. Railroad Co., 31 Me. 228; Hawkins v. Railroad Co., 17 Mich. 57, 18 Mich. 427; Ogdensburg & L. C. R. Co. v. Pratt, 22 Wall. 123; Wing v. Railroad Co., 1 Hilt. [N. Y.] 641; Merchants' Dispatch & Transportation Co. v. Cornforth, 3 Colo. 280; Boscowitz v. Express Co.,

supplied with water, and fruits must be protected from frost.[22] Although, by the contract, the carrier is exempted from liability for loss by fire, he will nevertheless be responsible for damage to the goods from sparks, occurring through his negligence in failing to equip his engine with a proper spark arrester.[23] The vehicles must be reasonably suited for the conveyance of particular classes of goods,[24] and the cars or other vehicles, even if they are the property of another carrier, must be reasonably secure and strong.[25] The carrier must not mingle goods, if their character is known to him, calculated to do injury one to another,—as flour and turpentine,[26] cloths and acids.[27] He must use reasonable diligence in checking waste or damage during transit, of which he either knew, or, in the exercise of ordinary care, should have known,—as leakage of a cask,[28] or the deterioration of perishable goods through lack of ventilation.[29]

93 Ill. 523; Steinweg v. Railway Co., 43 N. Y. 123); Alabama & V. R. Co. v. Searles, 71 Miss. 744, 16 South. 255; Helliwell v. Railway Co., 7 Fed. 68; Peck v. Weeks, 34 Conn. 145; Sherman v. Steamship Co., 26 Hun, 107.

[22] Merchants' Dispatch & Transportation Co. v. Cornforth, 3 Colo. 280. Per contra, where the shipper selects the vehicle, Carr v. Schafer, 15 Colo. 48, 24 Pac. 873; Tucker v. Railroad Co., 11 Misc. Rep. 366, 32 N. Y. Supp. 1.

[23] Steinweg v. Railway Co., 43 N. Y. 123; Maxwell v. Railroad Co., 48 La. Ann. 385, 19 South. 287.

[24] Shaw v. Railway Co., 18 Law J. Q. B. 181, 13 Q. B. 347; Root v. Railroad Co., 83 Hun, 111, 31 N. Y. Supp. 357. If a package is too large to be carried in a closed car, it is not negligence to carry it on an open one, provided reasonable care is used to protect it from the weather. Burwell v. Railroad Co., 94 N. C. 451.

[25] Combe v. Railroad Co., 31 Law T. (N. S.) 613; Amies v. Stevens, 1 Strange, 128; Blower v. Railway Co., L. R. 7 C. P. 655.

[26] The Colonel Ledyard, 1 Spr. 530, Fed. Cas. No. 3,027.

[27] Alston v. Herring, 11 Exch. 822. But, if the goods are of a nature likely to be injured by contact with others, it is the duty of the shipper to notify the carrier, and, if he fails to do so, the latter will not be liable. Hutchinson v. Guion, 28 Law J. C. P. 63, 5 C. B. (N. S.) 149.

[28] Beck v. Evans, 16 East, 244. And see, also, Cox v. Railway Co., 3 Fost. & F. 77; Hunnewell v. Taber, 2 Spr. 1, Fed. Cas. No. 6,880; Cincinnati, N. O. & T. P. Ry. Co. v. N. K. Fairbanks & Co., 33 C. C. A. 611, 90 Fed. 467; Davis v. Railroad Co., 66 Vt. 290, 29 Atl. 313.

[29] Davidson v. Gwynne, 12 East, 381. See, also, Bird v. Cromwell, 1 Mo. 81; Chouteaux v. Leech, 18 Pa. St. 224; Densmore Commission Co. v. Duluth, S. S. & A. Ry. Co., 101 Wis. 563, 77 N. W. 904; Chicago & A. R. Co. v. Davis, 159 Ill. 53, 42 N. E. 382.

Deviation and Delay.

Neither can the carrier plead exemption from liability by reason of the act of God or other excepted peril, if he has, without sufficient reason, deviated from the usual or agreed route of travel; in such circumstances his liability is absolute, regardless of the cause of loss.[30] "This absolute liability rests on the proposition that the wrongful deviation amounts to a conversion, and the carrier is thereafter liable as owner until the original owner voluntarily accepts a return of the goods." [31]

A master deviating in his voyage from the customary course was held liable for loss caused by tempest.[32] Where the carrier agreed to carry by land, but sent the goods by water, he was held liable for their destruction by the act of God.[33] If the owner of a designated line of boats declines to receive the goods, the carrier should advise the shipper and await instructions;[34] but if he forwards by another line, without such instructions or on his own authority, he is liable.[35] Nothing short of actual necessity is a sufficient reason for a deviation from the customary course,[36] and the burden is upon the carrier to prove the necessity.[37]

It is held by some writers that a negligent and unreasonable delay should impose on the carrier a liability as absolute as that raised by a deviation from the ordinary route, if the loss can be traced with

[30] Crosby v. Fitch, 12 Conn. 410; Powers v. Davenport, 7 Blackf. (Ind.) 497; Merchants' Despatch Transp. Co. v. Kahn, 76 Ill. 520; Louisville & N. R. Co. v. Gidley (Ala.) 24 South. 753; International & G. N. R. Co. v. Wentworth, 8 Tex. Civ. App. 5, 27 S. W. 680; Smith v. Railway Co., 91 Ala. 455, 8 South. 754; Davis v. Garrett, 6 Bing. 716.

[31] Hale, Bailm. & Carr. p. 360.

[32] Davis v. Garrett, 6 Bing. 716; Powers v. Davenport, 7 Blackf. (Ind.) 497; Phillips v. Brigham, 26 Ga. 617; Lawrence v. McGregor, Wright N. P. (Ohio) 193.

[33] Johnson v. Railroad Co., 33 N. Y. 610; Cox v. Foscue, 37 Ala. 505. The carrier must follow instructions as to mode of conveyance, Wilcox v. Parmelee, 3 Sandf. (N. Y.) 610; and as to selection of carriers beyond his own route, Johnson v. Railroad Co., 33 N. Y. 610.

[34] Goodrich v. Thompson, 44 N. Y. 324. And see Fisk v. Newton, 1 Denio, 45.

[35] Johnson v. Railroad Co., 33 N. Y. 610.

[36] Hand v. Baynes, 4 Whart. (Pa.) 204; Johnson v. Railroad Co., 33 N. Y. 610.

[37] Le Sage v. Railway Co., 1 Daly (N. Y.) 306.

any degree of certainty to the fault of unreasonable delay,[38] and this is substantially the ruling of the courts of New York.[39] The more rational principle, supported by the greater weight of authority, would seem to be that the carrier should not be held liable for the loss unless it occurred as a natural and foreseeable consequence of the delay.[40]

SAME—ACT OF GOD OR PUBLIC ENEMY.

84. When the loss or damage is caused by what, in legal phraseology, is known as the "act of God or the public enemy," the liability of the carrier as insurer does not attach.

When the loss or damage is caused by the act of God, the duty of the carrier is performed by the exercise of the degree of care required of the ordinary bailee for hire.[1] The only difficulty to be met with in the consideration of this principle, either among the text writers or the decisions, is its application. Some writers hold that the occurrence falls within the definition provided the carrier is without fault and no human agency is connected with the occurrence;[2] while others insist that the action of nature must be essentially vio-

[38] Browne, Carr. § 98; Hutch. Carr. §§ 199, 200.

[39] Read v. Spaulding, 30 N. Y. 630; Michaels v. Railroad Co., Id. 564; Condict v. Railway Co., 54 N. Y. 500; Dunson v. Railroad Co., 3 Lans. (N. Y.) 265. See, also, Hewett v. Railway Co., 63 Iowa, 611, 19 N. W. 790; Read v. Railroad Co., 60 Mo. 199; McGraw v. Railroad Co., 18 W. Va. 361; Pruitt v. Railroad Co., 62 Mo. 527; Michigan Cent. R. Co. v. Curtis, 80 Ill. 324; Southern Exp. Co. v. Womack, 1 Heisk. (Tenn.) 256.

[40] Memphis & C. R. Co. v. Reeves, 10 Wall. 176; Morrison v. Davis, 20 Pa. St. 171; Denny v. Railroad Co., 13 Gray (Mass.) 481; Hoadley v. Transportation Co., 115 Mass. 304; and see Jones v. Gilmore, 91 Pa. St. 310, 314; St. Louis, I. M. & S. Ry. Co. v. Bland (Tex. Civ. App.) 34 S. W. 675; Palmer v. Railroad Co., 101 Cal. 187, 35 Pac. 630; Missouri Pac. Ry. Co. v. Levi (Tex. App.) 14 S. W. 1062; Gulf, C. & S. F. Ry. Co. v. Gatewood, 79 Tex. 89, 14 S. W. 913; Black v. Railroad Co., 30 Neb. 197, 46 N. W. 428; Blythe v. Railway Co., 15 Colo. 333, 25 Pac. 702.

§ 84. [1] Ante, p. 222.

[2] Hutch. Carr. § 175; Story, Bailm. §§ 489, 490, 511; 2 Kent, Comm. 597. See criticism of Colt v. McMechen, 6 Johns. 160, in American notes to Coggs v. Bernard, 1 Smith, Lead. Cas. 317.

lent.[3] But the question of violence would seem to be entirely immaterial, except that it might have importance in determining the care or negligence of the carrier in the circumstances.[4] Moderate disturbances of the elements are of common occurrence, and their possible happening should be taken into consideration by the carrier in providing for the safety of the goods. Losses happening in such circumstances would naturally be attributed to the failure of the carrier to guard against them, rather than to the elemental nature of the occurrence.[5] Again, the true test is said to be the entire absence of any human agency in producing the loss.[6] But this is far from satisfactory; for, as has just been intimated, the violence and nature of the disturbance must be considered in determining whether the carrier should not, in the exercise of due diligence, have anticipated and provided against a disturbance of like severity and frequency; and, if due diligence and foresight could have anticipated and prevented the loss, it follows that human agency was the legal producing cause. The only rational solution of the matter would seem to lie in a consideration of the circumstances surrounding each case, due regard being had for prevailing, known conditions and general experience in similar matters.

In the circumstances of the various cases, the following causes have been held to be the act of God: Lightning;[7] tempest;[8] earthquake;[9] extraordinary flood;[10] a sudden gust[11] or a severe gale

[3] Lawson, Bailm. § 120; Hutch. Carr. § 176.

[4] Schouler, Bailm. p. 391.

[5] Ante, p. 221.

[6] Hale, Bailm. & Carr. p. 357; Merritt v. Earle, 29 N. Y. 115; McArthur v. Sears, 21 Wend. (N. Y.) 190; Ewart v. Street, 2 Bailey (S. C.) 157; Backhouse v. Sneed, 5 N. C. 173; Trent Nav. Co. v. Ward, 3 Esp. 127.

[7] Forward v. Pittard, 1 Term R. 27, 33.

[8] Gillett v. Ellis, 11 Ill. 579.

[9] Slater v. Railway Co., 29 S. C. 96, 6 S. E. 936.

[10] Lovering v. Coal Co., 54 Pa. St. 291; Nashville & C. R. Co. v. David, 6 Heisk. (Tenn.) 261; Davis v. Railway Co., 89 Mo. 340, 1 S. W. 327; Norris v. Railway Co., 23 Fla. 182, 1 South. 475; Smith v. Railway Co., 91 Ala. 455, 8 South. 754; Wald v. Railroad Co., 162 Ill. 545, 44 N. E. 888; International & G. N. R. Co. v. Wentworth (Tex. Civ. App.) 27 S. W. 680. A flood such as has

[11] Germania Ins. Co. v. The Lady Pike, 8 Am. Law Reg. (N. S.) 614, Fed. Cas. No. 7,985.

of wind;[12] the sudden cessation of wind;[13] snowstorms;[14] the breaking of a dam;[15] freezing of navigable waters;[16] the freezing of fruit trees in transit;[17] a hidden, unknown rock;[18] a snag lodged by a freshet in a river.[19] If the carrier is negligent in failing to avoid the peril, the loss cannot be ascribed to the act of God.[20] On the other hand, and in some instances inconsistently with the foregoing cases, losses caused by fire not originating from lightning,[21] the explosion of a boiler,[22] collision,[23] heat,[24] hidden obstructions to navigation,[25] and the shifting of a buoy,[26] have been held not to be caused by the act of God.

occurred but twice in a generation is an act of God. Pearce v. The Thomas Newton, 41 Fed. 106.

[12] Blythe v. Railway Co., 15 Colo. 333, 25 Pac. 702. And see Miltimore v. Railway Co., 37 Wis. 190; Gulf, C. & S. F. Ry. Co. v. Compton (Tex. Civ. App.) 38 S. W. 220.

[13] Colt v. McMechen, 6 Johns. 160.

[14] Black v. Railroad Co., 30 Neb. 197, 46 N. W. 428; Feinberg v. Railroad Co., 52 N. J. Law, 451, 20 Atl. 33; Chapin v. Railway Co., 79 Iowa, 582, 44 N. W. 820; Palmer v. Railroad Co., 101 Cal. 187, 35 Pac. 630.

[15] Long v. Railroad Co., 147 Pa. St. 343, 23 Atl. 459 (the Johnstown flood of 1889).

[16] Bowman v. Teall, 23 Wend. (N. Y.) 306; Parsons v. Hardy, 14 Wend. (N. Y.) 215; Worth v. Edmonds, 52 Barb. (N. Y.) 40; West v. The Berlin, 3 Iowa, 532.

[17] Vail v. Railroad Co., 63 Mo. 230.

[18] Williams v. Grant, 1 Conn. 487; otherwise, if laid down in a chart, Pennewill v. Cullen, 5 Har. (Del.) 238.

[19] Smyrl v. Niolon, 2 Bailey (S. C.) 421.

[20] Norris v. Railway Co., 23 Fla. 182, 1 South. 475; Missouri, K. & T. Ry. Co. v. Olive (Tex. Civ. App.) 23 S. W. 526.

[21] Forward v. Pittard, 1 Term R. 27, 33; Condict v. Railway Co., 54 N. Y. 500; Miller v. Navigation Co., 10 N. Y. 431; Parsons v. Monteath, 13 Barb. (N. Y.) 353; Patton's Adm'rs v. Magrath, Dud. (S. C.) 159; Gilmore v. Carman, 1 Smedes & M. (Miss.) 279; Moore v. Railroad Co., 3 Mich. 23; Cox v. Peterson, 30 Ala. 608; Hyde v. Navigation Co., 5 Term R. 389. Per contra, Chicago & N. W. R. Co. v. Sawyer, 69 Ill. 285, the great fire, held not to be act of God.

[22] The Mohawk, 8 Wall. 153; Bulkley v. Cotton Co., 24 How. 386.

[23] Mershon v. Hobensack, 22 N. J. Law, 372; Plaisted v. Navigation Co., 27 Me. 132.

[24] Beard v. Railway Co., 79 Iowa, 518, 44 N. W. 800.

[25] New Brunswick Steamboat & Canal Transp. Co. v. Tiers, 24 N. J. Law, 697; Friend v. Woods, 6 Grat. (Va.) 189.

[26] Reaves v. Waterman, 2 Speer (S. C.) 197.

Proximate Cause.

To relieve the common carrier from liability, the act of God must have been the proximate cause of the loss.[27] If any agency, other than a natural one, contributes to cause the loss, it is not imputable solely to the act of God, and hence it follows that the act of God relied on as a defense must be shown to be the exclusive cause of the loss.[28] Thus, if a vessel sinks, partly by reason of being unseaworthy and partly by reason of a violent wind, the carrier will be liable.[29] So, also, where a steamer came in collision with the mast of a schooner recently sunk by a severe gale;[30] and, where a boat undergoing repairs on a dry dock was blown into the water by a sudden gust of wind, the court said: "The act of God which shook the dock from under the vessel was not the immediate cause of the damages. It was the holes in the vessel admitting torrents of water as soon as it touched the surface."[31]

A mistaken judgment, although occurring in the exercise of a sound discretion and prudence, does not relieve the carrier from liability. In McArthur v. Sears,[32] Cowen, J., said: "I have sought in vain for any case to excuse the loss of the carrier, where it arises from human action or neglect, or any combination of such action or neglect, except force exerted by a public enemy. No matter what degree of prudence may be exercised by the carrier and his servants, although the delusion by which it is baffled or the force by which it is overcome be inevitable, yet, if it be the result of human means, the carrier is responsible. * * * I believe it is matter of history that inhabitants of remote coasts, accustomed to plunder wrecked

[27] Merritt v. Earle, 29 N. Y. 115; Smith v. Shepherd, Abb. Shipp. (13th Ed.) p. 459; New Brunswick Steamboat & Canal Transp. Co. v. Tiers, 24 N. J. Law, 697.

[28] Packard v. Taylor, 35 Ark. 402; Merritt v. Earle, 29 N. Y. 115; Michaels v. Railroad Co., 30 N. Y. 564; King v. Shepherd, 3 Story, 349, Fed. Cas. No. 7,804; Ewart v. Street, 2 Bailey (S. C.) 157; Sprowl v. Kellar, 4 Stew. & P. (Ala.) 382; Lang v. Railroad Co., 154 Pa. St. 342, 26 Atl. 370; Savannah, F. & W. Ry. Co. v. Guano Co. (Ga.) 30 S. E. 555.

[29] Packard v. Taylor, 35 Ark. 402; Bell v. Reed, 4 Bin. (Pa.) 127.

[30] Merritt v. Earle, 29 N. Y. 115. And see Trent Navigation Co. v. Ward, 3 Esp. 127.

[31] Packard v. Taylor, 35 Ark. 402.

[32] 21 Wend. (N. Y.) 190.

vessels, have sometimes resorted to the expedient of luring benighted mariners, by false lights, to a rocky shore. Even such a harrowing combination of fraud and robbery would form no excuse. * * * The difficulty returns, therefore; if we receive the immediate agency of third persons in any shape, we open that very door for collusion which has denied an excuse by reason of theft, robbery, and fire."

The Public Enemy.

The common carrier is not an insurer against losses caused by the acts of the public enemy. The "public enemy," in its legal significance, is an organized military force, moving against the sovereign power of the carrier's country. Hence a common carrier will not be exempt from liability for losses caused by a mere insurrection,[33] unless it assumes the proportions of a civil war.[34] Neither do the acts of thieves, robbers, strikers, or rioters fall within the exception.[35] Nor do the acts of soldiers in the regular army, if they are acting willfully and unlawfully, and not in the discharge of their regular duty.[36] If actual hostilities exist, it is not essential that there

[33] Missouri Pac. Ry. Co. v. Nevill, 60 Ark. 375, 30 S. W. 425; Forward v. Pittard, 1 Term R. 27, 29. But see Nesbitt v. Lushington, 4 Term R. 783; Missouri Pac. Ry. Co. v. Nevill, 60 Ark. 375, 30 S. W. 425.

[34] Mauran v. Insurance Co., 6 Wall. 1; Nashville & C. R. Co. v. Estes, 10 Lea, 749; The Prize Cases, 2 Black, 635; Hubbard v. Express Co., 10 R. I. 244; Lewis v. Ludwick, 6 Cold. (Tenn.) 368. In the recent Civil War the Confederate forces were neither robbers on land nor pirates by sea. Fifield v. Insurance Co., 47 Pa. St. 166; Mauran v. Insurance Co., 6 Wall. 1. Per contra, Dole v. Insurance Co., 51 Me. 465.

[35] Coggs v. Bernard, 2 Ld. Raym. 909, 918; The Belfast v. Boon, 41 Ala. 50; Boon v. The Belfast, 40 Ala. 184; Lewis v. Ludwick, 6 Cold. (Tenn.) 368; Schieffelin v. Harvey, 6 Johns. (N. Y.) 170; Watkinson v. Laughton, 8 Johns. (N. Y.) 213; Morse v. Slue, 1 Vent. 190. Indians on the warpath are public enemies. Holladay v. Kennard, 12 Wall. 254. Strikers are not a public enemy, Missouri Pac. Ry. Co. v. Nevill, 60 Ark. 375, 30 S. W. 425; but their interference may excuse delay, Geismer v. Railway Co., 102 N. Y. 563, 7 N. E. 828; Pittsburgh, Ft. W. & C. R. Co. v. Hazen, 84 Ill. 36; Lake Shore & M. S. Ry. Co. v. Bennett, 89 Ind. 457; Pittsburgh, C. & St. L. Ry. Co. v. Hollowell, 65 Ind. 188; Haas v. Railroad Co., 81 Ga. 792, 7 S. E. 629; Gulf, C. & S. F. Ry. Co. v. Levi, 76 Tex. 337, 13 S. W. 191; Missouri Pac. Ry. Co. v. Same (Tex. App.) 14 S. W. 1062; Gulf, C. & S. F. Ry. Co. v. Gatewood, 79 Tex. 89, 14 S. W. 913; Southern Exp. Co. v. Glenn, 16 Lea (Tenn.) 472, 1 S. W. 102.

[36] Seligman v. Armijo, 1 N. M. 459.

should be a formal declaration of war.[37] Pirates, although nothing more than sea robbers, have always been included in the exception as the common enemy of all mankind.[38]

Although the loss is caused by the act of the public enemy, this does not relieve the carrier from his obligation to use due diligence in escaping capture or avoiding injury and loss.[39] And, if the loss occurs while the carrier is deviating from the usual course, he is liable therefor, regardless of the question whether it was caused by the deviation or not.[40] In the event of an unreasonable delay, the carrier will not be liable for a loss caused by the public enemy, unless it appears that such loss was a result naturally to be anticipated from the delay.[41]

SAME—ACT OF SHIPPER.

85. Common carriers of goods are not insurers against loss or damage caused by the act of the shipper.

If the shipper, by any act or by any species of deception, misleads the carrier as to the true nature or value of the goods, whereby he is led to exercise a care, less in degree or different in kind from what he would have bestowed had he been informed of their true nature, and the goods are consequently lost or damaged, the carrier is not liable.[1] Thus, where an attempt was made to defraud the carrier of his just compensation, by shipping money hid in the midst of a

[37] The Prize Cases, 2 Black, 635.

[38] Hutch. Carr. § 205; Lawson, Bailm. § 129; Story, Bailm. § 526; Pickering v. Barkley, Style, 132. But see The Belfast v. Boon, 41 Ala. 50.

[39] Forward v. Pittard, 1 Term R. 27; Parker v. James, 4 Camp. 112; Clark v. Railroad Co., 39 Mo. 184; Express Co. v. Kountze, 8 Wall. 342.

[40] Parker v. James, 4 Camp. 112.

[41] Southern Exp. Co. v. Womack, 1 Heisk. (Tenn.) 256; Holladay v. Kennard, 12 Wall. 254.

§ 85. [1] Gorham Mfg. Co. v. Fargo, 45 How. Prac. 90; Camden & A. R. Co. v. Baldauf, 16 Pa. St. 67; Relf v. Rapp, 3 Watts & S. (Pa.) 21; Southern Exp. Co. v. Crook, 44 Ala. 468; New York Cent. & H. R. R. Co. v. Fraloff, 100 U. S. 24; Phillips v. Earle, 8 Pick. (Mass.) 182; Chicago & A. R. Co. v. Thompson, 19 Ill. 578; Magnin v. Dinsmore, 62 N. Y. 35; Earnest v. Express Co., 1 Woods, 573, Fed. Cas. No. 4,248; Ocean S. S. Co. of Savannah v. Way, 90 Ga. 747, 17 S. E. 57; Shackt v. Railroad Co., 94 Tenn. 658, 30 S. W. 742.

bag of hay, the shipper was not allowed to recover for its loss.[2] So, likewise, where a diamond ring was sent in a small paper box, tied up with a string.[3] And, in general, it is true that, if the method of packing is calculated to mislead the carrier and make him underestimate the value of the goods, it is not material that actual fraud should be intended or proved.[4] The evident reason for this is that the carrier is thereby "thrown off his guard, and neglects to give the package the care and attention which he would have given it had he known its actual value." [5]

A hidden defect in packing the goods, whereby they are subject to injury and damage in the ordinary course of transportation, in a manner unknown to the carrier, relieves him from liability for a loss thus caused.[6]

If the shipper assumes any part of the responsibility connected with the transportation of the goods, either by express direction or by act of interference or assumption of authority, a resulting loss will be attributed to his, and not the carrier's, negligence.[7] Where the shipper of a horse opened a window in the box car, and left it

[2] Gibbon v. Paynton, 4 Burrows, 2298; Southern Exp. Co. v. Everett, 37 Ga. 688; Phillips v. Earle, 8 Pick. (Mass.) 182; The Ionic, 5 Blatchf. 538, Fed. Cas. No. 7,059; Crouch v. Railway Co., 14 C. B. 255; Edwards v. Sherratt, 1 East, 604; Batson v. Donovan, 4 Barn. & Ald. 21.

[3] Everett v. Express Co., 46 Ga. 303.

[4] Warner v. Transportation Co., 5 Rob. (N. Y.) 490; Orange Co. Bank v. Brown, 9 Wend. (N. Y.) 85; Pardee v. Drew, 25 Wend. (N. Y.) 459; Chicago & A. R. Co. v. Thompson, 19 Ill. 578; Shackt v. Railroad Co., 94 Tenn. 658, 30 S. W. 742; Great Northern Ry. Co. v. Shepherd, 8 Exch. 30, 14 Eng. Law & Eq. 367.

[5] Hutch. Carr. § 213. Where a box contains glass, the carrier should be informed of it. American Exp. Co. v. Perkins, 42 Ill. 458. And generally, see Hollister v. Nowlen, 19 Wend. (N. Y.) 234; Hayes v. Wells, Fargo & Co., 23 Cal. 185; St. John v. Express Co., 1 Woods, 612, Fed. Cas. No. 12,228.

[6] Klauber v. Express Co., 21 Wis. 21; Goodman v. Navigation Co., 22 Or. 14, 28 Pac. 894; Gulf, C. & S. F. Ry. Co. v. Holder, 10 Tex. Civ. App. 223, 30 S. W. 383. But see The Colonel Ledyard, 1 Spr. 530, Fed. Cas. No. 3,027. But, to relieve the carrier from liability, the loss must arise from the improper packing. Shriver v. Railroad Co., 24 Minn. 506.

[7] White v. Winnisimmet Co., 7 Cush. (Mass.) 155; Wilson v. Hamilton, 4 Ohio St. 722; Western & A. R. Co. v. Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916; Miltimore v. Railway Co., 37 Wis. 190; Rixford v. Smith, 52 N. H. 355; Ross v. Railroad Co., 49 Vt. 364; Betts v. Trust Co., 21 Wis. 80; East

open without the knowledge of the carrier, the latter was not liable for the loss of the horse, which jumped through the window and was killed.[8] So, also, if he furnishes the car [9] or accompanies the goods under an agreement to care for them.[10] Nor is the carrier liable for the miscarriage [11] or wrong delivery of the goods,[12] if the shipper has been guilty of negligence in improperly marking their destination.

SAME—AUTHORITY OF LAW.

86. Common carriers are not liable for loss occurring through the lawful exercise of public authority.

Whenever, in the course of transportation, the carrier is compelled, under the paramount authority of the law, to yield the possession of goods to its officers, he cannot be held liable for the loss.[1] It was so held where, in the exercise of police power, goods infected with contagious diseases or intoxicating liquors were seized.[2] If the goods are taken under legal process, it is not incumbent on the carrier to ascertain positively the validity of the writ before surrendering the possession; it is sufficient if it bears the ordinary indicia of validity.[3] "Whatever may be a carrier's duty to resist a forcible

Tennessee, V. & G. R. Co. v. Johnston, 75 Ala. 596; Pennsylvania Co. v. Kenwood Bridge Co., 170 Ill. 645, 49 N. E. 215.

[8] Hutchinson v. Railway Co., 37 Minn. 524, 35 N. W. 433.

[9] Illinois Cent. R. Co. v. Hall, 58 Ill. 409; or other appliances, Loveland v. Burke, 120 Mass. 139; Ross v. Railroad Co., 49 Vt. 364.

[10] Gleason v. Transportation Co., 32 Wis. 85; South & N. A. R. Co. v. Henlein, 52 Ala. 606; McBeath v. Railway Co., 20 Mo. App. 445.

[11] Congar v. Railroad Co., 24 Wis. 157; The Huntress, 2 Ware, 89 (Dav. 82), Fed. Cas. No. 6,914; Erie Ry. Co. v. Wilcox, 84 Ill. 239; Southern Exp. Co. v. Kaufman, 12 Heisk. (Tenn.) 161; Finn v. Railroad Corp., 102 Mass. 283.

[12] Lake Shore & M. S. R. Co. v. Hodapp, 83 Pa. St. 22.

§ 86. [1] Stiles v. Davis, 1 Black, 101; Nashville & C. R. Co. v. Estes, 10 Lea (Tenn.) 749; Indiana, I. & I. Ry. Co. v. Doremeyer, 20 Ind. App. 605, 50 N. E. 497.

[2] Wells v. Steamship Co., 4 Cliff. 228, Fed. Cas. No. 17,401. Game unlawfully killed. Thomas v. Express Co. (Minn.) 75 N. W. 1120.

[3] Stiles v. Davis, 1 Black, 101; Bliven v. Railroad Co., 36 N. Y. 403; Pingree v. Railroad Co., 66 Mich. 143, 33 N. W. 298; Furman v. Railroad Co., 57 Iowa, 42, 10 N. W. 272; Id., 62 Iowa, 395, 17 N. W. 598; Id., 68 Iowa, 219, 26 N. W. 83; Id., 81 Iowa, 540, 46 N. W. 1049; Ohio & M. Ry. Co. v. Yohe,

seizure without process, he cannot be compelled to assume that regular process is illegal, and to accept all the consequences of resisting officers of the law. If he is excusable for yielding to a public enemy, he cannot be at fault for yielding to actual authority what he may yield to usurped authority." [4] Where an attachment had been wrongfully issued against goods in the hands of the carrier, the court said: "It is true that these goods had been delivered to the defendant as carriers by the plaintiffs, to be conveyed for them to the place of destination, and were seized under an attachment against third persons; but the circumstance did not impair the legal effect of the seizure or custody of the goods under it, so as to justify the defendant in taking them out of the hands of the sheriff. The right of the sheriff to hold them was a question of law, to be determined by the proper legal proceedings, and not at the will of the defendant nor that of the plaintiffs." [5]

SAME—INHERENT NATURE OF GOODS.

87. The common carrier is not an insurer against loss arising from the inherent nature, vice, defect, or infirmity of the goods,[1] unless his negligence has contributed thereto.[2]

51 Ind. 181; French v. Transportation Co., 134 Mass. 288; Jewett v. Olsen, 18 Or. 419, 23 Pac. 262; The M. M. Chase, 37 Fed. 708; Savannah, G. & N. A. R. Co. v. Wilcox, 48 Ga. 432. But see Bingham v. Lamping, 26 Pa. St. 340; McAlister v. Railroad Co., 74 Mo. 351; Mierson v. Hope, 2 Sweeny (N. Y.) 561; Bennett v. Express Co., 83 Me. 236, 22 Atl. 159.

[4] Per Campbell, C. J., in Pingree v. Railroad Co., 66 Mich. 143, 33 N. W. 298.

[5] Stiles v. Davis, 1 Black, 101; Frank v. Railroad Co., 9 Pa. Super. Ct. 129.

§ 87. [1] Hale, Bailm. & Carr. p. 368; Story, Bailm. § 492a; Hutch. Carr. § 216a.

[2] Beard v. Railroad Co., 79 Iowa, 518, 44 N. W. 800; Harris v. Railroad Co., 20 N. Y. 232; Ohio & M. R. Co. v. Dunbar, 20 Ill. 624; Welsh v. Railroad Co., 10 Ohio St. 65; Powell v. Railroad Co., 32 Pa. St. 414; Smith v. Railroad Co., 12 Allen (Mass.) 531; Conger v. Railroad Co., 6 Duer (N. Y.) 375; and as to whether perishable property must be given preference in transportation, Swetland v. Railroad Co., 102 Mass. 276; Peet v. Railroad Co., 20 Wis. 594; Tierney v. Railroad Co., 76 N. Y. 305; Marshall v. Railroad Co., 45 Barb. (N. Y.) 502.

Thus, the carrier is not liable for the decay of fruits, the evaporation or leakage of liquids, and like deteriorations.[3]

LIABILITY FOR DELAY.

88. In the absence of special contract, the obligation of the common carrier is merely to use ordinary diligence to deliver the goods within a reasonable time.

89. When the carrier makes a specific agreement to carry and deliver the goods within a limited time, the obligation is absolute.

In the absence of special agreement, it is the duty of the carrier to use ordinary care to avoid delays in transportation and to deliver the goods within a reasonable time.[1] It follows that his liability for delay in transportation is determined by the test of reasonable care and reasonable time. Even if the delay is unreasonable, the owner is still bound to receive the goods when tendered at the destination.[2] In such cases, his remedy is not for a conversion, but for damages, measured by the loss proximately caused by the delay.[3]

[3] Beard v. Railroad Co., 79 Iowa, 518, 44 N. W. 800; Gulf, C. & S. F. Ry. Co. v. Levi, 76 Tex. 337, 13 S. W. 191; Cragin v. Railroad Co., 51 N. Y. 61; Louisville, N. O. & T. Ry. Co. v. Bigger, 66 Miss. 319, 6 South. 234; Illinois Cent. R. Co. v. Brelsford, 13 Ill. App. 251; The Howard v. Wissman, 18 How. 231; The Collenberg, 1 Black, 170; Swetland v. Railroad Co., 102 Mass. 276; Warden v. Greer, 6 Watts (Pa.) 424; Powell v. Mills, 37 Miss. 691; Evans v. Railroad Co., 111 Mass. 142. Thus, of peaches, American Exp. Co. v. Smith, 33 Ohio St. 511, 31 Am. Rep. 561, and note; and of potatoes, The Howard v. Wissman, 18 How. 231; fermentation of molasses, Warden v. Greer, 6 Watts (Pa.) 424; Faucher v. Wilson (N. H.) 38 Atl. 1002.

§§ 88–89. [1] Scovill v. Griffith, 12 N. Y. 509; Michigan Cent. R. Co. v. Burrows, 33 Mich. 6; Empire Transp. Co. v. Wallace, 68 Pa. St. 302; Kinnick v. Railroad Co., 69 Iowa, 665, 29 N. W. 772; Savannah, F. & W. Ry. Co. v. Pritchard, 77 Ga. 412, 1 S. E. 261; Johnson v. Railway Co., 90 Ga. 810, 17 S. E. 121.

[2] Hutch. Carr. § 328; Scovill v. Griffith, 12 N. Y. 509.

[3] Scovill v. Griffith, 12 N. Y. 509; Ruppel v. Railway Co., 167 Pa. St. 166, 31 Atl. 478; Hudson v. Railway Co., 92 Iowa, 231, 60 N. W. 608; Fox v. Railroad Co., 148 Mass. 220, 19 N. E. 222; Pereira v. Railroad Co., 66 Cal. 92, 4 Pac. 988; Douglass v. Railroad Co., 53 Mo. App. 473; Gulf, C. & S. F. R. Co.

What is a reasonable time is always a question of fact, requiring a consideration of all the attendant circumstances,—the nature of the goods; the distance; the character of the journey, whether by land or water; the motive power; the season of the year; the weather; and the like.[4]

Excuses for Delay.

If the delay in transportation occurs without the fault or negligence of the carrier, he cannot be held liable for resulting loss.[5] Nor will the carrier be liable for delay caused by mere accident or misfortune, although not of such a nature as to be characterized as "inevitable," provided it could not have been anticipated and avoided by the exercise of ordinary care.[6] Thus, the carrier will not be liable for delay caused by the violence of mobs or strikers,[7] although he

v. Hughes (Tex. Civ. App.) 31 S. W. 411; The Caledonia, 157 U. S. 124, 15 Sup. Ct. 537; Houseman v. Transportation Co., 104 Mich. 300, 62 N. W. 290. And the shipper may recover expenses to which he has been put by the delay. Black v. Baxendale, 1 Exch. 410; Galveston, H. & S. A. Ry. Co. v. Tuckett (Tex. Civ. App.) 25 S. W. 150; Gulf, C. & S. F. Ry. Co. v. Hume. 87 Tex. 211, 27 S. W. 110.

[4] Coffin v. Railroad Co., 64 Barb. (N. Y.) 379; Wibert v. Railroad Co., 12 N. Y. 245; Nudd v. Wells, 11 Wis. 407; Parsons v. Hardy, 14 Wend. (N. Y.) 215; Michigan Southern & N. I. R. Co. v. Day, 20 Ill. 375; Bennett v. Byram, 38 Miss. 17; East Tennessee & G. R. Co. v. Nelson, 1 Cold. (Tenn.) 272; Gerhard v. Neese, 36 Tex. 635; McGraw v. Railroad Co., 18 W. Va. 361; Petersen v. Case, 21 Fed. 885; St. Louis, I. M. & S. Ry. Co. v. Heath, 41 Ark. 476; Ormsby v. Railroad Co., 2 McCrary, 48, 4 Fed. 170, 706; St. Clair v. Railroad Co., 80 Iowa, 304, 45 N. W. 570.

[5] Ruppel v. Railway Co., 167 Pa. St. 166, 31 Atl. 478; Philadelphia, W. & B. R. Co. v. Lehman, 56 Md. 209; Taylor v. Railroad Co., L. R. 1 C. P. 385. But he is liable for negligent delay. Rawson v. Holland, 59 N. Y. 611; Michigan Southern & N. I. R. Co. v. Day, 20 Ill. 375; Rathbone v. Neal, 4 La. Ann. 563.

[6] Hutch. Carr. § 330.

[7] Pittsburgh, C. & St. L. R. Co. v. Hollowell, 65 Ind. 188. But see Blackstock v. Railroad Co., 20 N. Y. 48. Where the places of striking employés are promptly supplied by other competent men, and the strikers then prevent the new employés from doing their duty by lawless and irresistible violence, the company is not liable for delay caused solely by such violence. Pittsburgh, Ft. W. & C. R. Co. v. Hazen, 84 Ill. 36; Pittsburgh, C. & St. L. R. Co. v. Hollowell, 65 Ind. 188; Geismer v. Railway Co., 102 N. Y. 563, 7 N. E. 828; Gulf, C. & S. F. Ry. Co. v. Levi, 76 Tex. 337, 13 S. W. 191; Haas v. Railroad Co., 81 Ga. 792, 7 S. E. 629; International & G. N. Ry. Co. v. Tisdale, 74 Tex. 8, 11 S. W. 900; Lake Shore & M. S. Ry. Co. v. Bennett, 89 Ind. 457; Bart-

would be absolutely liable for loss or damage from the same source.[8] Other causes of excusable delay are: A low stage of water, impeding navigation;[9] collision either on land[10] or water;[11] an unusual press of freight;[12] heavy snow;[13] freezing of navigable waters;[14] and the like.[15]

Not infrequently the ultimate safety of the goods must be considered, rather than their speedy delivery, and in such circumstances delay may become a positive duty. Thus, where the customary route of a vessel through Long Island Sound became blocked with ice, and, in attempting to make the passage by way of the open ocean, the vessel and goods were lost in a storm, the carrier was held liable, on the ground that the master should have waited until the safer route was open.[16]

When a delay occurs, it is the duty of the carrier to use ordinary care to preserve the goods from injury or deterioration,[17] and he must resume and complete the transportation so soon as the cause of the delay is removed.[18]

lett v. Railway Co., 94 Ind. 281; Missouri Pac. Ry. Co. v. Levi (Tex. App.) 14 S. W. 1062; Southern Pac. Ry. Co. v. Johnson (Tex. App.) 15 S. W. 121; Gulf, C. & S. F. Ry. Co. v. Gatewood, 79 Tex. 89, 14 S. W. 913.

[8] See ante, p. 229.

[9] Bennett v. Byram, 38 Miss. 17; Silver v. Hale, 2 Mo. App. 557.

[10] Conger v. Railroad Co., 6 Duer (N. Y.) 375.

[11] Parsons v. Hardy, 14 Wend. (N. Y.) 215.

[12] Wibert v. Railroad Co., 12 N. Y. 245; Michigan Cent. R. Co. v. Burrows, 33 Mich. 6. But see Thomas v. Railway Co., 63 Fed. 200; International & G. N. Ry. Co. v. Anderson, 3 Tex. Civ. App. 8, 21 S. W. 691; Louisville & N. R. Co. v. Touart, 97 Ala. 514, 11 South. 756.

[13] Pruitt v. Railroad Co., 62 Mo. 527; Ballentine v. Railroad Co., 40 Mo. 491; Briddon v. Railway Co., 28 L. J. Exch. 51.

[14] Bowman v. Teall, 23 Wend. (N. Y.) 306; Beckwith v. Frisbie, 32 Vt. 559. But see Spann v. Transportation Co., 11 Misc. Rep. 680, 33 N. Y. Supp. 566.

[15] Generally, Vicksburg & M. R. Co. v. Ragsdale, 46 Miss. 458; Livingston v. Railroad Co., 5 Hun (N. Y.) 562; Taylor v. Railway Co., L. R. 1 C. P. 385. Atmospheric conditions crippling telegraph service, International & G. N. R. Co. v. Hynes, 3 Tex. Civ. App. 20, 21 S. W. 622; floods, St. Louis, I. M. & S. Ry. Co. v. Jones (Tex. Civ. App.) 29 S. W. 695; International & G. N. R. Co. v. Wentworth, 8 Tex. Civ. App. 5, 27 S. W. 680.

[16] Crosby v. Fitch, 12 Conn. 410.

[17] Bowman v. Teall, 23 Wend. (N. Y.) 306; Bennett v. Byram, 38 Miss. 17.

[18] Hadley v. Clarke, 8 Term R. 259; Palmer v. Lorillard, 16 Johns. (N. Y.) 348.

SAME—SPECIAL CONTRACT OF DELIVERY.

90. When the carrier, by special contract, agrees to deliver the goods within a specified time, he becomes an insurer in that respect, and the duty is absolute,[1] and not even the act of God will relieve him from liability.[2]

In all contracts of this kind, it is the duty of the shipper to furnish the goods at the time agreed on, and, on his default in this particular, the carrier cannot be held liable if the transportation is not completed within the prescribed time.[3]

CONTRACTS LIMITING LIABILITY.

91. In the absence of a prohibiting statute, the common carrier of goods may, by special contract with the shipper, limit his liability to that of ordinary bailee for hire; but he cannot thereby relieve himself of responsibility for the negligence of himself or his agents.

EXCEPTIONS—(a) By the Illinois rule, the carrier may stipulate against the ordinary, but not the gross, negligence of his servants.

(b) By the New York rule, the carrier may contract against liability for any degree of negligence on the part of his servants, but cannot escape responsibility for his personal negligence.

§ 90. [1] Fox v. Railroad Co., 148 Mass. 220, 19 N. E. 222; Pereira v. Railroad Co., 66 Cal. 92, 4 Pac. 988; Chicago & A. R. Co. v. Thrapp, 5 Ill. App. 502; Deming v. Railroad Co., 48 N. H. 455; Place v. Express Co., 2 Hilt. (N. Y.) 19; Harrison v. Railway Co., 74 Mo. 364; Parmalee v. Wilks, 22 Barb. (N. Y.) 539; Harmony v. Bingham, 12 N. Y. 99; Cantwell v. Express Co., 58 Ark. 487, 25 S. W. 503. The contract may be implied from acceptance of the goods with knowledge that they are intended to be at their destination on a given day. Chicago & A. R. Co. v. Thrapp, 5 Ill. App. 502; Grindle v. Express Co., 67 Me. 317; Philadelphia, W. & B. R. Co. v. Lehman, 56 Md. 209. But see United States Exp. Co. v. Root, 47 Mich. 231, 10 N. W. 351.

[2] Harmony v. Bingham, 12 N. Y. 99; Id., 1 Duer (N. Y.) 209; Miller v. Railway Co., 1 Mo. App. Rep'r, 474.

[3] Hutch. Carr. § 319a; Fowler v. Steam Co., 87 N. Y. 190.

In England, in the early part of the present century, the rigor of the common law was relaxed, and the right of the carrier to limit his extraordinary liability by special contract was clearly recognized,[1] and he was even permitted to exempt himself from liability for his own negligence.[2] In this country, the earliest recorded case in which the question squarely arose was that of Gould v. Hill.[3] Basing its decision on grounds of public policy, the court held in that case that the carrier could not qualify or vary his common-law liability by contract. This was followed, after an interval of a few years, by the case of New Jersey Steam Nav. Co. v. Merchants' Bank,[4] in which the supreme court of the United States disapproved the ruling in Gould v. Hill, and unanimously decided that the common carrier might, by special contract, restrict his liability. And it is now almost universally held in this country that the carrier may contract against his liability as an insurer, but not against liability for damages caused by his own or his servants' negligence.[5] While

§ 91. [1] Izett v. Mountain, 4 East, 371; Nicholson v. Willan, 5 East, 507; Clarke v. Gray, 6 East, 564; Harris v. Packwood, 3 Taunt. 264; Beck v. Evans, 16 East, 244; Munn v. Baker, 2 Starkie, 255; Wyld v. Pickford, 8 Mees. & W. 443; Carr v. Railway Co., 7 Exch. 707.

[2] Maving v. Todd, 1 Starkie, 72; Leeson v. Holt, Id. 186; Carr v. Railway Co., 7 Exch. 707.

[3] 2 Hill (N. Y.) 623.

[4] 6 How. 344.

[5] South & N. A. R. Co. v. Henlein, 52 Ala. 606, 56 Ala. 368; East Tennessee, V. & G. R. Co. v. Johnston, 75 Ala. 596; Little Rock, M. R. & T. Ry. Co. v. Talbot, 47 Ark. 97, 14 S. W. 471; Taylor v. Railroad Co., 39 Ark. 148; Overland Mail & Express Co. v. Carroll, 7 Colo. 43, 1 Pac. 682; Merchants' Dispatch & Transportation Co. v. Cornforth, 3 Colo. 280; Union Pac. R. Co. v. Rainey, 19 Colo. 225, 34 Pac. 986; Camp v. Steamboat Co., 43 Conn. 333; Welch v. Railroad Co., 41 Conn. 333; Central R. Co. v. Bryant, 73 Ga. 722, 726; Berry v. Cooper, 28 Ga. 543; Flinn v. Railroad Co., 1 Houst. (Del.) 469, 502; Boscowitz v. Express Co., 93 Ill. 523; Erie Ry. Co. v. Wilcox, 84 Ill. 239; Rosenfeld v. Railway Co., 103 Ind. 121, 2 N. E. 344; Bartlett v. Railway Co., 94 Ind. 281; Ohio & M. Ry. Co. v. Selby, 47 Ind. 471; Sprague v. Railway Co., 34 Kan. 347, 8 Pac. 465; St. Louis, K. C. & N. Ry. Co. v. Piper, 13 Kan. 505; Louisville & N. R. Co. v. Brownlee, 14 Bush (Ky.) 590; Louisville, C. & L. R. Co. v. Hedger, 9 Bush (Ky.) 645; New Orleans Mut. Ins. Co. v. Railroad Co., 20 La. Ann. 302; Roberts v. Riley, 15 La. Ann. 103; Little v. Railroad Co., 66 Me. 239; Willis v. Railway Co., 62 Me. 488; McCoy v. Transportation Co., 42 Md. 498; Brehme v. Dinsmore, 25 Md. 328; Hoadley v. Transportation Co., 115

conceding the justice and reason of the rule permitting the carrier to restrict his liability as an insurer, our courts have recognized the unequal footing upon which the carrier and the shipper stand, and have steadfastly held it a matter of public policy to place some limitation upon the rule. They have, accordingly, been almost unanimous in denying the right of common carriers to contract against liability for negligence, either of themselves or their agents or employés. The elaborate opinion of Mr. Justice Bradley in New York

Mass. 304; Pemberton Co. v. Railroad Co., 104 Mass. 144, 151; School Dist. in Medfield v. Boston, H. & E. R. Co., 102 Mass. 552; Grace v. Adams, 100 Mass. 505; Squire v. Railroad Co., 98 Mass. 239; Feige v. Railroad Co., 62 Mich. 1, 28 N. W. 685; Michigan Cent. R. Co. v. Ward, 2 Mich. 538, overruled in Michigan Cent. R. Co. v. Hale, 6 Mich. 243; Boehl v. Railway Co., 44 Minn. 191, 46 N. W. 333; Hull v. Railway Co., 41 Minn. 510, 43 N. W. 391; Ortt v. Railway Co., 36 Minn. 396, 31 N. W. 519; Chicago, St. L. & N. O. R. Co. v. Abels, 60 Miss. 1017; New Orleans, St. L. & C. R. Co. v. Faler, 58 Miss. 911; McFadden v. Railway Co., 92 Mo. 343, 4 S. W. 689; Ball v. Railway Co., 83 Mo. 574; Craycroft v. Railroad Co., 18 Mo. App. 487; Atchison & N. R. Co. v. Washburn, 5 Neb. 117, 121; Chicago, R. I. & P. R. Co. v. Witty, 32 Neb. 275, 49 N. W. 183; Rand v. Transportation Co., 59 N. H. 363; Moses v. Railroad Co., 24 N. H. 71, 32 N. H. 523; Ashmore v. Transportation Co., 28 N. J. Law, 180; Phifer v. Railway Co., 89 N. C. 311; Smith v. Railroad Co., 64 N. C. 235; Gaines v. Insurance Co., 28 Ohio St. 418; United States Exp. Co. v. Backman, Id. 144; Union Exp. Co. v. Graham, 26 Ohio St. 595; Armstrong v. Express Co., 159 Pa. St. 640, 28 Atl. 448; Merchants' Despatch Transp. Co. v. Bloch, 86 Tenn. 392, 397, 6 S. W. 881; Coward v. Railroad Co., 16 Lea (Tenn.) 225; Gulf, C. & S. F. Ry. Co. v. Trawick, 68 Tex. 314, 4 S. W. 567 (under statute); Gulf, C. & S. F. Ry. Co. v. McGown, 65 Tex. 640; Houston & T. C. R. Co. v. Burke, 55 Tex. 323; Mann v. Birchard, 40 Vt. 326; Blumenthal v. Brainerd, 38 Vt. 402; Virginia & T. R. Co. v. Sayers, 26 Grat. (Va.) 328; Wilson v. Railroad Co., 21 Grat. (Va.) 654, 671; Brown v. Express Co., 15 W. Va. 812; Maslin v. Railroad Co., 14 W. Va. 180; Abrams v. Railway Co., 87 Wis. 485, 58 N. W. 780. And see Black v. Transportation Co., 55 Wis. 319, 13 N. W. 244; Thomas v. Railway Co., 63 Fed. 200; Hudson v. Railway Co., 92 Iowa, 231, 60 N. W. 608; New York Cent. R. Co. v. Lockwood, 17 Wall. 357; Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. 318, 328; Ogdensburg & L. C. R. Co. v. Pratt, 22 Wall. 123; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469; Thomas v. Lancaster Mills, 19 C. C. A. 88, 71 Fed. 481; Liverpool & L. & G. Ins. Co. v. McNeill, 32 C. C. A. 173, 89 Fed. 131; St. Louis & S. F. Ry. Co. v. Tribbey, 6 Kan. App. 467, 50 Pac. 458; Cox v. Railroad Co., 170 Mass. 129, 49 N. E. 97; Bird v. Railroad Co., 99 Tenn. 719, 42 S. W. 451; International & G. N. R. Co. v. Parish (Tex. Civ. App.) 43 S.

Cent. R. Co. v. Lockwood [6] is almost exhaustive upon the subject: "It is contended that, though a carrier may not stipulate for his own negligence, there is no good reason why he should not be permitted to stipulate for immunity for the negligence of his servants, over whose actions, in his absence, he can exercise no control. If we advert for a moment to the fundamental principles on which the law of common carriers is founded, it will be seen that this objection is inadmissible. In regulating the establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties,—an object essential to the welfare of every civilized community. Hence the common-law rule, which charged the common carrier as an insurer. Why charge him as such? Plainly, for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers, the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason of it; in the other, it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment, and to assert that he may do so seems almost a contradiction in terms. Now, to what avail does the law attach these essential duties to the employment of the common carrier, if they may be waived in respect to his agents and servants, especially when the carrier is an artificial being, incapable of acting except by agents and servants? It is carefulness and diligence in performing the service which the law demands, not an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law. It is a favorite argument, in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men must be permitted to make their own agreements, and that it is no concern of the pub-

W. 1066; Pierce v. Southern Pac. Co., 120 Cal. 156, 47 Pac. 874, 52 Pac. 302; Pittsburgh, C., C. & St. L. Ry. Co. v. Sheppard, 56 Ohio St. 68, 46 N. E. 61.

[6] 17 Wall. 357.

lic on what terms an individual chooses to have his goods carried. Thus, in Dorr v. New Jersey Steam Nav. Co.,[7] the court sums up its judgment thus: 'To say the parties have not a right to make their own contract, and to limit the precise extent of their own respective risks and liabilities, in a matter no way affecting the public morals or conflicting with the public interests, would, in my judgment, be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right.' Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers, in effect, by introducing new rules of obligation. The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle, or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this or abandon his business. In the present case, for example, the freight agent of the company testified that though they made 40 or 50 contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And the reason is obvious enough: If they did not accept this, they must pay tariff rates. These rates were 70 cents a hundred pounds for carrying from Buffalo to Albany, and each horned animal was rated at 2,000 pounds, making a charge of $14 for every animal carried, instead of the usual charge of $70 for a car load; being a difference of three to one. Of course, no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are, and how necessary it is to stand firmly by those principles of law by which the public interests are protected. If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging

[7] 4 Sandf. (N. Y.) 136.

him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse, to say the least, to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness. It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable that the courts sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against; it was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright, and to injure themselves in that state, when such articles or live animals became injured without their fault or negligence. And, when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to them without the violation of any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of society, and the better administration of the laws, had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule that he must be responsible at all

events. Hence the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law. Hence, as before remarked, we regard the English statute called the 'Railway and Canal Traffic Act,' passed in 1854, which declared void all notices and conditions made by common carriers, except such as the judge at the trial, or the courts, should hold just and reasonable, as substantially a return to the rules of the common law. It would have been more strictly so, perhaps, had the reasonableness of the contract been referred to the law, instead of the individual judges. The decisions made for more than half a century before the courts commenced the abnormal course which led to the necessity of that statute, giving effect to certain classes of exemptions stipulated for by the carrier, may be regarded as authorities on the question as to what exemptions are just and reasonable. So the decisions of our own courts are entitled to like effect, when not made under the fallacious notion that every special contract imposed by the common carrier on his customers must be carried into effect, for the simple reason that it was entered into without regard to the character of the contract and the relative situation of the parties. Conceding, therefore, that special contracts made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable (to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part), when they ask to go still further, and to be excused for negligence (an excuse so repugnant to the law of their foundation and to the public good), they have no longer any plea of justice or reason to support such a stipulation, but the contrary; and then the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public operate with full force to devest the transaction of validity."

SAME—LIMITATION IN ILLINOIS.

92. The decisions in Illinois sustain contracts limiting the carrier's liability to losses caused by gross negligence.

Under the decisions in Illinois, the right of the carrier to contract against liability is carried to the extreme; he is thereby permitted to restrict his responsibility to the gross or willful negligence of his servants.[1] A few other states have lent their sanction to the same doctrine.[2]

SAME—LIMITATION IN NEW YORK.

93. Under the New York decisions, the carrier is permitted to contract against the results of his servants', but not against those of his own, negligence.

The argument for the New York rule is clearly stated in the case of French v. Buffalo & E. R. Co.:[1] "A party may certainly consent to place the instruments and agencies which he is employing in his business at the service, pro hac vice, of another, undertaking to set them in motion under the scheme or plan of management which he has established, and say: 'You shall have the benefit of my enterprise, my machinery, my servants, my rules, my regulations, and scheme of administration; but I propose that you shall take the hazards of everything but my own fraud or gross negligence, and regard me in no respect insuring or guarantying the fidelity or the prudence, diligence, or care of those servants, whom I have no reason to distrust, but who may, out of my personal presence, neglect their

§ 92. [1] Arnold v. Railroad Co., 83 Ill. 273; Illinois Cent. R. Co. v. Morrison, 19 Ill. 136; Same v. Read, 37 Ill. 484; Erie Ry. Co. v. Wilcox, 84 Ill. 239; Wabash Ry. Co. v. Brown, 152 Ill. 484, 39 N. E. 273; Adams Exp. Co. v. Haynes, 42 Ill. 89; Illinois Cent. R. Co. v. Adams, Id. 474; Same v. Smyser, 38 Ill. 354; compare Adams Exp. Co. v. Stettaners, 61 Ill. 184; Boskowitz v. Express Co. (Ill.) 5 Cent. Law J. 58; Cleveland, C., C. & St. L. Ry. Co. v. Newlin, 74 Ill. App. 638.

[2] Meuer v. Railway Co., 5 S. D. 568, 59 N. W. 945. The INDIANA and ALABAMA courts now follow the ordinary rule. See ante, § 91, note 5.

§ 93. [1] *43 N. Y. 108.

duty or prove otherwise unfaithful.' There is no sound reason for denying that if a contract is made on those terms, and presumptively for a much less compensation to be paid, it shall not bind the parties. It may safely be assumed that, in this country, at least, men of business are shrewd enough to take care of their own interests, and that, if a party consents to such a bargain, it is because it is for his interest to do so. He expects to make or save money by relieving the other party from risks which he is willing to assume, and in general his expectation is realized. There is neither honesty nor policy in permitting him, when a loss happens through one of the risks he consented to bear, to deny the binding force of his contract. This is now the practical view of the subject, which is recognized as law."

It will be gathered from the foregoing opinion that a distinction is here recognized between the personal negligence of the carrier and that of his servants or agents, it being permitted to contract against the latter,[2] but not against the former.[3] The distinction is clearly unsound, whether the common carrier be a corporation or an individual. The dissenting opinion of Wright, J., in Smith v. New York Cent. R. Co.,[4] although dealing with the right of the carrier of passengers to limit his liability generally, presents a strong argument on the general proposition that it is contrary to law and public policy to permit the carrier to contract against the result of negligence, either of himself or his agents: "Whether a contract shall be avoided on the ground of public policy does not depend upon the question whether it is beneficial or otherwise to the contracting parties. Their personal interests have nothing to do with it, but the interests of the public are alone to be considered. The state is interested not only in the welfare, but in the safety, of its citizens. To promote these ends is a leading object of government. Parties

[2] Wilson v. Railroad Co., 97 N. Y. 87; Bissell v. Railroad Co., 25 N. Y. 442; Perkins v. Same, 24 N. Y. 196; Wells v. Same, Id. 181; Smith v. Same, Id. 222. But the decisions in New York have not been uniform. Wells v. Navigation Co., 8 N. Y. 375; Magnin v. Dinsmore, 70 N. Y. 410; Alexander v. Greene, 7 Hill, 533; Dorr v. Navigation Co., 11 N. Y. 485; Cole v. Goodwin, 19 Wend. 251; Mynard v. Railroad Co., 71 N. Y. 180.

[3] Smith v. Railroad Co., 24 N. Y. 222. Contra, Cragin v. Railroad Co., 51 N. Y. 61. See, also, Hawkins v. Railroad Co., 17 Mich. 57; Indianapolis, B. & W. Ry. Co. v. Strain, 81 Ill. 504; Welsh v. Railroad Co., 10 Ohio St. 65.

[4] 24 N. Y. 222.

are left to make whatever contracts they please, provided no legal or moral obligation is thereby violated, or any public interest impaired; but, when any effect or tendency of the contract is to impair such interest, it is contrary to public policy and void. Contracts in restraint of trade are void, because they interfere with the welfare and convenience of the state, yet the state has a deeper interest in protecting the lives of its citizens. It has manifested this interest unmistakably in respect to those who travel by railroads. Whether a carrier, to whose exclusive charge the safety of a passenger has been committed, by his own culpable negligence and misconduct, shall put in jeopardy the life of such passenger, is a question affecting the public, and not the party alone who is being carried. It is said that the passenger should be left to make whatever contract he pleases; but, in my judgment, the public having an interest in his safety, he has no right to absolve a railroad company, to whom he commits his person, from the discharge of those duties which the law has enjoined upon it in regard for the safety of men. Can a contract, then, which allows the carrier to omit all caution or vigilance, and is, in effect, a license to be culpably negligent, to the extent of endangering the safety of the passenger, be sustained? I think not. Such a contract, it seems to me, manifestly conflicts with the settled policy of the state in regard to railroad carriage. Its effect, if sustained, would obviously enable the carrier to avoid the duties which the law enjoins in regard to the safety of men, encourage negligence and fraud, and take away the motive of self-interest on the part of such carrier, which is, perhaps, the only one adequate to secure the highest degree of caution and vigilance. A contract with these tendencies is, I think, contrary to public policy, even when no fare is paid."

It is the duty of the carrier to carry safely and to see to it that there is no negligence in the performance of this duty. The master is equally liable whether the negligence is that of himself or of his agents. This is the general law. Were the rule otherwise, any one might escape liability for negligence in the performance of his duty by delegating the performance of his business to agents or servants.

SAME—LIMITATION OF AMOUNT OF LIABILITY.

94. Within reasonable limits, the carrier may restrict his responsibility to an agreed valuation of the merchandise offered, if the compensation for carriage is scheduled on that basis.

Some confusion and conflict exist among the decisions as to the limitation of liability for losses occurring through the negligence of the carrier, and especially where the carrier attempts by contract to fix the limit below the value of the property carried.

It is certainly settled by the weight of authority that if the shipper, for the purpose of obtaining a reduced rate, places a depreciated value upon the articles to be carried, or by any device, misrepresentation, or artifice induces the carrier to do so, he cannot, in either case, recover beyond the value which has been thus fixed.[1] The tariff is properly proportioned according to the value of the goods and the consequent risk which the carrier assumes, and a knowledge of the value is essential to determining the degree of care which should be bestowed on the goods. To permit the shipper to obtain reduced rates by misrepresentation, and, in the event of loss, to hold the carrier liable for the higher, concealed value, would be a gross injustice, and the placing of a premium on fraud.[2] In the leading case upon this subject, the supreme court of the United States declares its position in very clear language:[3] "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the

§ 94. [1] Rosenfeld v. Railway Co., 103 Ind. 121, 2 N. E. 344; Moses v. Railroad Co., 24 N. H. 71; Durgin v. Express Co., 66 N. H. 277, 20 Atl. 328; Hill v. Railroad Co., 144 Mass. 284, 10 N. E. 836; Graves v. Railroad Co., 137 Mass. 33; Squire v. Railroad Co., 98 Mass. 239; Magnin v. Dinsmore, 70 N. Y. 410; Steers v. Steamship Co., 57 N. Y. 1; New York Cent. & H. R. R. Co. v. Fraloff, 100 U. S. 24; Black v. Transportation Co., 55 Wis. 319, 13 N. W. 244; Pacific Exp. Co. v. Foley, 46 Kan. 457, 26 Pac. 665; Harvey v. Railroad Co., 74 Mo. 538.

[2] Graves v. Railroad Co., 137 Mass. 33; Hart v. Railroad Co., 112 U. S. 331, 5 Sup. Ct. 151; Rosenfeld v. Railway Co., 103 Ind. 121, 2 N. E. 344.

[3] Hart v. Railroad Co., 112 U. S. 331, 5 Sup. Ct. 151.

carrier the measure of care due to the value agreed on.[4] The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purposes of the contract of transportation between the parties to the contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be * * * repugnant to the soundest principles of fair dealing, and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." Certainly, there can be no injustice in restricting the shipper's claim for damages to the value which he has himself placed upon the property for transportation.[5] On the other hand, it is equally certain that the carrier cannot bind the shipper by an arbitrary valuation of the articles received for carriage. If there is no representation of value by the shipper or request of him for a statement of value; if there is no notice and agreement and no valuable consideration,—the carrier, in case of loss, must respond in damages for the full value of the property, regardless of any arbitrary valuation which he may have seen fit to place upon it.[6]

It remains to consider the power of the common carrier to limit his liability in cases of negligence to an amount less than the value

[4] See Graves v. Railroad Co., 137 Mass. 33; Squire v. Railroad Co., 98 Mass. 239; Rosenfeld v. Railway Co., 103 Ind. 121, 2 N. E. 344; Hopkins v. Westcott, 6 Blatchf. 64, Fed. Cas. No. 6,692; The Aline, 25 Fed. 562; The Hadji, 18 Fed. 459.

[5] Duntley v. Railroad Co., 66 N. H. 263, 20 Atl. 327. See, also, Magnin v. Dinsmore, 62 N. Y. 35; Graves v. Railroad Co., 137 Mass. 33; Hill v. Railroad Co., 144 Mass. 284, 10 N. E. 836; Alair v. Railroad Co., 53 Minn. 160, 54 N. W. 1072; Toy v. Railroad Co. (Sup.) 56 N. Y. Supp. 182; Pierce v. Southern Pac. Co., 120 Cal. 156, 47 Pac. 874, and 52 Pac. 302; Goodman v. Railway Co., 71 Mo. App. 460; Smith v. Express Co., 108 Mich. 572, 66 N. W. 479.

[6] Kansas City, St. J. & C. B. R. Co. v. Simpson, 30 Kan. 645, 2 Pac. 821; Louisville & N. R. Co. v. Levi, 8 Ohio Dec. 373; Gillespie v. Platt, 19 Misc. Rep. 43, 42 N. Y. Supp. 876; Donovan v. Oil Co., 155 N. Y. 112, 49 N. E. 678; Chicago & N. W. Ry. Co. v. Simon, 160 Ill. 648, 43 N. E. 596.

of the property. Some courts have held that all contracts in any degree limiting the amount of liability in such cases are void.[7] The argument supporting this view runs thus: "The carrier cannot, by contract, excuse itself from liability for the whole nor any part of a loss brought about by its negligence. To our minds, it is perfectly clear that the two kinds of stipulation—that providing for total, and that providing for partial, exemption from liability for the consequences of the carrier's negligence—stand upon the same ground, and must be tested by the same principles. If one can be enforced, the other can; if either be invalid, both must be held to be so, the same considerations of public policy operating in each case. With great deference for those who may differ with us, we think it entirely illogical and unreasonable to say that the carrier may not absolve itself from liability for the whole value of property lost or destroyed through its negligence, but that it may absolve itself from responsibility for one-half, three-fourths, seven-eighths, nine-tenths, or ninety-nine hundredths of the loss so occasioned. With great unanimity, the authorities say it cannot do the former. If allowed to do the latter, it may thereby substantially evade and nullify the law, which says it shall not do the former, and in that way do indirectly what it is forbidden to do directly. We hold that it can do neither. The requirement of

[7] Oppenheimer v. Express Co., 69 Ill. 62; Adams Exp. Co. v. Stettaners, 61 Ill. 184; Alabama G. S. R. Co. v. Little, 71 Ala. 611; South & N. A. R. Co. v. Henlein, 52 Ala. 606; Mobile & O. R. Co. v. Hopkins, 41 Ala. 486; Adams Exp. Co. v. Harris, 120 Ind. 73, 21 N. E. 340; Chicago, St. L. & N. O. R. Co. v. Abels, 60 Miss. 1017; Southern Exp. Co. v. Moon, 39 Miss. 822; Coward v. Railroad Co., 16 Lea (Tenn.) 225; Georgia Railroad & Banking Co. v. Keener, 93 Ga. 808, 21 S. E. 287; Ruppel v. Railroad Co., 167 Pa. St. 166, 31 Atl. 478; Wabash Ry. Co. v. Brown, 152 Ill. 484, 39 N. E. 273; Kansas City, St. J. & C. B. R. Co. v. Simpson, 30 Kan. 645, 2 Pac. 821; United States Exp. Co. v. Backman, 28 Ohio St. 144; Black v. Transportation Co., 55 Wis. 319, 13 N. W. 244; Moulton v. Railroad Co., 31 Minn. 85, 16 N. W. 497; Louisville & N. R. Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311; Grogan v. Express Co., 114 Pa. St. 523, 7 Atl. 134; Weiller v. Railroad Co., 134 Pa. St. 310, 19 Atl. 702; Adams Exp. Co. v. Holmes (Pa. Sup.) 9 Atl. 166; American Exp. Co. v. Sands, 55 Pa. St. 140; Westcott v. Fargo, 61 N. Y. 542; Southern Pac. Ry. Co. v. Maddox, 75 Tex. 300, 12 S. W. 815; St. Louis & S. F. Ry. Co. v. Sherlock, 59 Kan. 23, 51 Pac. 899; Baltimore & O. S. W. Ry. Co. v. Ragsdale, 14 Ind. App. 406, 42 N. E. 1106; Ohio & M. Ry. Co. v. Tabor, 98 Ky. 503, 32 S. W. 168.

the law has ever been, and is now, that the common carrier shall be diligent and careful in the transportation of its freight, and public policy forbids that it shall throw off that obligation by stipulation for exemption, in whole or in part, from the consequences of its negligent acts." [8]

It is believed, however, that a contract of this nature, fairly entered into, does not conflict with the general rule that common carriers cannot limit their liability for losses occurring through their negligence. Such a contract leaves the carrier responsible for his negligence; it merely fixes the rate of tariff and liquidates the damages.[9] It should be noted, however, that a reduced freight rate, or other valuable consideration, is essential to the validity of contracts of this class.[10]

SAME—LIMITING TIME AND MANNER OF MAKING CLAIMS.

95. The common carrier may, by special contract, limit the time within which any claim for damages shall be presented, provided a reasonable time is allowed.[1]

The circumstances of each case must be considered in determining what length of time is reasonable.[2] Thus, a stipulation requir-

[8] Louisville & N. R. Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311.

[9] Harvey v. Railroad Co., 74 Mo. 538. See, also, Hart v. Railroad Co., 112 U. S. 331, 5 Sup. Ct. 151; Calderon v. Steamship Co., 16 C. C. A. 332, 69 Fed. 574.

[10] McFadden v. Railway Co., 92 Mo. 343, 4 S. W. 689. In this case the rate charged was usual and regular, and the contract was avoided for want of consideration. Many of the cases cited in support of the former view may be similarly reconciled with the principles stated in this paragraph, when the facts are closely considered. See post, pp. 252, 253.

§ 95. [1] Gulf, C. & S. F. Ry. Co. v. Trawick, 68 Tex. 314, 4 S. W. 567; Southern Exp. Co. v. Hunnicutt, 54 Miss. 566; Southern Exp. Co. v. Caldwell, 21 Wall. 264; Weir v. Express Co., 5 Phila. 355; United States Exp. Co. v. Harris, 51 Ind. 127; Southern Exp. Co. v. Glenn, 16 Lea (Tenn.) 472, 1 S. W. 102; Baltimore & O. S. W. Ry. Co. v. Ragsdale, 14 Ind. App. 406, 42 N. E. 1106; Lewis v. Railroad Co., 5 Hurl. & N. 867. But see Grieve v. Railway Co., 104 Iowa, 659, 74 N. W. 192.

[2] Cox v. Railroad Co., 170 Mass. 129, 49 N. E. 97; Gulf, C. & S. F. Ry. Co. v. Yates (Tex. Civ. App.) 32 S. W. 355. The following intervals have been held reasonable: Ninety days, Southern Exp. Co. v. Caldwell, 21 Wall. 264; thirty

ing the consignee of cattle to present any claim for damages at the time the cattle were received, and before they were unloaded and mingled with the other cattle, was held reasonable and valid.[3] But a stipulation requiring goods to be examined before leaving the station, as applied to a car load of cotton, is not reasonable.[4]

The manner of presenting claims may also be regulated by contract in a reasonable manner,[5] and the requirement that notice of loss be made in writing,[6] or at the place of shipment, is valid.[7]

days, Hirshberg v. Dinsmore, 12 Daly (N. Y.) 429; Kaiser v. Hoey (City Ct. N. Y.) 1 N. Y. Supp. 429; Southern Exp. Co. v. Hunnicutt, 54 Miss. 566; Glenn v. Express Co., 86 Tenn. 594, 8 S. W. 152; Weir v. Express Co., 5 Phila. 355; five days, Chicago & A. R. Co. v. Simms, 18 Ill. App. 68; Dawson v. Railway Co., 76 Mo. 514; sixty days, Thompson v. Railroad Co., 22 Mo. App. 321; seven days, Lewis v. Railway Co., 5 Hurl. & N. 867. The following periods have been held unreasonable: Sixty days from date of contract, Pacific Exp. Co. v. Darnell (Tex. Sup.) 6 S. W. 765; thirty days from date of contract, Adams Exp. Co. v. Reagan, 29 Ind. 21; Central Vermont R. Co. v. Soper, 8 C. C. A. 341, 59 Fed. 879; Southern Exp. Co. v. Caperton, 44 Ala. 101; thirty-two days from date of shipment contract, Southern Exp. Co. v. Bank, 108 Ala. 517, 18 South. 664. But see Southern Exp. Co. v. Caldwell, 21 Wall. 264; Central Vermont R. Co. v. Soper, 8 C. C. A. 341, 59 Fed. 879. What is a reasonable time is a question of law for the court. Heimann v. Telegraph Co., 57 Wis. 562, 16 N. W. 32; Browning v. Railroad Co., 2 Daly (N. Y.) 117. Failure to present a claim within the stipulated time is not a bar to recovery, if the failure was not caused by the owner's fault. Glenn v. Express Co., 86 Tenn. 594, 8 S. W. 152.

[3] Goggin v. Railway Co., 12 Kan. 416. Compare Smitha v. Railroad Co., 86 Tenn. 198, 6 S. W. 209. As to what is removing or intermingling, see Chicago, St. L. & N. O. R. Co. v. Abels, 60 Miss. 1017. See generally, The Santee, 2 Ben. 519, Fed. Cas. No. 12,328; Rice v. Railway Co., 63 Mo. 314; Sprague v. Railway Co., 34 Kan. 347, 8 Pac. 465; Owen v. Railroad Co., 87 Ky. 626, 9 S. W. 698.

[4] Capehart v. Railroad Co., 81 N. C. 438. See, also, Owen v. Railroad Co., 87 Ky. 626, 9 S. W. 698; Rice v. Railway Co., 63 Mo. 314; Sprague v. Railway Co., 34 Kan. 347, 8 Pac. 465. Such a stipulation does not apply to latent injuries, which could not be discovered at time of delivery. Ormsby v. Railroad Co., 4 Fed. 170, 706; Capehart v. Railroad Co., 77 N. C. 355.

[5] A requirement that the claim be verified by affidavit is valid. Black v. Railway Co., 111 Ill. 351. Cf. International & G. N. Ry. Co. v. Underwood, 62 Tex. 21. Notice in writing to a particular officer may be required. Dawson v. Railway Co., 76 Mo. 514.

[6] Hirshberg v. Dinsmore, 12 Daly (N. Y.) 429; Chicago & A. R. Co. v. Simms,

[7] See note 7 on following page.

SAME—CONSIDERATION.

96. All contracts in any degree limiting the liability of the carrier are, in a manner, detractions from the legal obligation to receive and carry safely, and, to be effectual, must be supported by a valid consideration other than the mere undertaking of carriage.[1]

But an agreement to do something to which the carrier is not already obligated is sufficient, as to carry at a reduced rate,[2] or to receive a passenger on a freight train,[3] or to carry a customer free of charge.[4] When the rate charged is fixed by law, an agreement to carry at that rate furnishes no consideration for a contract limiting liability,[5] and the same is true, a fortiori, when the rate charged is the highest permitted by the law.[6] But, when the rate

18 Ill. App. 68; Wood v. Railway Co., 118 N. C. 1056, 24 S. E. 704. But see Smitha v. Railroad Co., 86 Tenn. 198, 6 S. W. 209.

[7] Such requirement is waived where the carrier has no officer at the place named to whom notice could be given. Good v. Railway Co. (Tex. Sup.) 11 S. W. 854; Missouri Pac. Ry. Co. v. Harris, 67 Tex. 166, 2 S. W. 574.

§ 96. [1] Bissell v. Railroad Co., 25 N. Y. 442; McMillan v. Railroad Co., 16 Mich. 79; German v. Railroad Co., 38 Iowa, 127. See, also, Missouri, K. & T. Ry. Co. v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565; Kansas Pac. Ry. Co. v. Reynolds, 17 Kan. 251; Kellerman v. Railroad Co., 136 Mo. 177, 34 S. W. 41, and 37 S. W. 828; San Antonio & A. P. Ry. Co. v. Barnett, 12 Tex. Civ. App. 321, 34 S. W. 139. A common carrier has no right to demand of a shipper a waiver of his rights as a condition precedent to receiving freight. Missouri Pac. Ry. Co. v. Fagan, 72 Tex. 127, 9 S. W. 749.

[2] Bissell v. Railroad Co., 25 N. Y. 442; Nelson v. Railroad Co., 48 N. Y. 498; Jennings v. Railway Co. (Sup.) 5 N. Y. Supp. 140; Dillard v. Railroad Co., 2 Lea (Tenn.) 288; Stewart v. Railway Co., 21 Ind. App. 218, 52 N. E. 89; Berry v. Railroad Co., 44 W. Va. 538, 30 S. E. 143; Baltimore & O. S. W. Ry. Co. v. Crawford, 65 Ill. App. 113. A stipulation, in a bill of lading, exempting the receiving carrier from its common-law liability for the loss of goods while in its warehouse at the end of its line, and before delivering to the connecting carrier, is void, unless there is a special consideration for such exemption, other than the mere receipt of the goods, and the undertaking to carry them. Wehmann v. Railway Co., 58 Minn. 22, 59 N. W. 546.

[3] Arnold v. Railroad Co., 83 Ill. 273.

[4] Bissell v. Railroad Co., 25 N. Y. 442.

[5] Wehmann v. Railway Co., 58 Minn. 22, 59 N. W. 546.

[6] See cases cited in section 96, note 1, supra.

charged is the usual tariff to all comers, it does not follow that it is not a reduced rate, and it will be a sufficient consideration to support the agreement limiting the liability, provided the carrier might have lawfully charged a higher rate.[7]

CONSTRUCTION OF LIMITING CONTRACTS.

97. Contracts in limitation of liability are to be construed strictly against the carrier,[1] giving the shipper the benefit of all doubts and ambiguities.[2]

And so, if the carrier has given two notices, he will be bound by the one least favorable to himself.[3] Nor will a general clause be permitted to enlarge specific exemptions. For example, a release from liability for loss arising from "leakage or decay, chafing or breakage, or from any other cause," does not exempt the carrier from liability for loss by fire.[4] A general exemption from liability for loss will not include losses occurring through negligence.[5]

The lex loci contractus determines the validity of contracts limiting liability.[6] But the existence of the contract, the admission

[7] Duvenick v. Railroad Co., 57 Mo. App. 550. But see Hance v. Railway Co., 56 Mo. App. 476.

§ 97. [1] Magnin v. Dinsmore, 56 N. Y. 168; Edsall v. Transportation Co., 50 N. Y. 661; Hooper v. Wells, Fargo & Co., 27 Cal. 11; Levering v. Insurance Co., 42 Mo. 88; Rosenfeld v. Railroad Co., 103 Ind. 121, 2 N. E. 344; St. Louis & S. E. R. Co. v. Smuck, 49 Ind. 302; Gronstadt v. Witthoff, 15 Fed. 265; Marx v. Steamship Co., 22 Fed. 680; Ayres v. Railroad Corp., 14 Blatchf. 9, Fed. Cas. No. 689.

[2] Kansas City, M. & B. R. Co. v. Holland, 68 Miss. 351, 8 South. 516; Black v. Transportation Co., 55 Wis. 319, 13 N. W. 244; Little Rock, M. R. & T. Ry. Co. v. Talbot, 39 Ark. 523.

[3] Munn v. Baker, 2 Starkie, 255. And see Edsall v. Transportation Co., 50 N. Y. 661; Airey v. Merrill, 2 Curt. 8, Fed. Cas. No. 115.

[4] Menzell v. Railroad Co., 1 Dill. 531, Fed. Cas. No. 9,429. See, also, Hawkins v. Railroad Co., 17 Mich. 57.

[5] Ashmore v. Transportation Co., 28 N. J. Law, 180; Mynard v. Railroad Co., 71 N. Y. 180. But see Cragin v. Railroad Co., 51 N. Y. 61.

[6] Talbott v. Transportation Co., 41 Iowa, 247; Fonseca v. Steamship Co., 153 Mass. 553, 27 N. E. 665; Hoadley v. Transportation Co., 115 Mass. 304; Western & A. R. Co. v. Cotton Mills, 81 Ga. 522, 7 S. E. 916; McDaniel v. Railway Co., 24 Iowa, 412; Cantu v. Bennett, 39 Tex. 303; First Nat. Bank of Toledo

of evidence, and the remedy upon the contract are matters controlled by the lex fori.[7]

SAME—NOTICES LIMITING LIABILITY.

98. Notices limiting liability, to be effectual, must receive the assent of the shipper; and such assent cannot be inferred from a mere knowledge, followed by a delivery of the goods to the carrier.

In considering the various forms of notices employed by common carriers to limit their liability, and their legal effect, it must be remembered that the carrier has no right to refuse goods properly offered for carriage. Subject to certain reasonable regulations, every man has a right to insist that his property, if classed as carriageable goods, shall be transported subject to the carrier's common-law liability. The carrier cannot impose a stipulation of reduced liability as a condition precedent to their reception and carriage. The owner can insist that they be received subject to all the risks and responsibilities that the law annexes to the carrier's employment.[1] It is therefore apparent that the carrier cannot devest himself of his legal obligations by any act of his own which is purely ex parte. And if it appear that a restrictive notice has actually been seen by the shipper, no presumption is thereby raised that he assents to its terms. It is equally inferable that he has the intention to insist on his legal rights, and the burden is on the carrier to establish the contract qualifying his liability.[2] "Conced-

v. Shaw, 61 N. Y. 283; Brockway v. Express Co., 168 Mass. 257, 47 N. E. 87; Texas & P. Ry. Co. v. Payne (Tex. Civ. App.) 38 S. W. 366. But see Chicago, B. & Q. R. Co. v. Gardiner, 51 Neb. 70, 70 N. W. 508. Compare Dyke v. Railway Co., 45 N. Y. 113; Curtis v. Railroad Co., 74 N. Y. 116.

[7] Hoadley v. Transportation Co., 115 Mass. 304. And see Faulkner v. Hart, 82 N. Y. 413.

§ 98. [1] See Hollister v. Nowlen, 19 Wend. (N. Y.) 234; Cole v. Goodwin, Id. 251; Jones v. Voorhees, 10 Ohio, 145; Bennett v. Dutton, 10 N. H. 481, 487; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 382; Moses v. Railroad Co., 24 N. H. 71; Kimball v. Railroad Co., 26 Vt. 247, at page 256; Dorr v. Navigation Co., 4 Sandf. (N. Y.) 136; Id., 11 N. Y. 485; Michigan Cent. R. Co. v. Hale, 6 Mich. 243; Slocum v. Fairchild, 7 Hill (N. Y.) 292.

[2] McMillan v. Railroad Co., 16 Mich. 79, 111; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 383.

ing that there may be a special contract for restricted liability, such a contract cannot, I think, be inferred from a general notice brought home to the employer.' The argument is that, where a party delivers goods to be carried, after seeing a notice that the carrier intends to limit his responsibility, his assent to the terms of the notice may be implied. But this argument entirely overlooks a very important consideration. Notwithstanding the notice, the owner has a right to insist that the carrier shall receive the goods subject to all the responsibilities incident to his employment. If the delivery of goods under such circumstances authorizes an implication of any kind, the presumption is as strong, to say the least, that the owner intended to insist on his legal rights, as it is that he was willing to yield to the wishes of the carrier. If a coat be ordered from a mechanic after he has given the customer notice that he will not furnish the article at a less price than $100, the assent of the customer to pay that sum, though it be double the value, may, perhaps, be implied; but if the mechanic had been under a legal obligation not only to furnish the coat, but to do so at a reasonable price, no such implication would arise. Now, the carrier is under a legal obligation to receive and convey the goods safely, or answer for the loss. He has no right to prescribe any other terms; and a notice can, at the most, only amount to a proposal for a special contract, which requires the assent of the other party. Putting the matter in the most favorable light for the carrier, the mere delivery of goods after seeing a notice cannot warrant a stronger presumption that the owner intended to assent to a restricted liability on the part of the carrier than it does that he intended to insist on the liabilities imposed by law; and a special contract cannot be implied where there is such an equipoise of probabilities."[3]

What Constitutes Assent.

A notice amounts to nothing more than a proposition which can ripen into a contract only when followed by assent. A prerequisite to assent is, of course, a knowledge of the terms and conditions contained in the notice. Various methods have been adopted by the carrier for placing notices before the shipper, and bringing

[3] Hollister v. Nowlen, 19 Wend. (N. Y.) 234, 247. See, also, Merchants' Dispatch Transp. Co. v. Furthmann, 149 Ill. 66, 36 N. E. 624; Schulze-Berge v. The Guildhall, 58 Fed. 796; Wabash R. Co. v. Harris, 55 Ill. App. 159.

home to him a knowledge of their contents, such as advertisements in newspapers, posting notices, or printing them upon bills of lading, receipts, tickets, and the like. As there is no presumption that even a person who takes a newspaper reads all its contents, this method has been abandoned as impracticable.[4] The same objection applies to notices by means of signs, posters, handbills, and the like. A person may see a sign without reading it.[5]

Same—Bills of Lading.

Delivery to and acceptance by a shipper of a bill of lading or shipping receipt will constitute a contract as to the stipulations affecting the terms of shipment, although no express assent to such terms is shown.[6] The explanation for this seeming exception is not entirely satisfactory, depending, as it does, on the presumption that persons receiving them must know, from their uniform character and the nature of the business, that they contain the terms upon which the property is to be carried.[7] To be binding upon the shipper, the receipt or bill must be delivered before transportation has commenced, and while it is still in his power to recall the goods.[8] But if the shipper knew the contents of similar bills or receipts issued by the carrier, and his custom to deliver them after

[4] Michigan Cent. R. Co. v. Hale, 6 Mich. 243; Barney v. Prentiss, 4 Har. & J. (Md.) 317; Judson v. Railroad Corp., 6 Allen (Mass.) 486; Baldwin v. Collins, 9 Rob. (La.) 468; Rowley v. Horne, 3 Bing. 2; Munn v. Baker, 2 Starkie, 255.

[5] Clayton v. Hunt, 3 Camp. 27; Hollister v. Nowlen, 19 Wend. (N. Y.) 234; Gleason v. Transportation Co., 32 Wis. 85; Lake Shore & M. S. Ry. Co. v. Greenwood, 79 Pa. St. 373; Cantling v. Railroad Co., 54 Mo. 385; Butler v. Heane, 2 Camp. 415; Brooke v. Pickwick, 4 Bing. 218; Kerr v. Willan, 6 Maule & S. 150, 2 Starkie, 53.

[6] Grace v. Adams, 100 Mass. 505; Mulligan v. Railway Co., 36 Iowa, 181; Kirkland v. Dinsmore, 62 N. Y. 171; Anchor Line v. Dater, 68 Ill. 369; even though he neglects to read its terms, Davis v. Railroad Co., 66 Vt. 290, 29 Atl. 313. Acceptance of a bill of lading is not conclusive evidence that the shipper assented to a stipulation limiting the carrier's liability to his own line. Wabash R. Co. v. Harris, 55 Ill. App. 159; Chicago & N. W. Ry. Co. v. Simon, 160 Ill. 648, 43 N. E. 596. See, also, Schulze-Berge v. The Guildhall, 58 Fed. 796.

[7] Blossom v. Dodd, 43 N. Y. 264, 269.

[8] Wilde v. Transportation Co., 47 Iowa, 247; Merchants' Dispatch Transp. Co. v. Furthmann, 149 Ill. 66, 36 N. E. 624, affirming 47 Ill. App. 561; Michigan Cent. R. Co. v. Boyd, 91 Ill. 268.

shipment, he would be bound.[9] "Bills of lading are signed by the carrier only, and, where a contract is to be signed only by one party, the evidence of assent to its terms by the other party consists usually in his receiving and acting upon it. This is the case with deeds poll, and with various classes of familiar contracts, and the evidence of assent derived from the acceptance of the contract without objection is commonly conclusive. I do not perceive that bills of lading stand upon any different footing. If the carrier should cause limitations upon his liability to be inserted in the contract in such a manner as not to attract the consignor's attention, the question of assent might fairly be considered an open one;[10] and, if delivery of the bill of lading was made to the consignor under such circumstances as to lead him to suppose it to be something else,—as, for instance, a mere receipt for money,—it could not be held binding upon him as a contract, inasmuch as it had never been delivered to and accepted by him as such.[11] But, except in these and similar cases, it cannot become a material question whether the consignor read the bill of lading or not."[12]

Same—Express Receipts.

It was formerly held that the mere acceptance of express receipts, unless the terms were read and assented to by the shipper, did not amount to a contract,[13] but they now occupy the same position as bills of lading, and, when accepted without objection, constitute the contract between the parties.[14]

[9] Shelton v. Transportation Co., 59 N. Y. 258.

[10] Brown v. Railroad Co., 11 Cush. (Mass.) 97.

[11] King v. Woodbridge, 34 Vt. 565.

[12] McMillan v. Railroad Co., 16 Mich. 79. But where the notice is printed on the back of the paper, and not in and as a part of the proposed contract, assent is not implied by acceptance. Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. 318; Michigan Cent. R. Co. v. Hale, 6 Mich. 243; The Isabella, 8 Ben. 139, Fed. Cas. No. 7,099; Newell v. Smith, 49 Vt. 255; Ayres v. Railroad Corp., 14 Blatchf. 9, Fed. Cas. No. 689.

[13] Kirkland v. Dinsmore, 2 Hun (N. Y.) 46, 4 Thomp. & C. (N. Y.) 304, reversed 62 N. Y. 171; Belger v. Dinsmore, 51 Barb. (N. Y.) 69, reversed 51 N. Y. 166; Adams Exp. Co. v. Nock, 2 Duv. (Ky.) 562; Kember v. Express Co., 22 La. Ann. 158.

[14] Huntington v. Dinsmore, 4 Hun (N. Y.) 66, 6 Thomp. & C. (N. Y.) 195; Snider v. Express Co., 63 Mo. 376; Soumet v. Express Co., 66 Barb. (N. Y.) 284; Brehme v. Express Co., 25 Md. 328; Christenson v. Express Co., 15

Same—Tickets, Baggage Checks, Receipts, Etc.

Transportation tickets and baggage checks do not stand upon the same footing with bills of lading in respect to conditions and limitations printed and stamped upon them, and assent is not presumed from mere acceptance without objection.[15] Tickets and baggage checks are not in the nature of contracts, or even receipts, but are merely tokens or vouchers adopted for convenience.[16] Consequently they cannot be presumed to embody the terms upon which the property is shipped, and as limiting the liability of the carrier. Therefore a passenger is not bound by a notice printed upon the face of his ticket, limiting the weight and value of his baggage, unless his attention is called to the notice, or he is aware of it at the time his ticket is purchased;[17] nor even then, unless he assents to it,[18] although such assent might possibly be implied from acceptance without objection.[19] Where a printed receipt containing

Minn. 270 (Gil. 208); Kirkland v. Dinsmore, 62 N. Y. 171; Belger v. Dinsmore, 51 N. Y. 166; Magnin v. Dinsmore, 56 N. Y. 168; Westcott v. Fargo, 61 N. Y. 542; Adams Exp. Co. v. Haynes, 42 Ill. 89; Merchants' Dispatch Transp. Co. v. Leysor, 89 Ill. 43; Grace v. Adams, 100 Mass. 505; Boorman v. Express Co., 21 Wis. 154. But see Adams Express Co. v. Stettaners, 61 Ill. 184; American Merchants Union Exp. Co. v. Schier, 55 Ill. 140. In ILLINOIS carriers are forbidden to limit their liability by stipulation in the receipt given for the property. But see Illinois Cent. R. Co. v. Jonte, 13 Ill. App. 424. In DAKOTA and MICHIGAN the shipper's assent is, by statute, required to be shown by his signature. Hartwell v. Express Co., 5 Dak. 463, 41 N. W. 732; Feige v. Railroad Co., 62 Mich. 1, 28 N. W. 685.

[15] Prentice v. Decker, 49 Barb. (N. Y.) 21; Limburger v. Westcott, Id. 283; Sunderland v. Westcott, 2 Sweeny (N. Y.) 260; Isaacson v. Railroad Co., 94 N. Y. 278; Lechowitzer v. Packet Co., 6 Misc. Rep. 536, 27 N. Y. Supp. 140.

[16] Rawson v. Railroad Co., 48 N. Y. 212. Cf. Baltimore & O. R. Co. v. Campbell, 36 Ohio St. 647.

[17] Rawson v. Railroad Co., 48 N. Y. 212; Mauritz v. Railroad Co., 23 Fed. 765; Nevins v. Steamboat Co., 4 Bosw. (N. Y.) 225; San Antonio & A. P. Ry. Co. v. Newman (Tex.) 43 S. W. 915; Wiegand v. Railroad Co., 75 Fed. 370. But a "contract ticket," issued by a steamship company, containing two quarto papers of printed matter describing the rights and liabilities of the parties, binds the party to its stipulations, although he has neither read nor signed it. Fonseca v. Steamship Co., 153 Mass. 553, 27 N. E. 665.

[18] Baltimore & O. R. Co. v. Campbell, 36 Ohio St. 647; Indianapolis & C. R. Co. v. Cox, 29 Ind. 360, 95 Am. Dec. 640; Kansas City, St. J. & C. B. R. Co. v. Rodebaugh, 38 Kan. 45, 15 Pac. 899.

[19] Rawson v. Railroad Co., 48 N. Y. 212.

a condition limiting liability was given plaintiff by the agent of a baggage express company in exchange for a baggage check, the plaintiff was held not bound thereby. Andrews, J., in delivering the opinion of the court, said: "When a contract is required to be in writing, and a party receives a paper as a contract, or when he knows, or has reason to suppose, that a paper delivered to him contains the terms of a special contract, he is bound to acquaint himself with its contents; and, if he accepts and retains it, he will be bound by it, although he did not read it. But this rule cannot, for the reasons stated, be applied to this case, and the court properly refused to charge, as matter of law, that the delivery of the receipt created a contract for the carriage of the trunk, under its terms. The question whether, in a particular case, a party receiving such a receipt accepted it with notice of its contents, is one of evidence, to be determined by the jury. The fact of notice may be proved by direct or circumstantial evidence." [20]

SAME—ACTUAL NOTICE OF REASONABLE RULES.

99. The shipper will be bound, even without his assent, by actual notice of reasonable regulations and requirements to furnish information necessary for fixing rates and otherwise properly conducting the business.

In the proper regulation of his business, the carrier may give general notice to all his employers, requiring them to observe the methods employed, and to give information concerning the nature and value of the goods delivered for shipment. These are but reasonable regulations, which every man should be allowed to establish for the proper conduct of his business, to insure regularity and promptness, and to properly inform him of the responsibility he assumes.[1] The shipper is bound by the terms of notices of this class without his assent. The right of the carrier to graduate his charges according to the value of the goods and the risk involved,[2]

[20] Madan v. Sherard, 73 N. Y. 329.

§ 99. [1] McMillan v. Railroad Co., 16 Mich. 79, 110.

[2] Gibbon v. Paynton, 4 Burrows, 2298 (per Lord Mansfield and Ashton, J.); Tyly v. Morrice, Carth. 485; Southern Exp. Co. v. Newby, 36 Ga. 635; Batson

and the fraud and injury which would be worked upon him by withholding information essential to fixing the amount of reasonable compensation and determining the degree of care and diligence to be exercised in the carriage,[3] are the foundation of this doctrine. "This would not seem to be any infringement upon the principle of the ancient rule. He must have a right to know what it is that he undertakes to carry, and the amount and extent of his risk. We can see nothing that ought to prevent him from requiring notice of the value of the commodity delivered to him, when, from its nature, or the shape or condition in which he receives it, he may need the information; nor why he should not insist on being paid in proportion to the value of the goods, and the consequent amount of his risk." [4]

As has been already stated, in the absence of inquiries by the carrier, the shipper is not bound to disclose the character or value of the goods, but must answer truly, if interrogated.[5] The object and effect of notices of this class is to dispense with the necessity for a special inquiry in each case.[6] "If he has given general notice that he will not be liable, over a certain amount, unless the value is made known to him at the time of delivery, and a premium for insurance paid, such notice, if brought home to the knowledge of the owner, is as effectual in qualifying the acceptance of the goods as a special agreement; and the owner, at his peril, must disclose the value and pay the premium. The carrier, in such case, is not bound to make the inquiry; and, if the owner omits to make known the value, and does not, therefore, pay the premium at the time of delivery, it is considered as dealing unfairly with the carrier, and he is liable only to the amount mentioned in his notice, or not at all, according to the terms of his notice." [7]

v. Donovan, 4 Barn. & Ald. 21; Orange County Bank v. Brown, 9 Wend. (N. Y.) 85, 116.

[3] Fish v. Chapman, 2 Ga. 349; Cole v. Goodwin, 19 Wend. (N. Y.) 251; Judson v. Railroad Corp., 6 Allen (Mass.) 486; Magnin v. Dinsmore, 62 N. Y. 35; Hopkins v. Westcott, 6 Blatchf. 64, Fed. Cas. No. 6,692; New Jersey Steam Nav. Co. v. Bank, 6 How. 344; Farmers' & Mechanics' Bank v. Champlain Transp. Co., 23 Vt. 186.

[4] Moses v. Railroad Co., 24 N. H. 71, 91.

[5] See ante, p. 248.

[6] Patson v. Donovan, 4 Barn. & Ald. 21, 28.

[7] Orange County Bank v. Brown, 9 Wend. (N. Y.) 85, 114.

When the same bill or receipt contains both kinds of notices,—the one of reasonable regulations, and valid without assent, and the other limiting liability, and not valid without assent,—they are severable, and the one may be enforced and the other rejected.[8]

SPECIAL CLASSES OF GOODS.

100. Within certain limitations, it is the duty of the common carrier to transport all goods offered. Certain classes of property, however, possess such marked peculiarities that they require separate consideration. These are:

(a) Live stock.

(b) Baggage.

SAME—LIVE STOCK.

101. The nature of the goods carried does not determine the character of the transportation, and the carrier of live stock is a common carrier wherever he would be such if carrying other goods. But he is liable for injuries by reason of the vitality of the freight, only where they occur through his negligence.

The extension of the common-law liability of common carriers to carriers of live animals involves a question on which a conflict of opinion exists. Its decision is of great importance, as it involves the placing of the burden of proof in cases where damages are claimed for loss or injury.[1] If the liability of the defendant is not that of a common carrier, the burden is on the plaintiff to show that the loss occurred through the negligence of the carrier. If, however, the defendant is liable as a common carrier, the burden is on him to show that, without negligence, the loss occurred by reason of one of the excepted perils. As the question most frequently arises in connection with railroads, which are created common carriers by their organic acts, the decision of the matter is

[8] Oppenheimer v. Express Co., 69 Ill. 62; Moses v. Railroad Co., 24 N. H. 71; The Majestic, 9 C. C. A. 161, 60 Fed. 624.

§§ 100–101. [1] Kansas Pac. Ry. Co. v. Reynolds, 8 Kan. 623.

furthermore important in determining whether they are obligated to carry live stock for all who offer.

The weight of authority supports the proposition that carriers of live stock are common carriers, and liable as such whenever a carrier of other freight would be, in similar circumstances.[2] The leading case in support of this view is that of Kansas Pac. Ry. Co. v. Nichols,[3] in which the court said: "That railroads are created common carriers of some kind we believe is the universal doctrine of all courts. The main question is always whether they are common carriers of the particular thing then under consideration. The question in this case is whether they are common carriers of cattle. So far as our statutes are concerned, no distinction is made between the carrying of cattle and that of any other kind of property. Under our statutes a railroad may as well be a common carrier of cattle as of goods, wares, and merchandise, or of any other kind of property. Now, as no distinction has been made by statute between the carrying of the different kinds of property, we would infer that railroads were created for the purpose of being common carriers of all kinds of property which the wants or needs of the public require to be carried, and which can be carried by the railroads; and particularly we would infer that railroads were created for the purpose of being common carriers of cattle. * * * It

[2] Mynard v. Railroad Co., 71 N. Y. 180; Cragin v. Railroad Co., 51 N. Y. 61; Penn v. Railroad Co., 49 N. Y. 204; Conger v. Railroad Co., 6 Duer (N. Y.) 375; Clarke v. Railroad Co., 14 N. Y. 570; Harris v. Railroad Co., 20 N. Y. 232; St. Louis & S. E. Ry. Co. v. Dorman, 72 Ill. 504; Ohio & M. R. Co. v. Dunbar, 20 Ill. 624; Chicago, R. I. & P. R. Co. v. Harmon, 12 Ill. App. 54; Ayres v. Railroad Co., 71 Wis. 372, 37 N. W. 432; Evans v. Railroad Co., 111 Mass. 142; Rixford v. Smith, 52 N. H. 355; Kinnick v. Railroad Co., 69 Iowa, 665, 29 N. W. 772; McCoy v. Railroad Co., 44 Iowa, 424; German v. Railroad Co., 38 Iowa, 127; Powell v. Railroad Co., 32 Pa. St. 414; Atchison & N. R. Co. v. Washburn, 5 Neb. 117; Porterfield v. Humphreys, 8 Humph. (Tenn.) 497; Wilson v. Hamilton, 4 Ohio St. 722; Welsh v. Railroad Co., 10 Ohio St. 65; South & N. A. R. Co. v. Henlein, 52 Ala. 606; Kimball v. Railroad Co., 26 Vt. 247; Moulton v. Railway Co., 31 Minn. 85, 16 N. W. 497; Agnew v. The Contra Costa, 27 Cal. 425; Lindsley v. Railway Co., 36 Minn. 539, 33 N. W. 7; Gulf, C. & S. F. Ry. Co. v. Trawick, 68 Tex. 314, 4 S. W. 567; Myrick v. Railroad Co., 107 U. S. 102, 1 Sup. Ct. 425; Brown v. Railroad Co., 18 Mo. App. 569; McFadden v. Railway Co., 92 Mo. 343, 4 S. W. 689. And see Jag. Torts, p. 1073.

[3] 9 Kan. 235.

is claimed, however, that 'the transportation of cattle and live stock by common carriers by land was unknown to the common law.' Suppose it was; what does that prove? The transportation of thousands of other kinds of property, either by land or water, was unknown to the common law, and yet such kinds of property are now carried by common carriers and by railroads every day. * * * The reason why cattle and live stock were not transported by land by common carriers, at common law, was because no common carrier, at the time our common law was formed, had any convenient means for such transportation. Among the other kinds of property not transported by common carriers, either by land or water, at the time our common law was formed, are the following: Reapers, mowers, wheat drills, corn planters, cultivators, threshing machines, corn shellers, gypsum, guano, Indian corn, potatoes, tobacco, stoves, steam engines, sewing machines, washing machines, pianos, reed organs, fire and burglar proof safes, etc.; and yet no one would now contend that railroads are not common carriers of these kinds of articles. At common law the character of the carrier was never determined by the kind of property that he carried. * * * At common law no person was a common carrier of any article unless he chose to be, and unless he held himself out as such; and he was a common carrier of just such articles as he chose to be, and no others. If he held himself out as a common carrier of silks and laces, the common law would not compel him to be a common carrier of agricultural implements, such as plows, harrows, etc. If he held himself out as a common carrier of confectionery and spices, the common law would not compel him to be a common carrier of bacon, lard, and molasses.[4] And it seems to us clearly beyond all doubt that, if any person had, in England, prior to the year 1607, held himself out as a common carrier of cattle and live stock by land, the common law would have made him such. If so, where is the valid distinction that is attempted to be made between the carrying of live stock and the carrying of any other kind of personal property? The common law never declared that certain kinds of property only could be carried by common carriers, but it permitted all kinds of personal property to be so carried. At common law any person could be

[4] Tunnel v. Pettijohn, 2 Har. (Del.) 48.

a common carrier of all kinds, or any kind, and of just such kinds of personal property as he chose; no more, nor less. Of course, it is well known that at the time when our common law had its origin—that is, prior to the year 1607—railroads had no existence. But when they came into existence it must be admitted that they would be governed by the same rules, so far as applicable, which govern other carriers of property. Therefore it must be admitted that railroads might be created for the purpose of carrying one kind of property only, or for carrying many kinds, or for carrying all kinds of property which can be carried by railroads, including cattle, live stock, etc. In this state it must be presumed that they were created for the purpose of carrying all kinds of personal property. It can hardly be supposed that they were created simply for the purpose of being carriers of such articles only as were carried by common carriers under the common law prior to the year 1607; for, if such were the case, they would be carriers of but very few of the innumerable articles that are now actually carried by railroad companies. And it can hardly be supposed that they were created for the mere purpose of taking the place of pack horses, or clumsy wagons, often drawn by oxen, or such other primitive means of carriage and transportation as were used in England prior to that year. Railroads are undoubtedly created for the purpose of carrying all kinds of property which the common law would have permitted to be carried by common carriers in any mode, either by land or water, which probably includes all kinds of personal property. Our decision, then, upon this question, is that, whenever a railroad company receives cattle or live stock to be transported over their road from one place to another, such company assumes all the responsibilities of a common carrier, except so far as such responsibilities may be modified by special contract."

In support of the contrary doctrine, it is said, in the case of older corporations, at least, that the common carrier, in entering the business, was required and undertook to transport only such property as was usually carried by similar companies at the time of its organization and the inception of its business, and such other kinds of property as, in the progress of invention and business methods, might be tendered for carriage, and which did not, from its nature,

impose risks of a different character, or require an essentially different mode of management, or the incurring of extra expense for equipment on account of its new and different character; that the transportation of live stock by common carriers on land was unknown to the common law at the time when their extraordinary liabilities were fixed, making them insurers against all losses not occurring through the act of God or the public enemy; that the very nature and vitality of the animals, their constant tendency and inclination to move about, jostle, crowd, trample, and injure one another, introduces an element of hazard and risk wholly unknown, and not contemplated in the original undertaking of the carrier as a public servant; that, although this risk may be greatly lessened by care, by feeding and watering, and by constant vigilance, there is nevertheless imposed upon the carrier a degree of responsibility and an amount of labor so different from what is required in the case of other kinds of property that it is neither just nor right that he should be compelled to accept and carry live stock under the same strict rules of liability that attach to the carriage of other kinds of property.[5]

Inherent, Pernicious Condition of Animals.

As has been already stated, it is the duty of the common carrier to bestow upon the goods delivered to him for transportation the kind and degree of care which their disclosed nature demands.[6] If his duty has been discharged in this respect, and, without negligence on his part, the property is destroyed or damaged by any of the excepted perils, he will not be liable.[7] The same proposition holds true regarding the carriage of live stock. The carrier's liability is further contingent upon the inherent vice, disease, or condition of the animals shipped. By "vice" is meant that abnormal condition which, by its internal development, tends to the injury or destruction of the animal.[8] Animals may injure or destroy themselves or one another; they may perish from fright, or die of starvation because they refuse to eat the furnished food; they may suc-

[5] Michigan S. & N. I. R. Co. v. McDonough, 21 Mich. 165. See, also, Lake Shore & M. S. R. Co. v. Perkins, 25 Mich. 329.

[6] Ante, p. 222.

[7] Ante, p. 225.

[8] Blower v. Railway Co., L. R. 7 C. P. 655.

cumb to the effects of heat or cold. These are but developments of conditions inherent in live animals, against which the carrier gives no absolute warranty. In these cases it is sufficient for the carrier to show that he has not been negligent; that he has provided suitable means of transportation, and has exercised the degree of care, in the circumstances, which the nature of the property required.[9]

[9] Cragin v. Railroad Co., 51 N. Y. 61; Giblin v. Steamship Co., 8 Misc. Rep. 22, 28 N. Y. Supp. 69; Armstrong v. Express Co., 159 Pa. St. 640, 28 Atl. 448. See, also, Cleveland, C., C. & St. L. Ry. Co. v. Patterson, 69 Ill. App. 438; Hendrick v. Railroad Co., 170 Mass. 44, 48 N. E. 835; Comer v. Railroad Co., 52 S. C. 36, 29 S. E. 637; Cincinnati, N. O. & T. P. Ry. Co.'s Receiver v. Webb (Ky.) 46 S. W. 11; Richardson v. Railway Co., 61 Wis. 596, 21 N. W. 49; Illinois Cent. R. Co. v. Scruggs, 69 Miss. 418, 13 South. 698; Louisville, N. O. & T. Ry. Co. v. Bigger, 66 Miss. 319, 6 South. 234; Smith v. Railroad Co., 12 Allen (Mass.) 531; Penn v. Railroad Co., 49 N. Y. 204. Suitable provisions having been made, and injuries occurring through propensities, such as fright and bad temper, carrier is not liable. Evans v. Railroad Co., 111 Mass. 142; Regan v. Express Co., 49 La. Ann. 1579, 22 South. 835. The shipper must make known the necessity of unusual care in order that proper precaution may be used. Wilson v. Hamilton, 4 Ohio St. 722. On the liability of the carrier for the safe transportation of cattle as an insurer, see Clarke v. Railroad Co., 14 N. Y. 570; Rixford v. Smith, 52 N. H. 355; Goldey v. Railroad Co., 30 Pa. St. 242; McDaniel v. Railroad Co., 24 Iowa, 412. Delay caused by unavoidable accident, resulting in damage, does not excuse the carrier, unless, during the delay, he used the highest degree of care for the safety of the freight. Cincinnati, N. O. & T. P. Ry. Co.'s Receiver v. Webb (Ky.) 46 S. W. 11; Kinnick v. Railroad Co., 69 Iowa, 665, 29 N. W. 772. A carrier of live stock cannot stipulate for exemption from liability from the results of his own negligence. Moulton v. Railway Co., 31 Minn. 85, 16 N. W. 497; Kansas City, St. J. & C. B. R. Co. v. Simpson, 30 Kan. 645, 2 Pac. 821; St. Louis & S. F. Ry. v. Tribbey, 6 Kan. App. 497, 50 Pac. 458; Chicago & A. R. Co. v. Grimes, 71 Ill. App. 397; Leonard v. Whitcomb, 95 Wis. 646, 70 N. W. 817. Reasonableness of contract. Kansas & A. V. Ry. Co. v. Ayers, 63 Ark. 331, 38 S. W. 515.

SAME—BAGGAGE.

102. Carriers of passengers are common carriers of the passengers' reasonable baggage, and are liable as such for its safe delivery.

Obligation to Carry Baggage.

The obligation to carry his baggage is incident to and a part of the contract to carry the passenger, and he has a right to require that a reasonable amount be carried with him without extra charge.[1] The compensation for the carriage of the baggage is included in that paid for the fare of the passenger.[2] The amount of baggage may be restricted within reasonable limits, either by contract or statute; but, in the absence of such limitation, the carrier is liable for any amount received.[3] The liability of the carrier for baggage which it receives is that of a common carrier of goods,[4] unless the passenger is carried free,[5] or the property, legally speaking, does not constitute baggage,[6] in either of which events the carrier is liable only as a gratuitous bailee.

§ 102. [1] Originally, carriers were not held liable for baggage unless a separate compensation was paid therefor. Middleton v. Fowler, 1 Salk. 282. Subsequently a reasonable amount was allowed, by usage, without extra compensation, but the amount was jealously restricted. Pardee v. Drew, 25 Wend. (N. Y.) 459; Orange County Bank v. Brown, 9 Wend. (N. Y.) 85. Reasonableness of regulation requiring purchase of ticket before baggage will be checked. Coffee v. Railroad Co. (Miss.) 25 South. 157.

[2] Orange County Bank v. Brown, 9 Wend. (N. Y.) 85; Hollister v. Nowlen, 19 Wend. (N. Y.) 234; Cole v. Goodwin, 19 Wend. (N. Y.) 251. It is immaterial that the fare was paid by a third person. Roberts v. Koehler, 30 Fed. 94.

[3] New York Central & H. R. R. Co. v. Fraloff, 100 U. S. 24; Merrill v. Grinnell, 30 N. Y. 594. Where no inquiry is made by the carrier as to the value of the baggage, and the passenger does not, by act or artifice, mislead the carrier as to the true value, his failure to disclose the value will not relieve the carrier of liability. New York Cent. & H. R. R. Co. v. Fraloff, 100 U. S. 24.

[4] Hollister v. Nowlen, 19 Wend. (N. Y.) 234.

[5] Flint & P. M. Ry. Co. v. Weir, 37 Mich. 111.

[6] See post, pp. 270, 272.

What Constitutes Baggage.

"The term 'baggage' includes such goods and chattels as the convenience or comfort, the taste, the pleasure, or the protection of passengers generally makes it fit and proper for the passenger in question to take with him for his personal use, according to the wants or habits of the class to which he belongs, either with reference to the period of the transit or the ultimate purpose of the journey."[7] In Hawkins v. Hoffman,[8] Brownson, J., suggested as a proper test that whatever is usually carried as baggage should be so considered: "I do not intend to say that the articles must be such as every man deems essential to his comfort, for some men carry nothing, or very little, with them when they travel, while others consult their convenience by carrying many things. Nor do I intend to say that the rule is confined to wearing apparel, brushes, razors, writing apparatus, and the like, which most persons deem indispensable. If one has books for his instruction or amusement by the way, or carries his gun or fishing tackle, they would undoubtedly fall within the term 'baggage,' because they are usually carried as such. This is, I think, a good test for determining what things fall within the rule." Some other definitions are: "Only such articles as a traveler usually carries with him for his comfort or convenience, both during the journey and during his stay at the place of his destination;"[9] "all articles which it is usual for persons traveling to carry with them, whether from necessity or for convenience or amusement;"[10] "such articles of personal convenience or necessity as are usually carried by passengers for their personal use, and not merchandise, or other valuables."[11]

[7] Lawson, Bailm. § 272.

[8] 6 Hill (N. Y.) 586.

[9] Wood, Ry. Law, § 401.

[10] Ang. Carr. § 115.

[11] Hutch. Carr. § 679. The criticism of Judge Story's definition in Dibble v. Brown, 12 Ga. 217, 226, would apply equally well to that of Mr. Lawson: "When we settled down with Judge Story upon the proposition that by 'baggage' is to be understood 'such articles of necessity or personal convenience as are usually carried by passengers, for their personal use,' we are still without a rule for determining what articles are included in baggage; for such things as would be necessary to one man would not be necessary

Same—Articles Held to be Baggage.

Among the numerous articles which have been held to be baggage when carried by a passenger, are the following: Bedding, when the passenger is required to provide it,[12] but not otherwise;[13] clothing;[14] cloth and materials, when intended for clothing;[15] guns, for sporting purposes,[16] pistols,[17] and rifles;[18] tools of mechanics;[19]

to another. Articles which would be held but ordinary conveniences by A. might be considered incumbrances by B. One man, from choice or habit, or from educational incapacity to appreciate the comforts or conveniences of life, needs, perhaps, a portmanteau, a change of linen, and an indifferent razor; while another, from habit, position, and education, is unhappy without all the appliances of comfort which surround him at home. The quantity and character of baggage must depend very much upon the condition in life of the traveler,—his calling, his habits, his tastes, the length or shortness of his journey, and whether he travels alone or with his family. If we agree further with Judge Story, and say that the articles of necessity or of convenience must be such as are usually carried by travelers for their personal use, we are still at fault, because there is, in no state of this Union, nor in any part of any one state, any settled usage as to the baggage which travelers carry with them for their personal use. The quantity and character of baggage found to accompany passengers are as various as are the countenances of the travelers."

[12] Hirschsohn v. Packet Co., 34 N. Y. Super. Ct. 521.

[13] Connolly v. Warren, 106 Mass. 146; Macrow v. Railroad Co., L. R. 6 Q. B. 612. Contra, Ouimit v. Henshaw, 35 Vt. 605. And see Parmelee v. Fischer, 22 Ill. 212.

[14] Dexter v. Railroad Co., 42 N. Y. 326; Toledo, W. & W. Ry. Co. v. Hammond, 33 Ind. 379, 382; Dibble v. Brown, 12 Ga. 217, 225; Baltimore Steam-Packet Co. v. Smith, 23 Md. 402. Laces worth $10,000 have been held to be baggage. New York Cent. & H. R. R. Co. v. Fraloff, 100 U. S. 24.

[15] Mauritz v. Railroad Co., 23 Fed. 765, 21 Am. & Eng. R. Cas. 286, 292; Van Horn v. Kermit, 4 E. D. Smith (N. Y.) 453; Duffy v. Thompson, Id. 178.

[16] Van Horn v. Kermit, 4 E. D. Smith (N. Y.) 453.

[17] Davis v. Railroad Co., 22 Ill. 278. More than one revolver for a traveling grocer was held unnecessary, Chicago, R. I. & P. R. Co. v. Collins, 56 Ill. 212; although a pair of dueling pistols and a pocket pistol was held a proper equipment for a passenger in Woods v. Devin, 13 Ill. 746.

[18] Bruty v. Railway Co., 32 U. C. Q. B. 66; Davis v. Railroad Co., 10 How. Prac. (N. Y.) 330.

[19] Davis v. Railroad Co., 10 How. Prac. (N. Y.) 330; Porter v. Hildebrand, 14 Pa. St. 129. So, also, of a mechanic in watchmaking or jewelry, what is a reasonable quantity of tools being a question for the jury. Kansas City, Ft. S. & G. R. Co. v. Morrison, 34 Kan. 502, 9 Pac. 225.

surgical instruments;[20] opera glasses and telescopes;[21] watches and jewelry, for wearing purposes;[22] dressing cases;[23] books and manuscripts;[24] carpets;[25] money, for expenses;[26] and merchandise has been held to be baggage when its character is disclosed, or its nature apparent.[27]

Same—Articles Held not to be Baggage.

The circumstances and the purposes for which the particular article was being carried are often decisive of its legal character. In the circumstances attending the particular case the following articles have been held not to constitute baggage: Money not intended for personal use;[28] cloth for dresses for a third person;[29]

[20] Hannibal R. Co. v. Swift, 12 Wall. 262. A dentist's instruments, Brock v. Gale, 14 Fla. 523.

[21] Toledo, W. & W. Ry. Co. v. Hammond, 33 Ind. 379; Cooney v. Palace-Car Co. (Ala.) 25 South. 712; Cadwallader v. Railroad Co., 9 L. C. 169.

[22] McCormick v. Railroad Co., 4 E. D. Smith (N. Y.) 181; Torpey v. Williams, 3 Daly (N. Y.) 162; McGill v. Rowand, 3 Pa. St. 451; Coward v. Railroad Co., 16 Lea (Tenn.) 225; American Contract Co. v. Cross, 8 Bush (Ky.) 472.

[23] Cadwallader v. Railroad Co., 9 L. C. 169; Cooney v. Palace-Car Co. (Ala.) 25 South. 712.

[24] Gleason v. Transportation Co., 32 Wis. 85; Hopkins v. Westcott, 6 Blatch. 64, Fed. Cas. No. 6,692; Doyle v. Kiser, 6 Ind. 242; Texas & P. Ry. Co. v. Morrison's Faust Co. (Tex. Civ. App.) 48 S. W. 1103.

[25] Minter v. Railroad Co., 41 Mo. 503.

[26] Illinois Cent. R. Co. v. Copeland, 24 Ill. 332 (but cf. Davis v. Railroad Co., 22 Ill. 278); Merrill v. Grinnell, 30 N. Y. 594; Orange Co. Bank v. Brown, 9 Wend. (N. Y.) 85; Hutchings v. Railroad Co., 25 Ga. 61; Bomar v. Maxwell, 9 Humph. (Tenn.) 621; Doyle v. Kiser, 6 Ind. 242; Adams v. Steamboat Co., 151 N. Y. 163, 45 N. E. 369. In Merrill v. Grinnell, 30 N. Y. 594, $800 in gold was not considered too large an amount for the passenger to carry in his trunk for the whole of the contemplated journey from Hamburg to New York, and thence to San Francisco.

[27] Stoneman v. Railway Co., 52 N. Y. 429; Sloman v. Railroad Co., 67 N. Y. 208; Hellman v. Holladay, 1 Woolw. 365, Fed. Cas. No. 6,340. Where the carrier knows the contents of the trunk to be merchandise, and accepts it, he will be liable as a common carrier of goods. Hannibal R. Co. v. Swift, 12 Wall. 262; Waldron v. Railroad Co., 1 Dak. 351, 46 N. W. 456; Texas, etc., R. Co. v. Capps, 18 Cent. Law J. 211, 16 Am. & Eng. R. Cas. 118.

[28] Orange Co. Bank v. Brown, 9 Wend. (N. Y.) 85; Weed v. Railroad Co., 19 Wend. (N. Y.) 534; Whitmore v. The Caroline, 20 Mo. 513; Jordan v.

[29] Dexter v. Railroad Co., 42 N. Y. 326.

bedding and household goods;[30] presents;[31] toys;[32] medicines, handcuffs, and locks;[33] samples of traveling salesmen;[34] watches, in quantity;[35] bullion, and jewelry not for wearing purposes;[36] deeds and documents;[37] engravings and valuable papers;[38] and many other articles.[39]

Custom and Usage in Determining Character.

Usage and custom of the particular carrier is always relevant in determining whether the particular article is baggage or not, for by usage the carrier holds himself out to the traveling public as ready and willing to carry certain classes of property, without

Railroad Co., 5 Cush. (Mass.) 69; Dunlap v. Steamboat Co., 98 Mass. 371; Dibble v. Brown, 12 Ga. 217; Davis v. Railroad Co., 22 Ill. 278; Hutchings v. Railroad Co., 25 Ga. 61. Money carried in the passenger's trunk for transportation merely is not baggage, and, if the carrier is not informed of its presence, he is not liable for its loss. Orange Co. Bank v. Brown, 9 Wend. (N. Y.) 85.

[30] Connolly v. Warren, 106 Mass. 146; Macrow v. Railroad Co., L. R. 6 Q. B. 612; Texas & P. Ry. Co. v. Ferguson, 9 Am. & Eng. R. Cas. 395.

[31] Nevins v. Steamboat Co., 4 Bosw. (N. Y.) 225; The Ionic, 5 Blatchf. 538, Fed. Cas. No. 7,059.

[32] Hudston v. Railroad Co., 10 Best & S. 504 (a child's rocking horse).

[33] Bomar v. Maxwell, 9 Humph. (Tenn.) 620.

[34] Hawkins v. Hoffman, 6 Hill (N. Y.) 586; Pennsylvania Co. v. Miller, 35 Ohio St. 541; Texas, etc., R. Co. v. Capps, 16 Am. & Eng. R. Cas. 118; Alling v. Railroad Co., 126 Mass. 121; Stimson v. Railroad Co., 98 Mass. 83.

[35] Belfast & B. Ry. Co. v. Keys, 9 H. L. Cas. 556.

[36] Cincinnati & C. A. L. R. Co. v. Marcus, 38 Ill. 219; Nevins v. Steamboat Co., 4 Bosw. (N. Y.) 225; Steers v. Steamship Co., 57 N. Y. 1; Michigan Cent. R. Co. v. Carrow, 73 Ill. 348.

[37] Phelps v. Railway Co., 19 C. B. (N. S.) 321.

[38] Nevins v. Steamboat Co., 4 Bosw. (N. Y.) 225 (engravings); Phelps v. Railway Co., 19 C. B. (N. S.) 321; Thomas v. Railroad Co., 14 U. C. Q. B. 389 (valuable papers).

[39] Dog, transferred from coach to baggage car on demand of brakeman, held to be baggage, Cantling v. Railroad Co., 54 Mo. 385; stage properties held not to be baggage, Oakes v. Railroad Co., 20 Or. 392, 26 Pac. 230; Masonic regalia held not to be baggage, Nevins v. Steamboat Co., 4 Bosw. (N. Y.) 225; nor a sacque, muff, and napkin ring (for a man), Chicago, R. I. & P. R. Co. v. Boyce, 73 Ill. 510. And see, as to hunting dog, Kansas City, M. & B. R. Co. v. Higdon, 94 Ala. 286, 10 South. 282; Honeyman v. Railroad Co., 13 Or. 352, 10 Pac. 628; books bought by wife for husband, Hurwitz v. Packet Co. (City Ct. N. Y.) 56 N. Y. Supp. 379; uncrated bicycles, State v. Railway Co., 71 Mo. App. 385.

extra compensation, as personal baggage. In such cases he is clearly liable as a common carrier for articles so received. In fact, such an offer to carry unusual articles as baggage is not infrequently a direct inducement to the selection of the particular carrier.[40]

Merchandise as Baggage.

It follows from what has already been said that the common carrier of passengers is not bound to carry as baggage that which does not, in a legal sense, properly fall within that classification.[41] The carrier may, of course, volunteer to accept any kind of property in any amount as baggage, either in special instances or by established usage, and in all such cases he becomes liable as a common carrier of goods for the property so received for transportation.[42] And, if goods are so packed that their nature is obvious, knowledge of their character on the part of the carrier will be presumed;[43] as if a roll of carpet be received as baggage.[44] But knowledge of the nature of the contents will not necessarily be presumed from the exterior of the package, as if a box be tendered instead of a trunk;[45] nor will the fact that a trunk is of the kind generally used by commercial travelers imply any notice that it contains merchandise, such as samples.[46] A passenger tendering a

[40] Dibble v. Brown, 12 Ga. 217; Texas, etc., R. Co. v. Capps, 16 Am. & Eng. R. Cas. 118. But see Alling v. Railroad Co., 126 Mass. 121. The course of business and practice of a railroad company in respect to the custody of baggage passing over its line and to be transferred to a connecting road is of great importance in determining the nature of its liability therefor. Ouimit v. Henshaw, 35 Vt. 605.

[41] Pfister v. Railroad Co., 70 Cal. 169, 11 Pac. 686; Norfolk & W. R. Co. v. Irvine, 84 Va. 553, 5 S. E. 532; Id., 85 Va. 217, 7 S. E. 233.

[42] Jacobs v. Tutt, 33 Fed. 412; Toledo & O. C. Ry. Co. v. Dages, 57 Ohio St. 38, 47 N. E. 1039; Trimble v. Railroad Co., 39 App. Div. 403, 57 N. Y. Supp. 437.

[43] Thomp. Carr. 523; Waldron v. Railroad Co., 1 Dak. 351, 46 N. W. 456; Butler v. Railroad Co., 3 E. D. Smith (N. Y.) 571. If the carrier has knowledge of the character of the articles, he will be liable for their safety. Oakes v. Railroad Co., 20 Or. 392, 26 Pac. 230. And see cases collected in Hale, Bailm. p. 385, note.

[44] Minter v. Railroad Co., 41 Mo. 503.

[45] Belfast & B. Ry. Co. v. Keys, 9 H. L. Cas. 556.

[46] See Michigan Cent. R. Co. v. Carrow, 73 Ill. 348; Alling v. Railroad

package to be carried as baggage impliedly represents that it contains only baggage,[47] and the carrier has a right to rely on such representation,[48] and will be liable only for gross negligence, in the event of loss, if he has been deceived.[49] Questions put by the carrier as to the nature of the contents must be answered truly, and, if the passenger refuses to answer, the carrier may decline to transport the baggage.[50]

Passenger Must be Owner.

That the liability of the carrier as insurer of a reasonable amount of personal baggage may attach, it is essential that the passenger have either a general or special property in the baggage in question. Thus, if money, placed by one passenger in the valise of another, with the latter's knowledge, and by him delivered for transportation as his baggage, is lost, the owner cannot recover.[51] But

Co., 126 Mass. 121; Humphreys v. Perry, 148 U. S. 627, 13 Sup. Ct. 711. Goods and samples of a commercial traveler are to be considered as personal baggage where their character was fully understood at the time of their reception. Dixon v. Navigation Co., 15 Ont. App. 647, 39 Am. & Eng. R. Cas. 425. See, also, Sloman v. Railroad Co., 67 N. Y. 208, reversing 6 Hun, 546.

[47] Michigan Cent. R. Co. v. Carrow, 73 Ill. 348; Humphreys v. Perry, 148 U. S. 627, 13 Sup. Ct. 711; Haines v. Railroad Co., 29 Minn. 160, 12 N. W. 447. Contra, Kuter v. Railroad Co., 1 Biss. 35, Fed. Cas. No. 7,955.

[48] If the transaction was a legal fraud, it is sufficient to avoid the contract. Michigan Cent. R. Co. v. Carrow, 73 Ill. 348. See, also, Blumenthal v. Railroad Co., 79 Me. 550, 11 Atl. 605; Hellman v. Holladay, 1 Woolw. 365, Fed. Cas. No. 6,340.

[49] Michigan Cent. R. Co. v. Carrow, 73 Ill. 348; Smith v. Railroad Co., 44 N. H. 325; Alling v. Railroad Co., 126 Mass. 121; Blumantle v. Railroad Co., 127 Mass. 322. And see Haines v. Railroad Co., 29 Minn. 160, 12 N. W. 447; Pennsylvania Co. v. Miller, 35 Ohio St. 541; Greenwich Ins. Co. v. Memphis & C. Packet Co., 4 O. L. D. 405; Bowler & Burdick Co. v. Toledo & O. C. Ry. Co., 10 Ohio Cir. Ct. R. 272; Cahill v. Railway Co., 13 C. B. (N. S.) 818; Great Northern Ry. Co. v. Shepherd, 8 Exch. 30.

[50] New York Cent. & H. R. R. Co. v. Fraloff, 100 U. S. 24; Norfolk & W. R. Co. v. Irvine, 84 Va. 553, 5 S. E. 532; Id., 85 Va. 217, 7 S. E. 233.

[51] Dunlap v. Steamboat Co., 98 Mass. 371; Becher v. Railroad Co., L. R. 5 Q. B. 241. Traveling man's samples, where goods are owned by employer, Missouri Pac. Ry. Co. v. Liveright (Kan. App.) 53 Pac. 763; Cattaraugus Cutlery Co. v. Buffalo R. & P. Ry. Co., 24 App. Div. 267, 48 N. Y. Supp. 451.

members of the same family may carry one another's effects,[52] and it has been held that where the plaintiff went on in advance, leaving his baggage to be brought seven days later by his wife, with her own baggage, defendant was liable to plaintiff for its loss.[53] But where a servant preceded his master, carrying his luggage, the carrier was held not liable for its loss.[54]

Passenger Need not Accompany Baggage.

In the absence of special agreement, or negligence on the part of the carrier, a passenger is liable for freight charges on his baggage unless he accompanies it. But if a passenger pays his fare with an agreement as to the forwarding of his baggage, the company is liable as a common carrier, whether the baggage is forwarded on the same, the preceding, or a subsequent train, and the owner is not liable for any additional charge.[55] To render the carrier liable as an insurer, it is not, therefore, essential that the passenger accompany his baggage. Neither is it essential that the compensation be paid in advance. It is sufficient if the carrier receives and undertakes to transport the baggage according to an agreement, either receiving his compensation in advance or undertaking to collect it when the carriage is complete. The fare paid by the passenger is full compensation for the carriage of his reasonable, personal baggage; but if baggage is subsequently forwarded under the direction of the passenger, in the absence of special agreement or negligence on the carrier's part, it must be paid for as ordinary merchandise.[56]

[52] Dexter v. Railroad Co., 42 N. Y. 326. But not partnership property carried by a member of the firm. Pennsylvania R. Co. v. Knight, 58 N. J. Law, 287, 33 Atl. 845.

[53] Curtis v. Railroad Co., 74 N. Y. 116.

[54] Becher v. Railroad Co., L. R. 5 Q. B. 241.

[55] Warner v. Railroad Co., 22 Iowa, 166. See, also, Shaw v. Railroad Co., 40 Minn. 144, 41 N. W. 548; Collins v. Railroad Co., 10 Cush. (Mass.) 506; Wilson v. Railway, 56 Me. 60; Wald v. Railroad Co., 162 Ill. 545, 44 N. E. 888. Railroad companies are not obliged to receive as baggage the trunk of one who does not go by the same train. Graffam v. Railroad Co., 67 Me. 234.

[56] Wilson v. Railway, 56 Me. 60. Where the passenger, with the consent of the carrier, stops over, and permits his baggage to go on, the carrier is liable as an insurer until a reasonable time elapses after the baggage has reached its destination without the passenger calling for it. Logan v. Rail-

In Custody of Passenger.

To charge the common carrier as insurer, it is essential that he should have sole custody of the goods.[57] Regarding the baggage of passengers, the question of custody arises most frequently in connection with articles retained by the passenger under his supervision in the same car or compartment. These cases fall naturally into three classes:

(a) Where the passenger retains in his possession, without notice, articles which are not technically baggage. In such cases the carrier is not liable for their loss, even if it occurs through his negligence,[58] for the reason that the carrier's liability to the passenger is limited by his contract, and he is under no obligation to carry more than a reasonable amount of ordinary personal baggage.[59] Thus, when a passenger was violently robbed of a large amount of bonds, which he was carrying on his person, unknown to the carrier, the latter was held not to be liable.[60]

(b) When the passenger's ordinary baggage is delivered to the carrier, but, for the convenience of the former, is transported in the car or state-room with the passenger where he can have access to it, the carrier is liable as insurer.[61] A regulation forbidding passengers to take light baggage, necessary for use during the journey, into the state room or car with them, except at their own risk, is not a reasonable regulation.[62] What constitutes a suffi-

road Co., 11 Rob. (La.) 24; Chicago, R. I. & P. R. Co. v. Fairclough, 52 Ill. 106. But see Laffrey v. Grummond, 74 Mich. 186, 41 N. W. 894.

[57] See ante, p. 218.

[58] Hillis v. Railway Co., 72 Iowa, 228, 33 N. W. 643; First Nat. Bank v. Marietta & C. R. Co., 20 Ohio St. 259; Weeks v. Railroad Co., 72 N. Y. 50.

[59] Henderson v. Railroad Co., 20 Fed. 430; Id., 123 U. S. 61, 8 Sup. Ct. 60.

[60] Weeks v. Railroad Co., 72 N. Y. 50, 56; First Nat. Bank of Greenfield v. Marietta & C. R. Co., 20 Ohio St. 259.

[61] Van Horn v. Kermit, 4 E. D. Smith (N. Y.) 453; Dunn v. Steamboat Co., 58 Hun, 461, 12 N. Y. Supp. 406; Mudgett v. Steamboat Co., 1 Daly (N. Y.) 151; Gore v. Transportation Co., 2 Daly (N. Y.) 254; Macklin v. Steamboat Co., 7 Abb. Prac. N. S. (N. Y.) 229; Walsh v. The H. M. Wright, 1 Newb. 494, Fed. Cas. No. 17,115. But see Williams v. Packet Co., 3 Cent. Law J. 400; Gleason v. Transportation Co., 32 Wis. 85; Dawley v. Car Co., 169 Mass. 315, 47 N. E. 1024.

[62] Macklin v. Steamboat Co., 7 Abb. Prac. N. S. (N. Y.) 229; Gleason v.

cient delivery of baggage to the carrier, is a question involving much perplexity and confusion of authorities. Even if the baggage is ordinary and proper, and is not retained in possession by the passenger for the purpose of taking care of it,—animo custodiendi,—the carrier will be liable only for negligence.[63] The English rule is supported by weight of authority, and is succinctly stated by Cockburn, C. J., in a case where the carrier was held liable for the loss of a chronometer, placed in a seat in a railway carriage. After stating that such circumstances must exist as "lead irresistibly to the conclusion that the passenger takes such personal control and charge of his property as altogether to give up all hold upon the company, before we can say the company, as carriers, are relieved from liability in case of loss,"[64] the learned chief justice continues: "What really took place appears to be this: That, by desire of plaintiff, the porter of the company placed the article in a carriage, upon a particular seat, which was to be reserved for the plaintiff. I am far from saying that no case can arise in which a passenger, having luggage which, by the terms of the contract, the company is bound to convey to the place of destination, can release the company from the care and custody of an article by taking it into his own immediate charge; but I think the circumstances should be very strong to show such an intention on the part of the passenger, and to relieve the company of their ordinary liability. And it is not because a part of the passenger's luggage, which is to be conveyed with him, is, by the mutual consent of the company and himself, placed with him in the carriage in which he travels, that the company are to be considered as released from their ordinary obligations. Nothing could be more inconvenient than that the practice of placing small articles, which it is convenient to the passenger to have about him in the carriage in which he travels, should be discontinued; and if the company were, from the mere fact of articles of this description being placed in a carriage with a passenger, to be at once relieved

Transportation Co., 32 Wis. 85; Mudgett v. Steamboat Co., 1 Daly (N. Y.) 151; Gore v. Transportation Co., 2 Daly (N. Y.) 254.

[63] Post, p. 277.

[64] Le Conteur v. Railroad Co., L. R. 1 Q. B. 54. Cf. Kinsley v. Railroad Co., 125 Mass. 54.

from the obligation of safe carriage, it would follow that no one who has occasion to leave the carriage temporarily could do so consistently with the safety of his property. I cannot think, therefore, we ought to come to any conclusion which would have the effect of relieving the company, as carriers, from the obligation to carry safely, which obligation, for general convenience of the public, ought to attach to them."

It is undoubtedly the law that when a passenger does not deliver his property to the carrier, but retains exclusive possession and control of it himself, no liability rests on the carrier, in the absence of negligence; as, for instance, where the passenger's pocket is picked, or his overcoat or satchel is taken from a seat occupied by him.[65] But there is no such possession or exclusive control in the case of persons occupying berths in sleeping cars, and the carrier is liable to them for the loss of personal effects occurring through his negligence.[66] And in the case of carriers by water the assignment of a state room to a passenger is an invitation to him to place his ordinary baggage there, with the assurance that it will be protected, and safely delivered.[67]

(c) When articles are retained in the possession and control of the passenger, animo custodiendi, of a class which would be proper baggage if delivered to the carrier, the latter is liable only for losses occasioned by his own negligence,[68] and, a fortiori, if the

[65] Tower v. Railroad Co., 7 Hill (N. Y.) 47. See, also, Hillis v. Railway Co., 72 Iowa, 228, 33 N. W. 643.

[66] Pullman Palace-Car Co. v. Freudenstein, 3 Colo. App. 540, 34 Pac. 578.

[67] Hutch. Carr. § 700; Mudgett v. Steamboat Co., 1 Daly (N. Y.) 151; Gore v. Transportation Co., 2 Daly (N. Y.) 254; Walsh v. The H. M. Wright, 1 Newb. 494, Fed. Cas. No. 17,115; Macklin v. Steamboat Co., 7 Abb. Prac. N. S. (N. Y.) 229. See, also, American S. S. Co. v. Bryan, 83 Pa. St. 446; The R. E. Lee, 2 Abb. (U. S.) 49, Fed. Cas. No. 11,690; Del Valle v. The Richmond, 27 La. Ann. 90; Williams v. Packet Co., 3 Cent. Law J. 400; Abbott v. Bradstreet, 55 Me. 530; Clark v. Burns, 118 Mass. 275.

[68] Clark v. Burns, 118 Mass. 275; Pullman Palace-Car Co. v. Pollock, 69 Tex. 120, 5 S. W. 814; The Crystal Palace v. Vanderpool, 16 B. Mon. (Ky.) 302. See, also, Tower v. Railroad Co., 7 Hill (N. Y.) 47; Runyan v. Railroad Co., 61 N. J. Law, 537, 41 Atl. 367. The carrier is still liable for negligence. American S. S. Co. v. Bryan, 83 Pa. St. 446; Kinsley v. Railroad Co., 125 Mass. 54; Williams v. Packet Co., 3 Cent. Law J. 400.

loss is occasioned by the negligence of the passenger, there can be no recovery.

SAME—EFFECTS OF OCCUPANTS OF SLEEPING CARS.

103. Sleeping-car companies are not common carriers, either of passengers or of their baggage.

The railroad company contracts for the transportation of both the sleeping car and its occupants, and assumes the responsibilities and liabilities of the carrier. Nevertheless, a sleeping-car company is bound to use ordinary care to protect the persons and property of its occupants, and to prevent intruders from picking the pockets and carrying off the clothes of the passengers while they are asleep.[1] A sleeping-car company is not an innkeeper.[2]

BEGINNING OF LIABILITY.

104. The liability of the carrier attaches when goods are accepted by him for immediate transportation.

105. Acceptance may be presumed from conformity with custom of carrier in this respect, or may be concluded from the contract.

§ 103. [1] Pullman Car Co. v. Gardner, 3 Penny. (Pa.) 78; Efron v. Car Co., 59 Mo. App. 641; Chamberlain v. Car Co., 55 Mo. App. 474; Pullman Palace-Car Co. v. Freudenstein, 3 Colo. App. 540, 34 Pac. 578; Lewis v. Car Co., 143 Mass. 267, 9 N. E. 615; Pullman Palace-Car Co. v. Pollock, 69 Tex. 120, 5 S. W. 814; Same v. Gavin, 93 Tenn. 53, 23 S. W. 70; Whitney v. Car Co., 143 Mass. 243, 9 N. E. 619; Pullman Palace-Car Co. v. Adams (Ala.) 24 South. 921; Williams v. Webb, 22 Misc. Rep. 513, 49 N. Y. Supp. 1111; Id., 27 Misc. Rep. 508, 58 N. Y. Supp. 300; Belden v. Car Co. (Tex. Civ. App.) 43 S. W. 22; Voss v. Car Co., 16 Ind. App. 271, 43 N. E. 20, and 44 N. E. 1010; Pullman Palace-Car Co. v. Hall (Ga.) 32 S. E. 923.

[2] Pullman Palace-Car Co. v. Smith, 73 Ill. 360; Falls River & Machine Co. v. Pullman Palace-Car Co., 6 Ohio Dec. 85, 4 Ohio N. P. 26; Pullman Palace-Car Co. v. Hall (Ga.) 32 S. E. 923.

SAME—DELIVERY FOR IMMEDIATE TRANSPORTATION.

106. The responsibility of the carrier does not attach until there has been a complete delivery to him of the goods for the purpose of immediate transportation.[1]

To complete the delivery of the goods to the carrier, it is essential that the property be placed in a position to be cared for, and under the control of the carrier or his agent, with his knowledge and consent.[2] After the carrier has accepted the goods for shipment, it is, of course, immaterial what disposition he may make of them to suit his convenience. His liability as a carrier remains in force.[3] But if the goods are held by the carrier pending some further action by the shipper before they can be forwarded, the delivery is not complete, and the carrier is not liable as such.[4] So long as the goods remain in the carrier's hands for any other purpose than immediate shipment,—as, for example, awaiting some further action by the shipper,—the liability imposed is that of a warehouseman.[5] The relation between shipper and carrier in these

§§ 104–106. [1] Michigan Southern & N. I. R. Co. v. Shurtz, 7 Mich. 515; Grand Tower Mfg. & Transp. Co. v. Ullman, 89 Ill. 244; Clarke v. Needles, 25 Pa. St. 338; Merriam v. Railroad Co., 20 Conn. 354; Blossom v. Griffin, 13 N. Y. 569; St. Louis, I. M. & S. Ry. Co. v. Murphy, 60 Ark. 333, 30 S. W. 419; London & L. Fire Ins. Co. v. Rome, W. & O. R. Co., 144 N. Y. 200, 39 N. E. 79; Id., 68 Hun, 598, 23 N. Y. Supp. 231; Stewart v. Gracy, 93 Tenn. 314, 27 S. W. 664; Gulf, C. & S. F. Ry. Co. v. Trawick, 80 Tex. 270, 15 S. W. 568, and 18 S. W. 948; McCullough v. Railway Co., 34 Mo. App. 23; Barron v. Eldredge, 100 Mass. 455; Illinois Cent. R. Co. v. Smyser, 38 Ill. 354.

[2] Grosvenor v. Railroad Co., 39 N. Y. 34. See, also, Bergheim v. Railway Co., 3 C. P. Div. 221; St. Louis, I. M. & S. Ry. Co. v. Murphy, 60 Ark. 333, 30 S. W. 419.

[3] Rogers v. Wheeler, 52 N. Y. 262; Fitchburg & W. R. Co. v. Hanna, 6 Gray (Mass.) 539; Boehm v. Combe, 2 Maule & S. 172, 174; Hutch. Carr. § 89.

[4] Michigan Southern & N. I. R. Co. v. Shurtz, 7 Mich. 515; Moses v. Railroad Co., 24 N. H. 71; Rogers v. Wheeler, 52 N. Y. 262; O'Neill v. Railroad Co., 60 N. Y. 138; Wade v. Wheeler, 3 Lans. (N. Y.) 201; Barron v. Eldredge, 100 Mass. 455; Fitchburg & W. R. Co. v. Hanna, 6 Gray (Mass.) 539; St. Louis, I. M. & S. Ry. Co. v. Knight, 122 U. S. 79, 7 Sup. Ct. 1132.

[5] St. Louis, A. & T. H. R. Co. v. Montgomery, 39 Ill. 335; Barron v. Eldredge, 100 Mass. 455; Mt. Vernon Co. v. Railroad Co., 92 Ala. 296, 8 South.

circumstances is a question of law to be determined on the facts of the individual case.[6]

Place of Delivery.

The place of delivery of goods is immaterial, provided there is an acceptance of them by the carrier.[7] But, if the delivery is not made at a regular shipping point, no acceptance will be presumed.[8] There must be an actual acceptance by the carrier or an agent in full authority.[9]

SAME—ACCEPTANCE.

107. No liability attaches to the carrier until there has been an actual or constructive acceptance by him of the goods.

The acceptance may be either actual or constructive,[1] but there can be no liability on the part of the carrier, as such, until he has accepted the goods.[2] In the absence of special agreement, the reasonable rules and regulations of the carrier as to place and

687; O'Neill v. Railroad Co., 60 N. Y. 138; Schmidt v. Railway Co., 90 Wis. 504, 63 N. W. 1057.

[6] Story, Bailm. § 535; Buckland v. Express Co., 2 Redf. Am. Ry. Cas. 46; Judson v. Railroad Corp., 4 Allen (Mass.) 520; Barron v. Eldredge, 100 Mass. 455.

[7] Phillips v. Earle, 8 Pick. (Mass.) 182.

[8] Blanchard v. Isaacs, 3 Barb. (N. Y.) 388.

[9] Hutch. Carr. § 87; Cronkite v. Wells, 32 N. Y. 247; Southern Exp. Co. v. Newby, 36 Ga. 635. Cf. Witbeck v. Schuyler, 44 Barb. (N. Y.) 469; Missouri Coal & Oil Co. v. Hannibal & St. J. R. Co., 35 Mo. 84.

§ 107. [1] Merriam v. Railroad Co., 20 Conn. 354; Converse v. Transportation Co., 33 Conn. 166; Ford v. Mitchell, 21 Ind. 54; Green v. Railroad Co., 38 Iowa, 100, 41 Iowa, 410; Wright v. Caldwell, 3 Mich. 51; Packard v. Getman, 6 Cow. (N. Y.) 757; Freeman v. Newton, 3 E. D. Smith (N. Y.) 246; Illinois Cent. R. Co. v. Smyser, 38 Ill. 354; O'Bannon v. Express Co., 51 Ala. 481; Yoakum v. Dryden (Tex. Civ. App.) 26 S. W. 312; Evansville & T. H. R. Co. v. Keith, 8 Ind. App. 57, 35 N. E. 296. Delivery of bill of lading not essential. Meloche v. Railway Co. (Mich.) 74 N. W. 301; Berry v. Railway Co., 122 N. C. 1002, 30 S. E. 14; Gulf, C. & S. F. Ry. Co. v. Compton (Tex. Civ. App.) 38 S. W. 220. Delivery of warehouse receipts with order for delivery of the goods not a constructive delivery. Stewart v. Gracy, 98 Tenn. 314, 27 S. W. 664.

[2] Missouri Pac. Ry. Co. v. McFadden, 154 U. S. 155, 14 Sup. Ct. 990.

mode of shipment will govern. And so, while a deposit of goods on a dock would be insufficient to bind the carrier, in the absence of notice,[3] it would be otherwise if there were an agreement that goods might be delivered at that or any other designated place without any notice.[4] In the latter case an acceptance is presumed. There is likewise a presumption of acceptance where goods are delivered at a particular place, in accordance with an established custom or usage.[5]

TERMINATION OF LIABILITY.

108. The liability of a common carrier terminates when the transportation is completed according to the terms of the contract. Ordinarily, this occurs either by

(a) Delivery to the consignee, or

(b) Delivery to a connecting carrier.

Ordinarily, the liability of the common carrier does not terminate until his contract of carriage is fully performed.[1] Generally, the performance of the contract is accompanied by surrender of possession,[2] but the possession by the carrier, as such, may terminate, and the goods still be retained by him in the capacity of warehouseman.

[3] Packard v. Getman, 6 Cow. (N. Y.) 757; Merriam v. Railroad Co., 20 Conn. 354; or merely leaving them on his premises, Grosvenor v. Railroad Co., 39 N. Y. 34; Buckman v. Levi, 3 Camp. 414.

[4] Hutch. Carr. § 90; Wright v. Caldwell, 3 Mich. 51.

[5] Lake Shore & M. S. Ry. Co. v. Foster, 104 Ind. 293, 4 N. E. 22; Wright v. Caldwell, 3 Mich. 51; Converse v. Transportation Co., 33 Conn. 166; Merriam v. Railroad Co., 20 Conn. 354; Green v. Railroad Co., 38 Iowa, 100; Id., 41 Iowa, 410; Montgomery & E. Ry. Co. v. Kolb, 73 Ala. 396.

§ 108. [1] Stone v. Waitt, 31 Me. 409; De Mott v. Laraway, 14 Wend. (N. Y.) 225; Michigan Southern & N. I. R. Co. v. Day, 20 Ill. 375; Western Transp. Co. v. Newhall, 24 Ill. 466.

[2] But the carrier must obey instructions of shipper or owner of goods as to their delivery. Michigan Southern & N. I. R. Co. v. Day, 20 Ill. 375. The carrier's risk ends if the consignee assumes control of the goods before they have arrived at place of delivery. Stone v. Waitt, 31 Me. 409.

SAME—DELIVERY TO CONSIGNEE.

109. Delivery to the consignee is effected

(a) By a personal delivery to the consignee, when it is required by contract or custom; or

(b) By notice of arrival of goods and reasonable opportunity to remove them; or

(c) By the arrival (in most states) of the goods at the usual depot of the company.

Personal Delivery.

The conditions which, at an earlier day, made the custom of personal delivery almost universal, have nearly disappeared with the advent of improved means of transportation.[1] When, however, the same primitive means are still employed, the requirements of delivery are unchanged.[2] The duty of the different kinds of carriers as to personal delivery has been so well settled by adjudication that it is to-day a matter of law, rather than of custom. On account of the mode of transportation, personal delivery is not required of either carriers by water[3] or railroads.[4] Personal delivery is, however, required of express companies,[5] except at small stations and villages.[6]

§ 109. [1] Fenner v. Railroad Co., 44 N. Y. 505.

[2] Fisk v. Newton, 1 Denio (N. Y.) 45; Gibson v. Culver, 17 Wend. (N. Y.) 305; Storr v. Crowley, 1 McClel. & Y. 129; Hemphill v. Chenie, 6 Watts & S. (Pa.) 62; Eagle v. White. 6 Whart. (Pa.) 505; Bansemer v. Railway Co., 25 Ind. 434.

[3] Gibson v. Culver, 17 Wend. (N. Y.) 305; Cope v. Cordova, 1 Rawle (Pa.) 203; Union Steamboat Co. v. Knapp. 73 Ill. 506; Chickering v. Fowler, 4 Pick. (Mass.) 371.

[4] Hutch. Carr. (2d Ed.) § 367; Merchants' Dispatch Transp. Co. v. Hallock, 64 Ill. 284; Thomas v. Railroad Corp., 10 Metc. (Mass.) 472; Norway Plains Co. v. Railroad Co., 1 Gray (Mass.) 263; Fenner v. Railroad Co., 44 N. Y. 505.

[5] Baldwin v. Express Co., 23 Ill. 197; American Merchants' Union Exp. Co. v. Schier, 55 Ill. 140; Same v. Wolf, 79 Ill. 430; Witbeck v. Holland,

[6] Baldwin v. Express Co., 23 Ill. 197; Gulliver v. Express Co., 38 Ill. 503. It has been held that the consignor must have known of the usage when he shipped the goods, or he is not bound by it. Packard v. Earle, 113 Mass. 280.

Where a personal delivery is necessary, it must be made to the consignee in person, or to an authorized representative,[7] and at a reasonable time.[8] It must be made at his residence or office,[9] and not at the foot of the stairs leading to his apartments.[10] If, on a proper tender of delivery, the consignee refuses to accept, or to pay the reasonable charges, the carrier may store the goods,[11] and is no longer liable as a common carrier,[12] but as a warehouseman.[13] If the consignee is dead, or cannot be found after reasonable diligence, the carrier's liability as such terminates.[14] But, if the carrier knows that the goods are the property of the consignor, it is his duty to advise him of the nondelivery,[15] otherwise if he has no knowledge as to the ownership.[16]

45 N. Y. 13; American Union Exp. Co. v. Robinson, 72 Pa. St. 274; Union Exp. Co. v. Ohleman, 92 Pa. St. 323; Marshall v. Express Co., 7 Wis. 1; Southern Exp. Co. v. Armstead, 50 Ala. 350; Sullivan v. Thompson, 99 Mass. 259; Bennett v. Express Co., 12 Or. 49, 6 Pac. 160; Gary v. Express Co. (Tex. Civ. App.) 40 S. W. 845.

[7] Southern Exp. Co. v. Everett, 37 Ga. 688; Sullivan v. Thompson, 99 Mass. 259. Delivery to clerk. Sullivan v. Thompson, 99 Mass. 259. Delivery of consignment "in care of" another. United States Exp. Co. v. Hammer, 21 Ind. App. 186, 51 N. E. 953.

[8] Marshall v. Express Co., 7 Wis. 1; Merwin v. Butler, 17 Conn. 138; Hill v. Humphreys, 5 Watts & S. (Pa.) 123.

[9] Gibson v. Culver, 17 Wend. (N. Y.) 305; Fisk v. Newton, 1 Denio (N. Y.) 45; Duff v. Budd, 3 Brod. & B. 177; Storr v. Crowley, 1 McClel. & Y. 129; Hyde v. Navigation Co., 5 Term R. 389.

[10] Haslam v. Express Co., 6 Bosw. (N. Y.) 235.

[11] Schouler, Bailm. 513. And see Hawkins v. The Hattie Palmer, 63 Fed. 1015.

[12] Storr v. Crowley, 1 McClel. & Y. 129; Illinois Cent. R. Co. v. Carter, 165 Ill. 570, 46 N. E. 374; Manhattan Rubber Shoe Co. v. Chicago, B. & Q. R. Co., 9 App. Div. 172, 41 N. Y. Supp. 83.

[13] Weed v. Barney, 45 N. Y. 344; Gibson v. Express Co., 1 Hun, 387.

[14] Adams Exp. Co. v. Darnell, 31 Ind. 20; Marshall v. Express Co., 7 Wis. 1; Clendaniel v. Tuckerman, 17 Barb. 184; Roth v. Railroad Co., 34 N. Y. 548; Alabama & Tenn. R. Co. v. Kidd, 35 Ala. 209; Hasse v. Express Co., 94 Mich. 133, 53 N. W. 918.

[15] American Merchants' Union Exp. Co. v. Wolf, 79 Ill. 430; Stephenson v. Hart, 4 Bing. 476, 484.

[16] Kremer v. Express Co., 6 Coldw. (Tenn.) 356; Fisk v. Newton, 1 Denio (N. Y.) 45; Weed v. Barney, 45 N. Y. 344; Neal v. Railroad Co., 8 Jones, Law (N. C.) 482; Manhattan Rubber Shoe Co. v. Railroad Co., 9

Delivery of Goods C. O. D.

When the carrier receives goods for transportation C. O. D., the additional duty devolves on him to collect and return the money to the shipper.[17] Such liability arises, however, only from contract, express or implied;[18] but a previous course of dealing between the parties may imply such contract.[19] In all such cases the instructions of the consignor form part of the contract of delivery, and must be fully carried out.[20]

Notice of Arrival—Carriers by Water.

The carrier of goods by water need not make a personal delivery,[21] but may land them at a wharf at the port of destination.[22] If no other point is designated,[23] they should be landed at the usual wharf.[24]

Ordinarily, if there is but one consignee, or if all consignees are unanimous, the carrier should consult their convenience as to one of several wharves within the same port.[25] Where there is a num-

App. Div. 172, 41 N. Y. Supp. 83. Mr. Hutchinson thinks that when the consignee refuses to receive the goods there should be a presumption of ownership in the consignor. Hutch. Carr. (2d Ed.) § 384.

[17] United States Exp. Co. v. Keefer, 59 Ind. 263. As to the carrier's liability for the safe return of the money, see Harrington v. McShane, 2 Watts (Pa.) 443.

[18] American Exp. Co. v. Lesem, 39 Ill. 313; Chicago & N. R. Co. v. Merrill, 48 Ill. 425; Southern Ry. Co. v. Kinchen, 103 Ga. 186, 29 S. E. 816; Louisville & N. R. Co. v. Hartwell, 99 Ky. 436, 36 S. W. 183.

[19] American Exp. Co. v. Lesem, 39 Ill. 313.

[20] Murray v. Warner, 55 N. H. 546; Meyer v. Lemcke, 31 Ind. 208; Feiber v. Telegraph Co. (Com. Pl.) 3 N. Y. Supp. 116; Libby v. Ingalls, 124 Mass. 503. But the consignor may ratify a delivery not in accordance with his instructions. Rathbun v. Steamboat Co., 76 N. Y. 376.

[21] Ante, p. 282.

[22] Chickering v. Fowler, 4 Pick. (Mass.) 371; Segura v. Reed, 3 La. Ann. 695; Goodwin v. Railroad Co., 50 N. Y. 154, 10 Am. Rep. 457; Scott v. Province, 1 Pittsb. R. 189.

[23] Johnston v. Davis, 60 Mich. 56, 26 N. W. 830.

[24] Richmond v. Steamboat Co., 87 N. Y. 240; The Boston, 1 Low. 464, Fed. Cas. No. 1,671; The E. H. Fittler, 1 Low. 114, Fed. Cas. No. 4,311; Montgomery v. The Port Adelaide, 38 Fed. 753; Devato v. Barrels of Plumbago, 20 Fed. 510; Gatliffe v. Bourne, 4 Bing. (N. C.) 314; Salmon Falls Mfg. Co. v. The Tangier, 1 Cliff. 396, Fed. Cas. No. 12,266.

[25] Richmond v. Steamboat Co., 87 N. Y. 240; Dixon v. Dunham, 14 Ill.

ber of consignees, the same rule obtains as to the convenience of a majority, if the preference is made known to the master within a reasonable time.[26]

A reasonable time must be allowed by the carrier for removal of the goods, and he cannot require their removal on Sunday, or on a legal holiday on which labor is forbidden.[27] And until the goods have been placed by the carrier in a situation favorable for removal, his liability as insurer continues.[28] But the consignee is bound to act with due promptness in removing the goods, and his failure to do so will relieve the carrier of his liability as insurer.[29] The carrier must use due diligence to discover and notify the consignee of the arrival of the goods, and his failure to do so will render him liable for consequent damages.[30] The circumstances of each case control in determining what is due diligence in this respect, and is always a question of fact for the jury.[31] Reasonable notice and reasonable time are such as give the consignee time enough, under all proper and ordinary circumstances, and proceeding in the ordinary mode of those engaged in the same business,

324; The Sultana v. Chapman, 5 Wis. 454; The E. H. Fittler, 1 Low. 114, Fed. Cas. No. 4,311; O'Rourke v. Tons of Coal, 1 Fed. 619; Teilman v. Plock, 21 Fed. 349; The Mascotte, 2 C. C. A. 400, 51 Fed. 606.

[26] The E. H. Fittler, 1 Low. 114, Fed. Cas. No. 4,311; The Boston, 1 Low. 464, Fed. Cas. No. 1,671; Devato v. Barrels of Plumbago, 20 Fed. 510.

[27] Richardson v. Goddard, 23 How. 28; Gates v. Ryan, 37 Fed. 154. As to the Fourth of July, see Russell Mfg. Co. v. New Haven Steamboat Co., 50 N. Y. 121; Scheu v. Benedict, 116 N. Y. 510, 22 N. E. 1073.

[28] The Eddy, 5 Wall. 481; The Ben Adams, 2 Ben. 445, Fed. Cas. No. 1,289; Goodwin v. Railroad Co., 58 Barb. (N. Y.) 195. See, also, Norton v. The Richard Winslow, 67 Fed. 259; Kirk v. Railway Co., 59 Minn. 161, 60 N. W. 1084.

[29] Redmond v. Steamboat Co., 46 N. Y. 578; Hedges v. Railroad Co., 49 N. Y. 223; Liverpool & G. W. Steam Co. v. Suitter, 17 Fed. 695; De Grau v. Wilson, Id. 698; Constable v. Steamship Co., 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. Ed. 903.

[30] Zinn v. Steamboat Co., 49 N. Y. 442; Sherman v. Railroad Co., 64 N. Y. 254; Union Steamboat Co. v. Knapp, 73 Ill. 506; Illinois Cent. R. Co. v. Carter, 62 Ill. App. 618; Price v. Powell, 3 N. Y. 322; Barclay v. Clyde, 2 E. D. Smith (N. Y.) 95.

[31] Zinn v. Steamboat Co., 49 N. Y. 442.

to provide for the care and removal of the goods.[32] The obligations as to delivery are the same with carriers by inland waters as by sea.[33] The giving of notice may be waived by custom of the parties,[34] or a usage dispensing with notice may be shown by the carrier.[35] But no such usage, or contract waiving notice, will relieve the carrier from losses occurring through his negligence.[36]

The carrier is not justified in abandoning or exposing to injury goods which the consignee refuses or fails to accept.[37] In such a contingency it is his duty to see them properly stored, whereby the liability is shifted from the carrier to the warehouseman.[38] But, so long as he has the custody of the goods, notwithstanding the fact of a constructive delivery, it is his duty to use ordinary care to protect and preserve the property.[39]

Delivery by Railroad Companies.

In some states it is held that the rule as to delivery is the same which governs carriers by water.[40] It is said that the liability of

[32] Hale, Bailm. & Carr. p. 455; Constable v. Steamship Co., 154 U. S. 51, 14 Sup. Ct. 1062.

[33] McAndrew v. Whitlock, 52 N. Y. 40.

[34] Russell Mfg. Co. v. New Haven Steamboat Co., 50 N. Y. 121; Ely v. Same, 53 Barb. (N. Y.) 207.

[35] Gibson v. Culver, 17 Wend. (N. Y.) 305; McMasters v. Railroad Co., 69 Pa. St. 374; Dixon v. Dunham, 14 Ill. 324; Crawford v. Clark, 15 Ill. 161; Farmers' & Mechanics' Bank v. Champlain Transp. Co., 16 Vt. 52, 23 Vt. 186; Sleade v. Payne, 14 La. Ann. 453; Stone v. Rice, 58 Ala. 95; Gatliffe v. Bourne, 4 Bing. N. C. 314, 329; Garside v. Navigation Co., 4 Term R. 581.

[36] The Surrey, 26 Fed. 791; The Spartan, 25 Fed. 44, 56; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344; Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174; Mynard v. Railroad Co., 71 N. Y. 180; The Hadji, 20 Fed. 875.

[37] Hermann v. Goodrich, 21 Wis. 543; Merwin v. Butler, 17 Conn. 138; Chickering v. Fowler, 4 Pick. (Mass.) 371; Dean v. Vaccaro, 2 Head (Tenn.) 488; Shenk v. Propeller Co., 60 Pa. St. 109; Northern v. Williams, 6 La. Ann. 578; Segura v. Reed, 3 La. Ann. 695; Tarbell v. Shipping Co., 110 N. Y. 170, 17 N. E. 721; Redmond v. Steamboat Co., 46 N. Y. 578; McAndrew v. Whitlock, 52 N. Y. 40; The City of Lincoln, 25 Fed. 835, 839; Richardson v. Goddard, 23 How. 28, 39; The Grafton, 1 Blatchf. 173, Fed. Cas. No. 5,655.

[38] Redmond v. Steamboat Co., 46 N. Y. 578.

[39] Tarbell v. Shipping Co., 110 N. Y. 170, 17 N. E. 721.

[40] Moses v. Railroad Co., 32 N. H. 523; Anniston & A. R. Co. v. Ledbetter, 92 Ala. 326, 9 South. 73; Columbus & W. Ry. Co. v. Ludden, 89 Ala. 612, 7

the railroad as a carrier terminates only with its control over the goods, and that control must be deemed to continue until there has been some act which is legally equivalent to a delivery.[41] Under this rule the carrier must notify the consignee of the arrival of the goods, and allow him a reasonable time for their removal.[42] Peculiar or unusual circumstances of the consignee will not be considered in determining what is a reasonable time.[43] If the goods are held longer than a reasonable time, to suit the convenience of the consignee, the carrier becomes merely a bailee for hire.[44] So, also, if the consignee or his authorized agent is present, and sees the arrival of the goods, and has an opportunity to take them

South. 471; Louisville & N. R. Co. v. Oden, 80 Ala. 38; Missouri Pac. Ry. Co. v. Nevill, 60 Ark. 375, 30 S. W. 425; Missouri Pac. Ry. Co. v. Wichita Wholesale Grocery Co., 55 Kan. 525, 40 Pac. 899; Leavenworth, L. & G. R. Co. v. Maris, 16 Kan. 333; Jeffersonville R. Co. v. Cleveland, 2 Bush (Ky.) 468; Maignan v. Railroad Co., 24 La. Ann. 333; Buckley v. Railroad Co., 18 Mich. 121; Feige v. Railroad Co., 62 Mich. 1, 28 N. W. 685; Pinney v. Railroad Co., 19 Minn. 251 (Gil. 211); Derosia v. Railroad Co., 18 Minn. 133 (Gil. 119); Kirk v. Railway Co., 59 Minn. 161, 60 N. W. 1084; Mills v. Railroad Co., 45 N. Y. 622; Hedges v. Railroad Co., 49 N. Y. 223; Rawson v. Holland, 59 N. Y. 611; McKinney v. Jewett, 90 N. Y. 267; McDonald v. Railroad Corp., 34 N. Y. 497; Fenner v. Railroad Co., 44 N. Y. 505; Sprague v. Railroad Co., 52 N. Y. 637; Faulkner v. Hart, 82 N. Y. 413; Pelton v. Railroad Co., 54 N. Y. 214; Tarbell v. Shipping Co., 110 N. Y. 170, 17 N. E. 721; Lake Erie & W. R. Co. v. Hatch, 52 Ohio St. 408, 39 N. E. 1042; Gaines v. Insurance Co., 28 Ohio St. 418; Hirsch v. The Quaker City, 2 Disn. (Ohio) 144; Lake Erie & W. R. Co. v. Hatch, 6 Ohio Cir. Ct. R. 230; Ouimit v. Henshaw, 35 Vt. 604; Blumenthal v. Brainerd, 38 Vt. 402; Winslow v. Railroad Co., 42 Vt. 700; Wood v. Crocker, 18 Wis. 345; Parker v. Railway Co., 30 Wis. 689; Lemke v. Railway Co., 39 Wis. 449; Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. 318. This is also the rule in England. Mitchell v. Railway Co., L. R. 10 Q. B. 256.

[41] Moses v. Railroad Co., 32 N. H. 523.

[42] Roth v. Railroad Co., 34 N. Y. 548; Hedges v. Railroad Co., 49 N. Y. 223; Lemke v. Railway Co., 39 Wis. 449; Columbus & W. Ry. Co. v. Ludden, 89 Ala. 612, 7 South. 471.

[43] Moses v. Railroad Co., 32 N. H. 523; Wood v. Crocker, 18 Wis. 345; Lemke v. Railway Co., 39 Wis. 449; Derosia v. Railroad Co., 18 Minn. 133 (Gil. 119); Pinney v. Railroad Co., 19 Minn. 251 (Gil. 211); Railroad Co. v. Maris, 16 Kan. 333.

[44] Moses v. Railroad Co., 32 N. H. 523; Frank v. Railway Co., 57 Mo. App. 181.

away.[45] And in such circumstances the carrier may charge a reasonable amount for storage.[46]

Arrival at Depot.

Under the Massachusetts rule the liability of the railroad company as a common carrier ceases when the goods arrive at the destination, and are transferred from the cars to the warehouse of the company.[47] This rule has been followed in a large number of states, and may now be considered as embodying the generally accepted doctrine on this point.[48] If it is the duty of the consignee to unload the goods from the car in which they arrive, the carrier's liability does not terminate until it has placed the car in a position suitable for the purpose.[49]

[45] Moses v. Railroad Co., 32 N. H. 523; Miller v. Mansfield, 112 Mass. 260; Barron v. Eldredge, 100 Mass. 455; Goold v. Chapin, 20 N. Y. 259; Weed v. Barney, 45 N. Y. 344; Tarbell v. Shipping Co., 110 N. Y. 170, 17 N. E. 721; Brown v. Railway Co., 54 N. H. 535; Kennedy v. Railroad Co., 74 Ala. 430; Alabama & T. R. Co. v. Kidd, 35 Ala. 209; Cairns v. Robins, 8 Mees. & W. 258; Mitchell v. Railway Co., L. R. 10 Q. B. 256.

[46] White v. Humphrey, 11 Q. B. 43; Norfolk & W. R. Co. v. Adams, 90 Va. 393, 18 S. E. 673; Baumbach v. Railway Co., 4 Tex. Civ. App. 650, 23 S. W. 693; Cairns v. Robins, 8 Mees. & W. 258.

[47] Norway Plains Co. v. Boston & M. R. Co., 1 Gray (Mass.) 263; Rice v. Hart, 118 Mass. 201.

[48] Jackson v. Railway Co., 23 Cal. 268 (but see Wilson v. Railroad Co., 94 Cal. 166, 29 Pac. 861); Southwestern R. Co. v. Felder, 46 Ga. 433; Rome R. Co. v. Sullivan, 14 Ga. 277, 282; Porter v. Railroad Co., 20 Ill. 407; Richards v. Railroad Co., Id. 404; Chicago & A. R. Co. v. Scott, 42 Ill. 132; Merchants' Dispatch Transp. Co. v. Hallock, 64 Ill. 284; Rothschild v. Railroad Co., 69 Ill. 164; Bansemer v. Railway Co., 25 Ind. 434; Cincinnati & A. L. R. Co. v. McCool, 26 Ind. 140; Pittsburgh, C. & St. L. Ry. Co. v. Nash, 43 Ind. 423, 426; Mohr v. Railroad Co., 40 Iowa, 579; Francis v. Railroad Co., 25 Iowa, 60; Independence Mills Co. v. Burlington, C. R. & N. Ry. Co., 72 Iowa, 535, 34 N. W. 320; Norway Plains Co. v. Boston & M. R. Co., 1 Gray (Mass.) 263; Rice v. Hart, 118 Mass. 201; Holtzclaw v. Duff, 27 Mo. 392; Gashweiler v. Railway Co., 83 Mo. 112; Rankin v. Railroad Co., 55 Mo. 167; Buddy v. Railway Co., 20 Mo. App. 206; Pindell v. Railway Co., 34 Mo. App. 675, 683; Neal v. Railroad Co., 53 N. C. 482; Morris & E. R. Co. v. Ayres, 29 N. J. Law, 393; McCarty v. Railroad Co., 30 Pa. St. 247; Shenk v. Propeller Co., 60 Pa. St. 109; Hipp v. Railway Co., 50 S. C. 129, 27 S. E. 623.

[49] Independence Mills Co. v. Burlington, C. R. & N. Ry. Co., 72 Iowa. 535, 34 N. W. 320; East Tennessee, V. & G. R. Co. v. Hunt, 15 Lea (Tenn.) 261.

Baggage.

In the case of baggage the passenger is entitled to a reasonable length of time after its arrival in which to remove it, and during this interval the liability of the carrier as an insurer continues.[50] The decisions are by no means unanimous in determining the length of time that may be called reasonable in this connection, but it may be safely stated that it is generally held to be much less than that allowed for the removal of freight,[51] and in several cases where the passenger and baggage arrived at night it was held an unreasonable delay to postpone the removal of the baggage until the following morning.[52] If delay occurs by reason of the fault of the carrier, the latter's liability is not, of course, permitted to be terminated thereby.[53] And, in any event, the carrier must use ordinary care to protect the baggage, and is liable, even after the lapse of a reasonable time, as a warehouseman.[54]

[50] Ouimit v. Henshaw, 35 Vt. 604; Hoeger v. Railway Co., 63 Wis. 100, 23 N. W. 435; Pennsylvania Co. v. Liveright, 14 Ind. App. 318, 41 N. E. 350; Hurwitz v. Packet Co. (City Ct. N. Y.) 56 N. Y. Supp. 379; Patscheider v. Railway Co., 3 Exch. Div. 153.

[51] Chicago & A. R. Co. v. Addizoat, 17 Ill. App. 632; Patscheider v. Railway Co., 3 Exch. Div. 153.

[52] Jacobs v. Tutt, 33 Fed. 412; Louisville, C. & L. R. Co. v. Mahan, 8 Bush (Ky.) 184; Roth v. Railroad Co., 34 N. Y. 548; Ross v. Railroad Co., 4 Mo. App. 583; Graves v. Railroad Co., 29 App. Div. 591, 51 N. Y. Supp. 636; Kansas City, Ft. S. & M. Ry. Co. v. McGahey, 63 Ark. 344, 38 S. W. 659. Arrival on Sunday, notwithstanding a statute prohibiting travel on that day, will not excuse delay. Jones v. Transportation Co., 50 Barb. (N. Y.) 193; Hoeger v. Railway Co., 63 Wis. 100, 23 N. W. 435; Van Horn v. Kermit, 4 E. D. Smith (N. Y.) 453; Burnell v. Railroad Co., 45 N. Y. 184; Holdridge v. Railroad Co., 56 Barb. (N. Y.) 191.

[53] Dininny v. Railroad Co., 49 N. Y. 546; Kansas City, Ft. S. & G. R. Co. v. Morrison, 34 Kan. 502, 9 Pac. 225; Prickett v. New Orleans Anchor Line, 13 Mo. App. 436.

[54] Burnell v. Railroad Co., 45 N. Y. 184; Mattison v. Railroad Co., 57 N. Y. 552; Fairfax v. Railroad Co., 67 N. Y. 11; Chicago, R. I. & P. R. Co. v. Fairclough, 52 Ill. 106; Bartholomew v. Railroad Co., 53 Ill. 227; Mote v. Railroad Co., 27 Iowa, 22; Rome R. R. v. Wimberly, 75 Ga. 316; Kansas City, Ft. S. & M. R. Co. v. Patten, 3 Kan. App. 338, 45 Pac. 108. As to what is a proper place to store baggage, see Hoeger v. Railway Co., 63 Wis. 100, 23 N. W. 435; St. Louis & C. R. Co. v. Hardway, 17 Ill. App. 321.

Since the baggage, in the ordinary course of transportation, arrives at the same time as the passenger, no notice of its arrival is held to be necessary.

SAME—DELIVERY TO CONNECTING CARRIER.

110. The initial carrier is not liable for losses occurring after the goods have been delivered to a connecting carrier, unless he has undertaken by special contract to convey the goods to their destination.

So far as the common law is concerned, the relations and obligations existing between the initial carrier and the connecting carrier, as to the reception and delivery of the goods, are the same as those existing between the carrier and the individual shipper.[1]

Who is a Connecting Carrier.

A connecting carrier is one whose line forms one of the links in the chain of transportation between the point of reception and destination. The connecting carrier may be the agent of either the first carrier, where the contract of carriage is to deliver at the destination, or the agent of the shipper, where the contract is to deliver to the next carrier.[2]

The Delivery.

Where, under the circumstances, or by virtue of the contract, the carrier is obligated to carry safely only to the end of his own line, his liability as an insurer is not terminated until a complete delivery has been made to the connecting carrier. This additional obligation is assumed by the reception of the goods billed to a point remote from the initial line.[3] To constitute a delivery of this na-

§ 110. [1] Shelbyville R. Co. v. Railroad Co., 82 Ky. 541.

[2] Nanson v. Jacob, 12 Mo. App. 125, 127; Western & A. R. Co. v. Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916. But see Missouri Pac. Ry. Co. v. Wichita Wholesale Grocery Co., 55 Kan. 525, 40 Pac. 899; Union Pac. Ry. Co. v. Vincent (Neb.) 78 N. W. 457; St. Louis S. W. Ry. Co. v. Elgin Condensed Milk Co., 74 Ill. App. 619.

[3] Myrick v. Railroad Co., 107 U. S. 102, 1 Sup. Ct. 425; Hoffman v. Railway Co. (Kan. App.) 56 Pac. 331; American Roofing Co. v. Memphis & C. Packet Co., 5 Ohio N. P. 146; Fremont, E. & M. V. R. Co. v. Waters, 50 Neb. 592, 70 N. W. 225; Hoffman v. Railroad Co., 85 Md. 391, 37 Atl. 214. Ship-

ture, the act must be so complete as to impose on the connecting line the liability of an insuring carrier.[4] This is in accordance with prevailing custom, and imposes no hardship. When the shipper surrenders possession and control of his goods, it is but right that the responsibility for their safety should be definitely placed and continued until they arrive at their destination.

Through Transportation—Liability for.

The common carrier is not obligated to transport goods beyond the terminus of its own line, or to contract for such further transportation.[5] But it may, by express contract, enlarge its liability, and even become an insurer of the goods during the entire course of their journey, and while passing over the lines of connecting carriers.[6] In such cases the latter become agents of the initial car-

ping directions must be delivered. Bosworth v. Railway Co., 30 C. C. A. 541, 87 Fed. 72. If the goods are forwarded by a different carrier, contrary to the shipper's orders, the initial carrier is liable for any loss sustained. Isaacson v. Raiload Co., 94 N. Y. 278; Johnson v. Railroad Co., 33 N. Y. 610; Georgia R. Co. v. Cole, 68 Ga. 623. The carrier undertaking to forward from the terminus of his own line must transmit all special instructions or become liable for resulting loss. Little Miami R. Co. v. Washburn, 22 Ohio St. 324; Dana v. Railroad Co., 50 How. Prac. (N. Y.) 428. A carrier acting as forwarding agent for the owner of goods, in transmitting directions to subsequent carriers, is liable only for want of reasonable diligence and care. Northern R. Co. v. Railroad Co., 6 Allen (Mass.) 254.

[4] Wehmann v. Railway Co., 58 Minn. 22, 59 N. W. 546. A mere notification to the succeeding carrier to take the goods, which he does not do, is not a delivery. Goold v. Chapin, 20 N. Y. 259. See, also, Condon v. Railroad Co., 55 Mich. 218, 21 N. W. 321; Lawrence v. Railroad Co., 15 Minn. 390 (Gil. 313); Wood v. Railway Co., 27 Wis. 541; Conkey v. Railway Co., 31 Wis. 619. The fact that a part of the goods were taken from the initial carrier, and the rest of the goods were pointed out, and ready to be taken, does not necessarily make a constructive delivery of the whole. Gass v. Railroad Co., 99 Mass. 220. Where there are no public means of transportation beyond terminus of initial carrier's line, he may properly deliver to warehouseman or wharfinger. Hermann v. Goodrich, 21 Wis. 543.

[5] Berg v. Railroad Co., 30 Kan. 561, 2 Pac. 639; Cincinnati, N. O. & T. P. Ry. Co. v. N. K. Fairbanks & Co., 33 C. C. A. 611, 90 Fed. 467.

[6] Burtis v. Railroad Co., 24 N. Y. 269, 272; Root v. Railroad Co., 45 N. Y. 524, 532; Quimby v. Vanderbilt, 17 N. Y. 306; Hill Mfg. Co. v. Boston & L. R. Corp., 104 Mass. 122; Gray v. Jackson, 51 N. H. 9; Phillips v. Railroad Co., 78 N. C. 294; Railroad Co. v. Pratt, 22 Wall. 123; Woodward v. Railroad Co., 1 Biss. 403, Fed. Cas. No. 18,006; Atchison, T. & S. F. Ry.

rier, for whose default it is liable. Such a contract, however, will not be inferred from ambiguous agreements or doubtful circumstances. It must be supported by clear and satisfactory evidence.[7] It is not essential that it be framed in express words. The extended liability may be raised by implication from strong circumstances or special words in the bill of lading or receipt.[8] The following circumstances, in the courts following the general rule that the carrier is prima facie liable for losses on its own line, are evidence, but not conclusive, of a through contract:[9] The use of the words "to forward," or "to be forwarded," in the carrier's receipt;[10] a receipt or bill of lading which purports to be a through contract;[11] the giving of a through rate;[12] the prepayment of freight

Co. v. Grant, 6 Tex. Civ. App. 674, 26 S. W. 286; Central Railroad & Banking Co. v. Georgia Fruit & Vegetable Exchange, 91 Ga. 389, 17 S. E. 904; Benett v. Steamboat Co., 6 C. B. 775. But see dicta per contra in Hood v. Railroad Co., 22 Conn. 502; Converse v. Transportation Co., 33 Conn. 166; Naugatuck R. Co. v. Waterbury Button Co., 24 Conn. 468; Elmore v. Railroad Co., 23 Conn. 457. As to liability for delay, see International & G. N. Ry. Co. v. Anderson, 3 Tex. Civ. App. 8, 21 S. W. 691.

[7] Myrick v. Railroad Co., 107 U. S. 102, 1 Sup. Ct. 425. Making through rate will not make carrier liable for acts of connecting carrier. Gulf, W. T. & P. Ry. Co. v. Griffith (Tex. Civ. App.) 24 S. W. 362.

[8] Berg v. Steamship Co., 5 Daly (N. Y.) 394; Robinson v. Transportation Co., 45 Iowa, 470; Piedmont Mfg. Co. v. Columbia & G. R. Co., 19 S. C. 353; Illinois Cent. R. Co. v. Kerr, 68 Miss. 14, 8 South. 330; Candee v. Railroad Co., 21 Wis. 582; International & G. N. Ry. Co. v. Tisdale, 74 Tex. 8, 11 S. W. 900; Railroad Co. v. Androscoggin Mills, 22 Wall. 594. And see Camden & A. R. Co. v. Forsyth, 61 Pa. St. 81.

[9] Root v. Railroad Co., 45 N. Y. 524, 532; Hill Mfg. Co. v. Boston & L. R. Corp., 104 Mass. 122; Camden & A. R. Co. v. Forsyth, 61 Pa. St. 81; Piedmont Mfg. Co. v. Columbia & G. R. Co., 19 S. C. 353; Woodward v. Railroad Co., 1 Biss. 403, Fed. Cas. No. 18,006.

[10] Reed v. Express Co., 48 N. Y. 462; Mercantile Mut. Ins. Co. v. Chase, 1 E. D. Smith (N. Y.) 115; Wilcox v. Parmelee, 3 Sandf. (N. Y.) 610; Schroeder v. Railroad Co., 5 Duer (N. Y.) 55; Buckland v. Express Co., 97 Mass. 124; Nashua Lock Co. v. Worcester & N. R. Co., 48 N. H. 339; Cutts v. Brainerd, 42 Vt. 566; East Tennessee & V. R. Co. v. Rogers, 6 Heisk. (Tenn.) 143; St. Louis, K. C. & N. Ry. Co. v. Piper, 13 Kan. 376; Colfax Mountain Fruit Co. v. Southern Pac. Co., 118 Cal. 648, 50 Pac. 775, 40 Lawy. Rep. Ann. 78.

[11] Helliwell v. Railway Co., 7 Fed. 68; Richardson v. The Charles P.

[12] See note 12 on following page.

for the entire distance;[13] the carrier's holding out to convey over the entire distance;[14] or an agreement that the goods be carried through in a particular car.[15] In the states following the English rule, these circumstances are conclusive of a through contract.[16] In the large majority of our states the carrier does not assume this

Chouteau, 37 Fed. 532; Harp v. The Grand Era, 1 Woods, 184, Fed. Cas. No. 6,084; Myrick v. Railroad Co., 9 Biss. 44, Fed. Cas. No. 10,001; Houston & T. C. R. Co. v. Park, 1 White & W. Civ. Cas. Ct. App. § 332; Texas & P. R. Co. v. Parrish, Id. § 942; Loomis v. Railway Co., 17 Mo. App. 340; Moore v. Henry, 18 Mo. App. 35; Wiggins Ferry Co. v. Chicago & A. R. Co., 73 Mo. 389.

[12] Weed v. Railroad Co., 19 Wend. (N. Y.) 534; Berg v. Steamship Co., 5 Daly (N. Y.) 394; Clyde v. Hubbard, 88 Pa. St. 358; Candee v. Railroad Co., 21 Wis. 589; Aiken v. Railway Co., 68 Iowa, 363, 27 N. W. 281; Railroad Co. v. Androscoggin Mills, 22 Wall. 594. But see McCarthy v. Railroad Co., 9 Mo. App. 159; East Tennessee & G. R. Co. v. Montgomery, 44 Ga. 278.

[13] Berg v. Steamship Co., 5 Daly (N. Y.) 394; Candee v. Railroad Co., 21 Wis. 589; Weed v. Railroad Co., 19 Wend. (N. Y.) 534; Piedmont Mfg. Co. v. Columbia & G. R. Co., 19 S. C. 353; Illinois Cent. R. Co. v. Kerr, 68 Miss. 14, 8 South. 330.

[14] Lawson, Bailm. § 103; Root v. Railroad Co., 45 N. Y. 524; Collender v. Dinsmore, 55 N. Y. 200; Toledo, P. & W. Ry. Co. v. Merriman, 52 Ill. 123; Hill Mfg. Co. v. Boston & L. R. Corp., 104 Mass. 122; Robinson v. Transportation Co., 45 Iowa, 470; Harris v. Railroad Co. (R. I.) 16 Atl. 512; St. John v. Express Co., 1 Woods, 612, Fed. Cas. No. 12,228; Chicago, St. L. & P. R. Co. v. Wolcott, 141 Ind. 267, 39 N. E. 451; Eckles v. Railway Co., 72 Mo. App. 296.

[15] International & G. N. Ry. Co. v. Tisdale, 74 Tex. 8, 11 S. W. 900.

[16] Hutch. Carr. (2d Ed.) § 152; Ohio & M. R. Co. v. Emrich, 24 Ill. App. 245; Wabash, St. L. & P. Ry. Co. v. Jaggerman, 115 Ill. 407, 4 N. E. 641; Illinois Cent. R. Co. v. Copeland, 24 Ill. 332; Same v. Johnson, 34 Ill. 389; Same v. Frankenberg, 54 Ill. 88; Central Railroad & Banking Co. v. Georgia Fruit & Vegetable Exchange, 91 Ga. 389, 17 S. E. 904; Adams Exp. Co. v. Wilson, 81 Ill. 339; Weed v. Railroad Co., 19 Wend. (N. Y.) 534; Hansen v. Railroad Co., 73 Wis. 346, 41 N. W. 529; Angle v. Railroad Co., 9 Iowa, 487; Mulligan v. Railway Co., 36 Iowa, 181; Pereira v. Railroad Co., 66 Cal. 92, 4 Pac. 988; Halliday v. Railway Co., 74 Mo. 159; Atlanta & W. P. R. Co. v. Texas Grate Co., 81 Ga. 602, 9 S. E. 600; Baltimore & O. R. Co. v. Campbell, 36 Ohio St. 647; Carter v. Peck, 4 Sneed (Tenn.) 203; Western & A. R. Co. v. McElwee, 6 Heisk. (Tenn.) 208; East Tennessee & V. R. Co. v. Rogers, Id. 143; Louisville & N. R. Co. v. Campbell, 7 Heisk. (Tenn.) 253.

extended liability by the mere acceptance of goods billed to a point beyond its own terminals.[17]

English Rule.

The English rule, as laid down in Muschamp v. Lancaster & P. J. Ry. Co.,[18] holds that when the carrier receives goods billed to a particular place, and fails to limit his responsibility by a positive agreement, he impliedly undertakes to carry them to the point of destination, although it may lie beyond the limits within which

[17] Elmore v. Railroad Co., 23 Conn. 457; Hood v. Railroad Co., 22 Conn. 502; Naugatuck R. Co. v. Waterbury Button Co., 24 Conn. 468; Converse v. Transportation Co., 33 Conn. 166; Savannah, F. & W. Ry. Co. v. Harris, 26 Fla. 148, 7 South. 544; Pittsburgh, C. & St. L. Ry. Co. v. Morton, 61 Ind. 539; Hill v. Railroad Co., 60 Iowa, 196, 14 N. W. 249; Perkins v. Railroad Co., 47 Me. 573; Skinner v. Hall, 60 Me. 477; Inhabitants of Plantation No. 4 v. Hall, 61 Me. 517; Baltimore & O. R. Co. v. Schumacher, 29 Md. 168, 176; Nutting v. Railroad Co., 1 Gray (Mass.) 502; Darling v. Railroad Corp., 11 Allen (Mass.) 295; Burroughs v. Railroad Co., 100 Mass. 26; Lowell Wire-Fence Co. v. Sargent, 8 Allen (Mass.) 189; Pendergast v. Express Co., 101 Mass. 120; Pratt v. Railroad Co., 102 Mass. 557; Crawford v. Railroad Ass'n, 51 Miss. 222; McMillan v. Railroad Co., 16 Mich. 79; Detroit & B. C. R. Co. v. McKenzie, 43 Mich. 609, 5 N. W. 1031; Rickerson Roller-Mill Co. v. Grand Rapids & I. R. Co., 67 Mich. 110, 34 N. W. 269; Irish v. Railway Co., 19 Minn. 376 (Gil. 323); Lawrence v. Railroad Co., 15 Minn. 390 (Gil. 313); Grover & Baker Sewing-Mach. Co. v. Missouri Pac. Ry. Co., 70 Mo. 672; Van Santvoord v. St. John, 6 Hill (N. Y.) 157; Lamb v. Transportation Co., 46 N. Y. 271; Condict v. Railway Co., 54 N. Y. 500; Rawson v. Holland, 59 N. Y. 611; Reed v. Express Co., 48 N. Y. 462; Phillips v. Railroad Co., 78 N. C. 294; Lindley v. Railroad, 88 N. C. 547; Knott v. Railroad Co., 98 N. C. 73, 3 S. E. 735; Camden & A. R. Co. v. Forsyth, 61 Pa. St. 81; American Exp. Co. v. Second Nat. Bank, 69 Pa. St. 394; Pennsylvania Cent. R. Co. v. Schwarzenberger, 45 Pa. St. 408; Clyde v. Hubbard, 88 Pa. St. 358; Knight v. Railroad Co., 13 R. I. 572; Harris v. Railway Co., 15 R. I. 371, 5 Atl. 305; Piedmont Mfg. Co. v. Columbia & G. R. Co., 19 S. C. 353 (but see Kyle v. Railroad Co., 10 Rich. Law [S. C.] 382); McConnell v. Railroad Co., 86 Va. 248, 9 S. E. 1006; Myrick v. Railroad Co., 107 U. S. 102, 1 Sup. Ct. 425; Stewart v. Railroad Co., 1 McCrary, 312, 3 Fed. 768; Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. 318; Ogdenburg & L. C. R. Co. v. Pratt, 22 Wall. 123; St. Louis Ins. Co. v. St. Louis, V., T. H. & I. R. Co., 104 U. S. 146; Wichita Val. Ry. Co. v. Swenson (Tex. Civ. App.) 25 S. W. 47.

[18] 8 Mees. & W. 421.

he professes to operate.[19] This rule is also followed in some American courts.[20] The English cases go so far as to hold that in these circumstances the first carrier only can be held liable for a loss occurring on connecting lines.[21]

Authority of Agents to Make Through Contracts.

A general freight agent of a company may bind his principal by a contract to carry beyond the limits of his own line,[22] but ordinarily, and in the absence of previous dealings raising a presumption of authority, a station agent has no such power.[23]

Presumption and Burden of Proof.

As the shipper, after the goods have passed from his possession and control, has no means of proving how the loss occurred, certain presumptions are raised in his favor.[24] In the first instance,

[19] Watson v. Railway Co., 3 Eng. Law & Eq. 497; Mytton v. Railway Co., 28 Law J. Exch. 385; Coxon v. Railway Co., 5 Hurl. & N. 274; Bristol & E. Ry. Co. v. Collins, Id. 969, 29 Law J. Exch. 41.

[20] Mobile & G. R. Co. v. Copeland, 63 Ala. 219; Louisville & N. R. Co. v. Meyer, 78 Ala. 597; Falvey v. Railroad Co., 76 Ga. 597; Rome R. Co. v. Sullivan, 25 Ga. 228; Mosher v. Express Co., 38 Ga. 37; Southern Exp. Co. v. Shea, Id. 519; Cohen v. Express Co., 45 Ga. 148; Illinois Cent. R. Co. v. Copeland, 24 Ill. 332; Illinois Cent. R. Co. v. Johnson, 34 Ill. 389; Illinois Cent. R. Co. v. Frankenberg, 54 Ill. 88; Chicago & N. W. R. Co. v. People, 56 Ill. 365; United States Exp. Co. v. Haines, 67 Ill. 137; Adams Exp. Co. v. Wilson, 81 Ill. 339; Erie Ry. Co. v. Wilcox, 84 Ill. 239; Angle v. Railroad Co., 9 Iowa, 487; Mulligan v. Railway Co., 36 Iowa, 181; Cincinnati, H. & D. R. Co. v. Spratt, 2 Duv. (Ky.) 4; Nashua Lock Co. v. Worcester & N. R. Co., 48 N. H. 339; Western & A. R. Co. v. McElwee, 6 Heisk. (Tenn.) 208; East Tennessee & V. R. Co. v. Rogers, Id. 143; Louisville & N. R. Co. v. Campbell, 7 Heisk. (Tenn.) 253; Carter v. Peck, 4 Sneed (Tenn.) 203; East Tennessee & G. R. Co. v. Nelson, 1 Cold. (Tenn.) 272.

[21] Collins v. Railway Co., 11 Exch. 790; Barter v. Wheeler, 49 N. H. 9; Chicago & N. W. Ry. Co. v. Northern Line Packet Co., 70 Ill. 217; Chesapeake & O. R. Co. v. Radbourne, 52 Ill. App. 203; Southern Exp. Co. v. Hess, 53 Ala. 19; Coxon v. Railway Co., 5 Hurl. & N. 274; Mytton v. Railway Co., 4 Hurl. & N. 615.

[22] Grover & Baker Sewing-Mach. Co. v. Missouri Pac. Ry. Co., 70 Mo. 672; White v. Railway Co., 19 Mo. App. 400.

[23] Burroughs v. Railroad Co., 100 Mass. 26; Turner v. Railroad Co., 20 Mo. App. 632; Grover & Baker Sewing-Mach. Co. v. Missouri Pac. Ry. Co., 70 Mo. 672; White v. Railway Co., 19 Mo. App. 400.

[24] Laughlin v. Railway Co., 28 Wis. 204.

it is essential only that the plaintiff show a delivery in good order to the first carrier, and either nondelivery or delivery in a damaged condition to the consignee.[25] In an action against the first carrier the latter may show that the goods were delivered to the next carrier in good order, or in the same condition in which he received them.[26] A prima facie case is made out against the last carrier by showing that the goods were delivered to the initial carrier in good condition; the presumption being, in the absence of proof to the contrary,[27] that this condition continued, and that the injury occurred on the last line.[28]

EXCUSES FOR NONDELIVERY.

111. Failure to deliver goods according to the contract of carriage is excused

(a) When a superior adverse claim to the goods is asserted.

(b) When there is a stoppage in transitu by the consignor.

(c) When the delivery is prevented by an excepted peril.

[25] Smith v. Railroad Co., 43 Barb. (N. Y.) 225; Brintnall v. Railroad Co., 32 Vt. 665; Missouri Pac. Ry. Co. v. Breeding (Tex. App.) 16 S. W. 184; Goodman v. Navigation Co., 22 Or. 14, 28 Pac. 898.

[26] Laughlin v. Railway Co., 28 Wis. 204; Smith v. Railroad Co., 43 Barb. (N. Y.) 225; Brintnall v. Railroad Co., 32 Vt. 665; Gulf, C. & S. F. Ry. Co. v. Malone (Tex. Civ. App.) 25 S. W. 1077.

[27] Gulf, C. & S. F. R. Co. v. Malone (Tex. Civ. App.) 25 S. W. 1077; Texas & P. Ry. Co. v. Barnhart, 5 Tex. Civ. App. 601, 23 S. W. 801; Louisville & N. R. Co. v. Jones, 100 Ala. 263, 14 South. 114; Forrester v. Railroad Co., 92 Ga. 699, 19 S. E. 811; Georgia Railroad & Banking Co. v. Forrester, 96 Ga. 428, 23 S. E. 416; Newport News & M. V. R. Co. v. Mendell (Ky.) 34 S. W. 1081; Farmington Mercantile Co. v. Chicago, B. & Q. R. Co., 166 Mass. 154, 44 N. E. 131; Louisville & N. R. Co. v. Tennessee Brewing Co., 96 Tenn. 677, 36 S. W. 392; Morganton Mfg. Co. v. Ohio R. & C. Ry. Co., 121 N. C. 514, 28 S. E. 474.

[28] Laughlin v. Railway Co., 28 Wis. 204; Mobile & O. R. Co. v. Tupelo Furniture Mfg. Co., 67 Miss. 35, 7 South. 279; Texas & P. Ry. Co. v. Barnhart, 5 Tex. Civ. App. 601, 23 S. W. 801; Texas & P. R. Co. v. Adams, 78 Tex. 372, 14 S. W. 666; Lin v. Railroad, 10 Mo. App. 125; Central Railroad & Banking Co. v. Bayer, 91 Ga. 115, 16 S. E. 953; International & G. N. Ry. Co. v. Foltz, 3 Tex. Civ. App. 644, 22 S. W. 541; Faison v. Railway Co., 69 Miss. 569, 13 South. 37. But see International & G. N. Ry. Co. v. Wolf, 3 Tex. Civ. App. 383, 22 S. W. 187; Western Ry. Co. v. Harwell, 97 Ala. 341, 11 South. 781.

SAME—SUPERIOR ADVERSE CLAIM.

112. The carrier acts at his peril in refusing to recognize a superior adverse claim, by whomsoever made.

Ordinarily, the carrier is bound by the presumption that the person who delivers the goods for carriage is fully representative of the owner, and his title is not open to dispute by the consignor. His directions as to delivery are authoritative, and must be followed.[1] But this presumption holds good only as to the voluntary action of the carrier. If the assertion of an adverse superior title is made by a third party, it does not apply.[2] If the goods have been demanded by and delivered to a third party, the carrier may always defend such delivery by showing the superior title in the third party.[3] Moreover, the carrier cannot be held liable if he has delivered the goods according to contract before claim is made by the real owner.[4]

SAME—STOPPAGE IN TRANSITU.

113. Nondelivery to the consignee is always excused by a stoppage in transitu by the consignor.[1]

The right of stoppage in transitu exists whenever an unpaid vendor learns of the insolvency of the consignee before the goods

§§ 111–112. [1] Sheridan v. New Quay Co., 4 C. B. (N. S.) 618; Laclouch v. Towle, 3 Esp. 115.

[2] Wells v. Express Co., 55 Wis. 23, 11 N. W. 537, and 12 N. W. 441; Western Transp. Co. v. Barber, 56 N. Y. 544; Bates v. Stanton, 1 Duer (N. Y.) 79; Floyd v. Bovard, 6 Watts & S. (Pa.) 75; King v. Richards, 6 Whart. (Pa.) 418; The Idaho, 93 U. S. 575; Rosenfield v. Express Co., 1 Woods, 131, Fed. Cas. No. 12,060; Great Western Ry. Co. v. Crouch, 3 Hurl. & N. 183; Buroughes v. Bayne, 5 Hurl. & N. 296; Taylor v. Plumer, 3 Maule & S. 562.

[3] Sheridan v. New Quay Co., 4 C. B. (N. S.) 618; American Exp. Co. v. Greenhalgh, 80 Ill. 68; Young v. Railway Co., 80 Ala. 100; Wolfe v. Railway Co., 97 Mo. 473, 11 S. W. 49; Hardman v. Willcock, 9 Bing. 382; Biddle v. Bond, 6 Best & S. 225; Cheesman v. Exall, 6 Exch. 341; Dixon v. Yates, 5 Barn. & Adol. 340.

[4] Sheridan v. New Quay Co., 4 C. B. (N. S.) 618.

§ 113. [1] Hutch. Carr. (2d Ed.) § 409; McFetridge v. Piper, 40 Iowa, 627; Reynolds v. Railroad Co., 43 N. H. 580; Newhall v. Vargas, 13 Me. 93.

have been delivered,[2] but the carrier is not bound to inform himself as to such insolvency before delivering the goods to the consignor, on his demand.[3] To excuse the carrier for nondelivery to the consignee, the notice of stoppage in transit must be made while the goods are actually in transit.[4] Transit, within this rule, is deemed to continue until the buyer, or his agent in that behalf, takes delivery of the goods from the carrier either before or after their arrival at the appointed destination,[5] or after the arrival of the goods at their appointed destination the carrier attorns to the buyer, and continues in possession as bailee for the buyer,[6] or the carrier wrongfully refuses to deliver the goods to the buyer or his agent in that behalf.[7]

[2] Rowley v. Bigelow, 12 Pick. (Mass.) 307, 313; Durgy Cement & Umber Co. v. O'Brien, 123 Mass. 12; Seymour v. Newton, 105 Mass. 272; Muller v. Pondir, 55 N. Y. 325; Gossler v. Schepeler, 5 Daly (N. Y.) 476; Gwyn v. Railroad Co., 85 N. C. 429; Benedict v. Schaettle, 12 Ohio St. 515; Reynolds v. Railroad Co., 43 N. H. 580; Loeb v. Peters, 63 Ala. 243; Secomb v. Nutt, 14 B. Mon. (Ky.) 324; Millard v. Webster, 54 Conn. 415, 8 Atl. 470. Where the right does not exist, see Lester v. Railroad Co., 73 Hun, 398, 26 N. Y. Supp. 206.

[3] Hale, Bailm. & Carr. p. 480; The Vidette, 34 Fed. 396; The E. H. Pray, 27 Fed. 474; Allen v. Railroad Co., 79 Me. 327, 9 Atl. 895; Bloomingdale v. Railroad Co., 6 Lea (Tenn.) 616; The Tigress, Brown & L. 45.

[4] Schotsmans v. Railroad Co., 2 Ch. App. 332; Rowley v. Bigelow, 12 Pick. (Mass.) 307.

[5] Seymour v. Newton, 105 Mass. 272; Kingman v. Denison, 84 Mich. 608, 48 N. W. 26; White v. Mitchell, 38 Mich. 390; Jenks v. Fulmer, 160 Pa. St. 527, 28 Atl. 841; Grive v. Dunham, 60 Iowa, 108, 14 N. W. 130; Symns v. Schotten, 35 Kan. 310, 10 Pac. 828; Wheeling & L. E. Ry. Co. v. Koontz, 15 Ohio Cir. Ct. R. 288; Whitehead v. Anderson, 9 Mees. & W. 518; Crawshay v. Eades, 1 Barn. & C. 182; Bolton v. Railway Co., L. R. 1 C. P. 431; James v. Griffin, 2 Mees. & W. 623.

[6] McFetridge v. Piper, 40 Iowa, 627; Langstaff v. Stix, 64 Miss. 171, 1 South. 97; Williams v. Hodges, 113 N. C. 36, 18 S. E. 83; James v. Griffin, 2 Mees. & W. 623; Ex parte Cooper, 11 Ch. Div. 68.

[7] Bird v. Brown, 4 Exch. 786.

SAME—EXCEPTED PERILS.

114. The carrier is not responsible for nondelivery of goods occasioned by perils excepted by the common law.

The perils which exempt a common carrier from liability for loss of goods intrusted to him have already been discussed.[1] If goods are lost by reason of circumstances which relieve the carrier of liability therefor, it follows that there can be no liability for nondelivery.

§ 114. [1] See ante, pp. 225–232.

CHAPTER VII.

OCCUPATION AND USE OF LAND AND WATER.

DUTIES—GENERAL RULE.

115. The breach of duties attached to the ownership or occupation of land does not involve principles different from the ordinary rules of negligence as applied to the use of chattels.

If A. agree to convey land to B., the latter undertaking to erect a house thereon, and the workmen of B., in preparing the foundation, undermine and injure C.'s adjoining house, the negligence, if any, is that of B., who is alone responsible, although the title to the land still remains in A.[1] In general, one may rightfully occupy his real estate, and enjoy and use it in any way that suits his pleasure or whim, provided he does not transgress the rule, "Sic utere tuo ut alienum non lædas." And even regarding this rule it is to be observed that he is not to be literally restricted thereby, for there are many acts which he may rightfully perform on his

§ 115. [1] Earle v. Hall, 2 Metc. (Mass.) 353. See, also, Painter v. Mayor, etc., 46 Pa. St. 213; Hilliard v. Richardson, 3 Gray (Mass.) 349; Prairie State Loan & Trust Co. v. Doig, 70 Ill. 52.

own land, although they will certainly result in injury to his neighbor.[2] All that the law requires of the landholder is that he exercise ordinary prudence and skill, to the end that he may not do unnecessary harm to his neighbor, as in putting down the foundations of his house.[3]

LATERAL SUPPORT.

116. A person may lawfully sink the foundation of his house on his own land, and adjacent to that of another, below the foundation of his neighbor's, and is not liable for any damage resulting to his neighbor's house, provided he has used due care and diligence to prevent injury thereto.

In the absence of negligence and unskillfuness, a person is not answerable in damage for the exercise of a right.[1] Following this principle, the New York courts hold that one may rightfully excavate upon his own land to any depth, provided he uses due care and diligence not to do unnecessary harm to his neighbor's property.[2] The Massachusetts courts, on the contrary, hold that a person has the right to have his soil, independent of any artificial improvements, remain in its natural condition, and that any one who interferes with that right is a wrongdoer, independently of any question of negligence. In the case of Gilmore v. Driscoll,[3] Gray, C. J., says: "The right of an owner of land to the support of the land adjoining is jure naturæ, like the right in a flowing stream. Every owner of land is entitled, as against his neighbor, to have the earth stand and the water flow in its natural condition. * * * But in the case of land which is fixed in its place, each owner has the absolute right to have land remain in its natural condition,

[2] See post. pp. 310, 311.

[3] Panton v. Holland, 17 Johns. (N. Y.) 92. See, also, Radcliff's Ex'rs v. Brooklyn, 4 N. Y. 195; Phelps v. Nowlen, 72 N. Y. 39.

§ 116. [1] Panton v. Holland, 17 Johns. (N. Y.) 92; Hemsworth v. Cushing, 115 Mich. 92, 72 N. W. 1108; Spohn v. Dives, 174 Pa. St. 474, 34 Atl. 192.

[2] Panton v. Holland, 17 Johns. (N. Y.) 92; Bailey v. Gray, 53 S. C. 503, 31 S. E. 354; Krish v. Ford (Ky.) 43 S. W. 237; Lapp v. Guttenkunst (Ky.) 44 S. W. 964; Obert v. Dunn, 140 Mo. 476, 41 S. W. 901.

[3] 122 Mass. 199.

unaffected by any act of his neighbor; and, if the neighbor digs upon or improves his own land so as to injure this right, may maintain an action against him, without proof of negligence. But this right of property is only in the land in its natural condition, and the damages in such an action are limited to the injury of the land itself, and do not include any injury to buildings or improvements thereon. While each owner may build upon and improve his own estate, at his pleasure, provided he does not infringe upon the natural right of his neighbor, no one can, by his own act, enlarge the liability of his neighbor for an interference with this natural right. If a man is not content to enjoy his land in its natural condition, but wishes to build upon or improve it, he must either make an agreement with his neighbor, or dig his foundations so deep, or take such other precautions, as to insure the stability of his buildings or improvements, whatever excavations the neighbor may afterwards make upon his own land in the exercise of his right."

DANGEROUS PREMISES.

117. It is the general duty of the owner or occupant of lands to so occupy and use them that they shall not become a source of danger to those who are rightfully upon or about the premises.

To this end it is the duty of the owner to use reasonable care that structures placed upon the land are properly constructed, and so maintained that they shall not endanger passers-by upon the street, or others rightfully about the premises. Thus, if the owner of a building which has been partially destroyed by fire permits the walls to remain standing, without taking proper precautions to prevent their falling into the adjacent street, he will be liable for injury to a passer-by caused by such neglect.[1] And the fact that the

§ 117. [1] Church of the Ascension v. Buckhart, 3 Hill (N. Y.) 193. See, also, Seabrook v. Hecker, 2 Rob. (N. Y.) 291; Schell v. Bank, 14 Minn. 43 (Gil. 34); Glover v. Mersman, 4 Mo. App. 90; Schwartz v. Gilmore, 45 Ill. 455. The owner of a building veneered with brick, the brick portion of the wall of which fell through the failure of the builder to anchor the same to the sheathing of the wall, as was proper and customary, was not liable for injuries occasioned by the fall, in the absence of evidence that, by his exer-

walls were, at the time of the accident, in the charge of a contractor, would not relieve the owner of liability.[2] But, to charge the owner or occupant with negligence, the defect or danger must be actually known, or discoverable in the exercise of ordinary diligence.[3]

Furthermore, it is the duty of the owner to construct his buildings so that natural accumulations of ice and snow upon the roof will not be discharged in a manner likely to harm travelers in the street.[4] So, also, if a spout for conveying water from the roof is so placed as to discharge upon a neighbor's land, to his injury;[5] or if the water is discharged upon the sidewalk, forming ice, by reason of which a traveler is injured.[6] If the owner of a building permits to be hung over the sidewalk lamps, signs, or other heavy articles likely to produce injury by falling, it is his duty to use at least ordinary care to see that they are securely fastened and maintained.[7]

cising ordinary care before the wall fell, he might have discovered the defect therein. Ryder v. Kinsey, 62 Minn. 85, 64 N. W. 94. But see Cork v. Blossom, 162 Mass. 330, 38 N. E. 495, where it was held that one who erects a chimney on his land is liable to an adjoining owner for injuries caused by its fall, when it is not the result of inevitable accident, or wrongful acts of third parties.

[2] Sessengut v. Posey, 67 Ind. 408; Knoop v. Alter, 47 La. Ann. 570, 17 South. 139.

[3] Metzger v. Schultz, 16 Ind. App. 454, 43 N. E. 886; Ryder v. Kinsey, 62 Minn. 85, 64 N. W. 94. But cf. Cork v. Blossom, 162 Mass. 330, 38 N. E. 495; Glase v. City of Philadelphia, 169 Pa. St. 488, 32 Atl. 600.

[4] Garland v. Towne, 55 N. H. 55; Wash v. Mead, 8 Hun (N. Y.) 387; Shipley v. Fifty Associates, 101 Mass. 251.

[5] Reynolds v. Clarke, 2 Ld. Raym. 1399; Bellows v. Sackett, 15 Barb. (N. Y.) 96.

[6] Kirby v. Association, 14 Gray (Mass.) 249; Lumley v. Manufacturing Co., 20 C. C. A. 1, 73 Fed. 767; Thuringer v. Railroad Co., 82 Hun, 33, 31 N. Y. Supp. 419; Citron v. Bayley, 36 App. Div. 130, 55 N. Y. Supp. 382.

[7] Tarry v. Ashton, 1 Q. B. Div. 314; Salisbury v. Herchenroder, 106 Mass. 458; Detzur v. Brewing Co. (Mich.) 77 N. W. 948.

SAME—VISITORS, LICENSEES, AND TRESPASSERS.

118. In a general way, the duty incumbent upon the occupant of premises towards those coming thereon is proportioned to the rightfulness of their presence. Those entering by invitation are entitled to a higher degree of care than those who are present by mere sufferance.

Visitors and Licensees.

In considering the degree of care which it is the duty of the owner to extend to those coming upon his land or premises, regard must be had to the character of the party, and his reasons for being there. One who comes into the store of a merchant by invitation, either express or implied, is entitled to greater consideration and care than one who enters by mere sufferance or is committing a trespass.

It is the duty of the occupant of premises to use ordinary care to maintain them in a reasonably safe condition for the accommodation of those who are invited there for the purposes of business.[1] The rule is equally applicable in all cases where the visitor is induced to come upon the premises for purposes beneficial to the owner or occupant.[2] The person thus induced to come upon the premises

§ 118. [1] Coughtry v. Woolen Co., 56 N. Y. 124; Bennett v. Railroad Co., 102 U. S. 577; Weston v. Railroad Co., 73 N. Y. 595; Carleton v. Steel Co., 99 Mass. 216; Homer v. Everett, 47 N. Y. Super. Ct. 298; Nave v. Flack, 90 Ind. 205; Pastene v. Adams, 49 Cal. 87; Parker v. Barnard, 135 Mass. 116; Learoyd v. Godfrey, 138 Mass. 315; Chapman v. Rothwell, El., Bl. & El. 168. Guest of a tenant, Defiance Water Co. v. Olinger, 54 Ohio St. 532, 44 N. E. 238; Metzger v. Schultz, 16 Ind. App. 454, 43 N. E. 886; Glase v. City of Philadelphia, 169 Pa. St. 488, 32 Atl. 600; Barman v. Spencer (Ind. Sup.) 49 N. E. 9; Anderson & Nelson Distilling Co. v. Hair (Ky.) 44 S. W. 658; Doherty v. McLean, 171 Mass. 399, 50 N. E. 938; Wilson v. Olano, 28 App. Div. 448, 51 N. Y. Supp. 109; Texas Loan Agency v. Fleming (Tex. Civ. App.) 46 S. W. 63. That the immediate cause was the act of a trespasser does not excuse negligence of defendant, Colorado Mortg. & Inv. Co. v. Rees, 21 Colo. Sup. 435, 42 Pac. 42.

[2] Currier v. Association, 135 Mass. 414; Brown v. Society, 47 Me. 275; Camp v. Wood, 76 N. Y. 92; Baker v. Tibbetts, 162 Mass. 468, 39 N. E. 350; Lepnick v. Gaddis, 72 Miss. 200, 16 South. 213.

may rightfully assume them to be reasonably safe,[3] but he is not excused from the exercise of ordinary care on his part; as if he should proceed along a dark passageway, and fall down an ordinary staircase, when common prudence would have dictated that he should take a light.[4]

Although it seems to be generally conceded that the landowner does not owe to the invited guest upon his premises the same degree of care that is due to one who comes there for purposes of business, it is not clear on what ground the distinction rests, or just how far it may be carried. Shearman and Redfield say: "In our judgment, the same rule should be applied in such a case that would be applied if the property were personal instead of real. The host should always be held responsible to the guest for gross negligence;[5] that is, for such want of care as would justify a suspicion that he was indifferent to the safety of his guest."[6] A bare licensee entering upon the premises of another must take them as he finds them, and cannot complain if he is injured by reason of their unfit or unsafe condition.[7] Under these circumstances the owner would be liable only for injuries resulting from negligence of such a character as to justify the conclusion that it was intentional or wanton. Thus, where workmen had been excavating sand on defendant's land, and had left an overhanging bank, in a vacant lot, where children sometimes played, and the bank fell, and killed an infant, who was then in charge of a sister, it was held that no recovery

[3] Francis v. Cockrell, L. R. 5 Q. B. 184. Application of rule to wife of prospective purchaser. Davis v. Ferris, 29 App. Div. 623, 53 N. Y. Supp. 571. But he cannot assume premises to be safe for an unreasonable or unintended use. Edwards v. Railroad Co., 98 N. Y. 245. Barbed wire stretched across a way not public, but customarily traveled. Morrow v. Sweeney, 10 Ind. App. 626, 38 N. E. 187.

[4] Wilkinson v. Fairrie, 1 Hurl. & C. 633; Zoebisch v. Tarbell, 10 Allen (Mass.) 385; otherwise, if there be special inducement, Sweeny v. Railroad Co., 10 Allen (Mass.) 368.

[5] As in case of gratuitous passengers on railroads. Philadelphia & R. R. Co. v. Derby, 14 How. 468.

[6] Shear. & R. Neg. (4th Ed.) § 706.

[7] Sweeny v. Railroad Co., 10 Allen (Mass.) 368; Zoebisch v. Tarbell, Id. 385; Gillis v. Railroad Co., 59 Pa. St. 129; Frost v. Railroad Co., 10 Allen (Mass.) 387; Pierce v. Whitcomb, 48 Vt. 127; Lake Erie & W. R. Co. v.

could be had, as defendant was not bound to keep the premises in safe condition for licensees or trespassers.[8] . If it were known to the owner that children were accustomed to play upon the land, it would be his duty to use ordinary care to see that it was reasonably safe, or, at least, that it contained no dangers which a child would not appreciate,—as lumber so carelessly piled that it was liable to fall.[9] This seeming exception, in the case of children, to the rule that the landowner owes no duty to the bare licensee or trespasser on his premises, has this apparent limitation: The liability of the landowner extends only to those cases where dangerous machinery, structures, and contrivances of a nature calculated to attract and entertain young children have been left unguarded, and caused injury to infants so young as to be non sui juris? An illustration of this is found in the so-called "Turntable Cases." [10] But,

Maus (Ind. App.) 51 N. E. 735; Flanagan v. Asphalt Co., 37 App. Div. 476, 56 N. Y. Supp. 18; Brehmer v. Lyman (Vt.) 42 Atl. 613; Smith v. Day, 86 Fed. 62; Blackstone v. Foundry Co., 170 Mass. 321, 49 N. E. 635; Fitzpatrick v. Manufacturing Co. (N. J. Sup.) 39 Atl. 675; Kinney v. Onsted, 113 Mich. 96, 71 N. W. 482. And where, under these circumstances, the injury is caused by the direct act of a stranger, a fortiori there is no liability. Mahoney v. Libbey, 123 Mass. 20. But see Clarkin v. Biwabik-Bessemer Co., 65 Minn. 483, 67 N. W. 1020, where defendant was held liable to the licensee, injured by an explosion of dynamite.

[8] Ratte v. Dawson, 50 Minn. 450, 52 N. W. 965; Grindley v. McKechnie, 163 Mass. 494, 40 N. E. 764; Richards v. Connell, 45 Neb. 517, 63 N. W. 915. See, also, Knight v. Abert, 6 Pa. St. 472; Galligan v. Manufacturing Co., 143 Mass. 527, 10 N. E. 171; Hargreaves v. Deacon, 25 Mich. 1; In re Demarest, 86 Fed. 803; Kayser v. Lindell (Minn.) 75 N. W. 1038.

[9] Bransom's Adm'r v. Labrot, 81 Ky. 638. See, also, Beehler v. Daniels, 19 R. I. 49, 31 Atl. 582. And generally, as to injuries to trespassers, see Pelton v. Schmidt, 104 Mich. 345, 62 N. W. 552; Gulf, C. & S. F. Ry. Co. v. Cunningham (Tex. Civ. App.) 30 S. W. 367; Walsh v. Railroad Co., 145 N. Y. 301, 39 N. E. 1068; Elliott v. Carlson, 54 Ill. App. 470; Biggs v. Barb-Wire Co. (Kan. Sup.) 56 Pac. 4; Ritz v. City of Wheeling (W. Va.) 31 S. E. 993, 43 Lawy. Rep. Ann. 148.

[10] Keffe v. Railway Co., 21 Minn. 207, approved in Union Pac. Ry. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619; Kolsti v. Railway Co., 32 Minn. 133, 19 N. W. 655; Doyle v. Railway Co., 42 Minn. 79, 43 N. W. 787; O'Malley v. Railway Co., 43 Minn. 294, 45 N. W. 440; City of Pekin v. McMahon, 154 Ill. 141, 39 N. E. 484; Siddall v. Jansen, 168 Ill. 43, 48 N. E. 191, 39 Lawy. Rep. Ann. 112; Price v. Water Co., 58 Kan. 551, 50 Pac. 450. But

even as to children non sui juris, not more than ordinary or reasonable care is required,[11] and the question of adequate care in the particular case must be for the jury.[12]

Trespassers.

If the occupant of premises owes no duty to the licensee, still less can a trespasser be heard to complain of the negligence of the landowner upon whose premises he has unlawfully entered. And so, where a statute required railroads to block all frogs upon their tracks, and plaintiff, a trespasser in the yards of defendant company, was injured by reason of the failure to comply with such statute, he was not allowed to recover; the court saying that the statute was passed for the protection of those rightfully upon the premises in the discharge of their duty, and not for the protection of trespassers.[13]

a very strong line of decisions take the opposite view in this class of cases. Walsh v. Railroad Co., 145 N. Y. 301, 39 N. E. 1068; Frost v. Railroad Co., 64 N. H. 220, 9 Atl. 790; Daniels v. Railroad Co., 154 Mass. 349, 28 N. E. 283; Stendal v. Boyd (Minn.) 75 N. W. 735; Delaware, L. & W. R. Co. v. Reich (N. J. Err. & App.) 40 Atl. 682; Peters v. Bowman, 115 Cal. 345, 47 Pac. 113, 598; Dobbins v. Railway Co. (Tex. Sup.) 41 S. W. 62.

[11] Kolsti v. Railway Co., 32 Minn. 133, 19 N. W. 655; Keffe v. Railroad Co., 21 Minn. 207; O'Malley v. Railway Co., 43 Minn. 294, 45 N. W. 440; City of Pekin v. McMahon, 154 Ill. 141, 39 N. E. 484; Moran v. Car Co., 134 Mo. 641, 36 S. W. 659. Ties insecurely piled. Missouri, K. & T. Ry. Co. of Texas v. Edwards, 90 Tex. 65, 36 S. W. 430.

[12] Doyle v. Railway Co., 42 Minn. 79, 43 N. W. 787. So held where plaintiffs, as bare licensees, remained in an abandoned camp where dynamite was stored by defendants, and which was exploded by heat, and injured plaintiffs. It was for the jury to determine whether plaintiffs had been afforded a reasonable time to vacate after they knew of the storage of the dynamite. Clarkin v. Biwabik-Bessemer Co., 65 Minn. 483, 67 N. W. 1020.

[13] Akers v. Railway Co., 58 Minn. 540, 60 N. W. 669. See, also, Beehler v. Daniels, 19 R. I. 49, 31 Atl. 582. And generally, as to injuries to trespassers, see Pelton v. Schmidt, 104 Mich. 345, 62 N. W. 552; Gulf, C. & S. F. Ry. Co. v. Cunningham (Tex. Civ. App.) 30 S. W. 367; Walsh v. Railroad Co., 145 N. Y. 301, 39 N. E. 1068; Elliott v. Carlson, 54 Ill. App. 470; Berlin Mills Co. v. Croteau, 32 C. C. A. 126, 88 Fed. 860; Reeves v. French (Ky.) 45 S. W. 771; Anderson v. Railway Co., 19 Wash. 340, 53 Pac. 345.

SAME—HIDDEN DANGERS, EXCAVATIONS, ETC.

119. The occupant of premises is liable for injuries inflicted by reason of maintaining contrivances or conditions involving hidden dangers, and likely to do harm, although the person injured is unlawfully or wrongfully on the premises.

From a very early date in this country, the landholder has been liable for injuries caused by traps or other harmful devices, placed out of doors for the purpose of doing harm to the person or property of those who came unbidden upon the premises.[1] In England, however, until the early part of the present century, the courts upheld the placing of spring guns and other mankilling devices in certain circumstances,[2] even where the land was not inclosed.[3] Although certain early decisions in this country apparently sustained the right of the householder to set spring guns inside his buildings for the purpose of injuring burglars,[4] the courts have not committed themselves unreservedly to the doctrine, and there can be no question that an innocent person, although a technical trespasser, if injured by such devices, could recover.[5]

Although spring guns, traps, and other similar barbaric devices now exist only in history, the courts still find analogous conditions in concealed dangers to which the simile of "trap" is applied, and it is now almost universally held that a person is liable for injuries inflicted by reason of maintaining a contrivance or condition involving a hidden danger, likely to do harm, even though the person injured is wrongfully or unlawfully upon the premises. And although a person may make such excavations as he sees fit upon his own land, and is, in general, not bound to place guards about them,[6]

§ 119. [1] Johnson v. Patterson, 14 Conn. 1; State v. Moore, 31 Conn. 479.

[2] Ilott v. Wilkes, 3 Barn. & Ald. 304. But it would seem that the owner was obliged to give proper notice that the premises were thus protected. Bird v. Holbrook, 4 Bing. 628. But see Jordin v. Crump, 8 Mees. & W. 782.

[3] Jordin v. Crump, 8 Mees. & W. 782. The practice was forbidden by Act May 28, 1827 (St. 7 & 8 Geo. IV. c. 18).

[4] Gray v. Combs, 7 J. J. Marsh. (Ky.) 478.

[5] State v. Moore, 31 Conn. 479.

[6] Kohn v. Lovett, 44 Ga. 251.

yet in this respect he must be governed entirely by the circumstances of the case. If the point of excavation is remote from the highway or any public or customary path, he owes no duty to strangers to fence or otherwise protect the hole.[7] But if the hole is so located that, in the ordinary course of events, there is a likelihood that a passer-by may fall into it, he leaves it unguarded at his peril,[8] and the fact that the injured person digressed slightly from the highway or path, and became even a technical trespasser, will not necessarily excuse the landowner.[9] It is evident that no specific rule can be laid down for determining the exact distance from a highway or traveled path at which the landowner may, with impunity, dig, and leave unguarded, a hole. The distance must necessarily vary with the circumstances of each case.[10] Each case must be determined by its peculiar incidents, having due regard for the general rule that, in taking care to use his property so as not to injure his neighbor, one is not bound to look beyond the natural and probable consequences of the act he is about to perform.[11]

Substantially the same rules have always been applicable in cases of injury to domestic animals by reason of the negligence or wanton carelessness of landowners, it being the common-law duty of the owner to fence them in, and not that of the landowner to fence them out.[12] And so it was held in a very early case, where de-

[7] Knight v. Abert, 6 Pa. St. 472; Kelley v. City of Columbus, 41 Ohio St. 263 (30 feet from sidewalk); Hardcastle v. Railroad Co., 4 Hurl. & N. 67 (20 feet from highway); Gillespie v. McGowan, 100 Pa. St. 144 (well, 80 feet from highway); Turner v. Thomas, 71 Mo. 596.

[8] Barnes' Adm'r v. Ward, 9 C. B. 392; Haughey v. Hart, 62 Iowa, 96, 17 N. W. 189; Graves v. Thomas, 95 Ind. 361; Vale v. Bliss, 50 Barb. (N. Y.) 358; Houston v. Traphagen, 47 N. J. Law, 23; Hutson v. King, 95 Ga. 271, 22 S. E. 615; Binny v. Carney (Sup.) 46 N. Y. Supp. 307; Hadley v. Taylor, L. R. 1 C. P. 53.

[9] Vale v. Bliss, 50 Barb. (N. Y.) 318; Hector Min. Co. v. Robertson, 22 Colo. 491, 45 Pac. 406; Lowe v. Salt Lake City, 13 Utah, 91, 44 Pac. 1050; Butz v. Cavanaugh, 137 Mo. 503, 38 S. W. 1104.

[10] 1 Thomp. Neg. (1st Ed.) p. 299; Young v. Harvey, 16 Ind. 314. Cf. Durham v. Musselman, 2 Blackf. (Ind.) 96. And see post, p. 310.

[11] Vale v. Bliss, 50 Barb. (N. Y.) 358; Kinchlow v. Elevator Co., 57 Kan. 374, 46 Pac. 703; Drennan v. Grady, 167 Mass. 415, 45 N. E. 741; Rosenbaum v. Shoffner, 98 Tenn. 624, 40 S. W. 1086.

[12] Mason v. Keeling, 12 Mod. 332, 1 Ld. Raym. 606; Bush v. Brainard, 1 Cow. (N. Y.) 78.

fendant had dug a pit in a common, into which the plaintiff's mare fell and was killed, that the plaintiff could not recover.[13] So, also, where plaintiff's cow strayed into defendant's wood, and drank maple sap which had been left exposed, and died,[14] and where defendant kept pickling brine exposed near the highway, and plaintiff's oxen were killed by reason of drinking it,[15] the defendants were not held liable. But where defendant placed traps, baited with meat, near the highway, without notice, but on his own premises, for the purpose of catching his neighbors' dogs, and plaintiff's dog, attracted by the meat, was killed, defendant was held liable.[16]

SAME—PRIVATE GROUNDS.

120. Where one's grounds are private, secluded, and in no way open to the public, the owner is under no obligation to maintain them with a view to the safety of those who come upon them without invitation, either express or implied.[1]

In Hargreaves v. Deacon,[2] referring to the duty of the landowner under the above circumstances, Graves, J., says: "On private property it applies less generally, and only to those who have a legal right to be there, and to claim the care of the occupant for their security, while on the premises, against negligence, or to those who are directly injured by some positive act involving more than passive negligence. Cases are quite numerous in which the same questions have arisen which arise in this case, and we have found none which hold that an accident from negligence, on private premises, can be made the ground of damages, unless the party injured

[13] Blyth v. Topham, Cro. Jac. 158, 1 Rolle, Abr. 88.

[14] Bush v. Brainard, 1 Cow. (N. Y.) 78.

[15] Hess v. Lupton, 7 Ohio, 216; Aurora Branch R. Co. v. Grimes, 13 Ill. 585.

[16] Townsend v. Wathen, 9 East, 277. Cf. Crowhurst v. Board, 4 Exch. Div. 5 (see 18 Alb. Law J. 514); Firth v. Iron Co., 3 C. P. Div. 254.

§ 120. [1] Gautret v. Egerton, L. R. 2 C. P. 371; Stone v. Jackson, 16 C. B. 199; Roulston v. Clark, 3 E. D. Smith (N. Y.) 366; Zoebisch v. Tarbell, 10 Allen (Mass.) 385; Frost v. Railway Co., Id. 387; Kohn v. Lovett, 44 Ga. 251.

[2] 25 Mich. 1.

has been induced to come by personal invitation, or by employment which brings him there, or by resorting there as to a place of business or of general resort, held out as open to customers or others whose lawful occasions may lead them to visit there. We have found no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity, or motives of private convenience, in no way connected with business or other relations with the occupant."

LANDLORD AND TENANT.

121. Primarily, the occupant, and not the owner, of leased premises is liable to third persons for injuries caused by the failure to keep the premises in repair.[1] The liability may, however, be extended to the landlord

(a) When the latter has made a contract to repair, or

(b) Where the premises were defective at the inception of the lease.

From a very early date it has been established by the common law that he who occupies, and not the landlord, is bound to protect the public against danger or injury arising from any defect in the condition of the premises.[2] Thus, in the early case of Cheetham v. Hampson [3] it was held that an action on the case for not repairing fences, to the injury of plaintiff, could be maintained

§ 121. [1] Payne v. Rogers, 2 H. Bl. 350; O'Brien v. Capwell, 59 Barb. (N. Y.) 497; Shindelbeck v. Moon (Ohio Sup.) 17 Am. Law Reg. 450; Kastor v. Newhouse, 4 E. D. Smith (N. Y.) 20; Gridley v. City of Bloomington, 68 Ill. 47; Blunt v. Aikin, 15 Wend. (N. Y.) 522; Szathmary v. Adams, 166 Mass. 145, 44 N. E. 124; Simon-Reigel Cigar Co. v. Gordon-Burnham Battery Co., 20 Misc. Rep. 598, 46 N. Y. Supp. 416; Gleason v. Boehm, 58 N. J. Law, 475, 34 Atl. 886; Reg. v. Watts, 1 Salk. 357; Cheetham v. Hampson, 4 Term R. 318; Russell v. Shenton, 3 Q. B. 449; Reg. v. Bucknall, 2 Ld. Raym. 804; Brent v. Haddon, 3 Cro. Jac. 555; Coupland v. Hardingham, 3 Camp. 398; Tarry v. Ashton, 1 Q. B. Div. 314. But see Trustees of Village of Canandaigua v. Foster, 156 N. Y. 354, 50 N. E. 971; Fox v. Buffalo Park, 21 App. Div. 321, 47 N. Y. Supp. 788.

[2] See ante, note 1.

[3] 4 Term R. 318.

against the occupant only, and not against the owner of the fee, not in possession.[4]

SAME—CONTRACT TO REPAIR.

122. The landlord also may become liable to the public for injuries received through failure to repair, if he has violated his express contract with his tenant in that regard.

When the landlord has entered into an express agreement with the tenant to keep the premises in repair, he will be liable to the public for injuries caused by his failure to do so.[1] And this even if the tenant is to pay for the omitted repairs.[2] And so, when workmen repairing a hall under such an agreement, negligently left the cellar entrance open during the night, and plaintiff fell into it, and was injured, the landlord was liable.[3] But, if the landlord undertakes to transmit power to adjacent buildings, he is liable for an injury to an employé of the tenant by neglecting to keep the pulleys and shafting in safe condition, although the lease required the tenant to keep the shaft in repair.[4] As a general proposition,

[4] See Ahern v. Steele, 115 N. Y. 203, 22 N. E. 193; Sterger v. Van Sicklen, 132 N. Y. 499, 30 N. E. 987. Lessor of railroad is not liable for torts of lessee. Miller v. Railroad Co., 125 N. Y. 118, 26 N. E. 35. Landlord is not liable for damage caused by want of repair of ordinary nature to privy vaults. Pope v. Boyle, 98 Mo. 527, 11 S. W. 1010. And generally, see City of Chicago v. O'Brennan, 65 Ill. 160; Gridley v. City of Bloomington, 68 Ill. 47; City of Lowell v. Spaulding, 4 Cush. (Mass.) 277; Brunswick-Balke-Collender Co. v. Rees, 69 Wis. 442, 34 N. W. 732; Texas Loan Agency v. Fleming (Tex. Sup.) 49 S. W. 1039; Metropolitan Sav. Bank v. Manion, 87 Md. 68, 39 Atl. 90.

§ 122. [1] Benson v. Suarez, 43 Barb. (N. Y.) 408; Payne v. Rogers, 2 H. Bl. 350; Black v. Maitland, 11 App. Div. 188, 42 N. Y. Supp. 653.

[2] Leslie v. Pounds, 4 Taunt. 649; Nelson v. Brewery Co., 2 C. P. Div. 311. But reservation of right to enter premises to repair the same does not attach liability to landlord. Clifford v. Cotton Mills, 146 Mass. 47, 15 N. E. 84. Landlord is under no implied obligation to make ordinary repairs. Medary v. Cathers, 161 Pa. St. 87, 28 Atl. 1012.

[3] Leslie v. Pounds, 4 Taunt. 649.

[4] Poor v. Sears, 154 Mass. 539, 28 N. E. 1046. So, also, where the owners of a defective pier were held liable to a stevedore for its falling down, although the lessees had covenanted to keep it in repair. Swords v. Edgar, 59 N. Y. 28.

however, where the tenant covenants to keep the premises in repair, he, and not the landlord, will be liable for any failure in that respect.[5] But if the landlord undertakes to make repairs, regardless of any agreement either on his part or that of the tenant, he will be liable for any negligence in that connection.[6]

SAME—PREMISES DEFECTIVE AT TIME OF RENTING.

123. The landlord is liable, equally with the tenant, to persons other than patrons or guests of the latter, for injuries resulting from the defective condition of the premises at the inception of the lease.

When the landlord makes a lease of premises which are at the time in a ruinous or defective condition, he is considered as authorizing or abetting a wrong, and will be liable for injuries suffered by third persons in consequence, and in such case the tenant is equally liable with the owner.[1] The burden is, however, on the plaintiff to show the existence of the defective condition prior to the inception of the lease.[2] But guests or patrons of the tenant, coming on the premises at his request, cannot look to the landlord for recompense for injuries which they receive through defects

[5] Glass v. Colman, 14 Wash. 635, 45 Pac. 310; Pretty v. Bickmore, L. R. 8 C. P. 401, approved in Gwinnell v. Eamer, L. R. 10 C. P. 658.

[6] Gill v. Middleton, 105 Mass. 477; Callahan v. Laughran, 102 Cal. 476, 36 Pac. 835.

§ 123. [1] Both the owner who constructs an offensive cesspool and the tenant who uses the premises are liable for injury to an adjoining occupant. Owings v. Jones, 9 Md. 108; Joyce v. Martin, 15 R. I. 558, 10 Atl. 620. See, also, McDonough v. Gilman, 3 Allen (Mass.) 264; O'Connor v. Andrews, 81 Tex. 28, 16 S. W. 628; McGuire v. Spence, 91 N. Y. 303; Davenport v. Ruckman, 10 Bosw. (N. Y.) 20, 37, 16 Abb. Prac. (N. Y.) 341, affirmed in 37 N. Y. 568; Moody v. City of New York, 43 Barb. (N. Y.) 282; Fish v. Dodge, 4 Denio (N. Y.) 311; Knauss v. Brua, 107 Pa. St. 85; Dorman v. Ames, 12 Minn. 451 (Gil. 347); House v. Metcalf, 27 Conn. 631; Larue v. Hotel Co., 116 Mass. 67; Hines v. Willcox, 96 Tenn. 148, 33 S. W. 914; Todd v. Flight, 9 C. B. (N. S.) 377; Gandy v. Jubber, 5 Best & S. 485; Rich v. Basterfield, 4 C. B. 783; Russell v. Shenton, 3 Q. B. 449. Boarder of tenant, Stenberg v. Willcox, 96 Tenn. 163, 33 S. W. 917; Matthews v. De Groff, 13 App. Div. 356, 43 N. Y. Supp. 237; Mancuso v. Kansas City, 74 Mo. App. 138.

[2] Union Brass Mfg. Co. v. Lindsay, 10 Ill. App. 583.

in the premises, even if the defects existed before the tenant went into possession,[3] or even if the landlord has agreed to repair.[4]

It is essential to the landlord's liability that he had notice, either actual or constructive, of the existence of the defect.[5] It follows as a corollary that when, at the time of the leasing, the premises are not dangerous, and do not constitute a nuisance, but become such through the act of the tenant, the owner is not responsible.[6] Thus, if a landlord lets premises with a stack of chimneys in a ruinous or fallen condition, he is liable for damages;[7] but if he builds a chimney, which, by the act of the tenant, becomes a nuisance, although the tenant could have built fires so that a nuisance could have been avoided, the tenant is liable, and not the landlord.[8] But if the condition of nuisance develops as a natural consequence from the use for which the premises were demised, the liability rests on the landlord for injury caused thereby.[9] So, where the demise was of a lime kiln and quarry, the landlord was held liable for the nuisance resulting from smoke from the kiln, as being the necessary consequence of an act he had authorized.[10] Where the landlord licenses

[3] Robbins v. Jones, 15 C. B. (N. S.) 221, 240; Moore v. Steel Co. (Pa. Sup.) 7 Atl. 198; Mellen v. Morrill, 126 Mass. 545; Marshall v. Heard, 59 Tex. 266; Ploen v. Staff, 9 Mo. App. 309; Burdick v. Cheadle, 26 Ohio St. 393. But see, as to employé, Anderson v. Hayes, 101 Wis. 538, 77 N. W. 891.

[4] Burdick v. Cheadle, 26 Ohio St. 393; Ploen v. Staff, 9 Mo. App. 309.

[5] Welfare v. Railway Co., L. R. 4 Q. B. 693; Southcote v. Stanley, 1 Hurl. & N. 247; Slight v. Gutzlaff, 35 Wis. 675. But such knowledge may be constructive. Timlin v. Oil Co., 126 N. Y. 514, 27 N. E. 786; Dickson v. Railway Co., 71 Mo. 575. And it has been held that, even if the landlord had notice of the defect, he is not liable if the tenant is bound to repair. Pretty v. Bickmore, L. R. 8 C. P. 401; Gwinnell v. Eamer, L. R. 10 C. P. 658. But see Ingwersen v. Rankin, 47 N. J. Law, 18; Coupe v. Platt, 172 Mass. 458, 52 N. E. 526; Willcox v. Hines, 100 Tenn. 524, 45 S. W. 781.

[6] Roswell v. Prior, 12 Mod. 635; Godley v. Hagerty, 20 Pa. St. 387; Congreve v. Smith, 18 N. Y. 79; Clifford v. Dam, 81 N. Y. 52. Cf. Fisher v. Thirkell, 21 Mich. 1–20. The owner and tenant may be jointly liable. Joyce v. Martin, 15 R. I. 558, 10 Atl. 620 (reviewing cases).

[7] Todd v. Flight, 9 C. B. (N. S.) 377.

[8] Rich v. Basterfield, 4 C. B. 783; Stickney v. Munroe, 44 Me. 195.

[9] Godley v. Hagerty, 20 Pa. St. 387; Congreve v. Smith, 18 N. Y. 79; Clifford v. Dam, 81 N. Y. 52.

[10] Harris v. James, 45 Law J. Q. B. 545.

the lessee to perform acts amounting to a nuisance, he is, of course, liable.[11]

SAME—LIABILITY TO TENANT.

124. The landlord is not, in general, liable to his tenant, or his tenant's servants or guests, for injuries caused by defects in the premises, unless

(a) The former has agreed to repair, or unless

(b) The tenant is compelled to endanger himself in obtaining access to the premises.

It is a generally accepted rule that, in the absence of fraud or deceit, no implied covenant exists that the premises are adapted or fit for the purposes for which they are demised.[1] If, therefore, the leased premises become unfit for use, the tenant, in the absence of a specific agreement, has no redress against the landlord,[2]

[11] White v. Jameson, L. R. 18 Eq. 303. And see Lufkin v. Zane, 157 Mass. 117, 31 N. E. 757.

§ 124. [1] Jaffe v. Harteau, 56 N. Y. 398; O'Brien v. Capwell, 59 Barb. (N. Y.) 497; Cleves v. Willoughby, 7 Hill (N. Y.) 83; Flynn v. Hatton, 43 How. Prac. (N. Y.) 333; Dutton v. Gerrish, 9 Cush. (Mass.) 89; Foster v. Peyser, Id. 242; Royce v. Guggenheim, 106 Mass. 201; Elliott v. Aiken, 45 N. H. 30; Scott v. Simons, 54 N. H. 426; Hart v. Windsor, 12 Mees. & W. 68; Chappell v. Gregory, 34 Beav. 250. If the landlord, in making repairs, neglects to use ordinary skill, thereby injuring the tenant, he is liable, although the repairs were gratuitous, and at the solicitation of the tenant. Gill v. Middleton, 105 Mass. 477; Callahan v. Laughran, 102 Cal. 476, 36 Pac. 835; Buckley v. Cunningham, 103 Ala. 449, 15 South. 826; Baker v. Holtpzaffell, 4 Taunt. 45; Bowe v. Hunking, 135 Mass. 380; Naumberg v. Young, 44 N. J. Law, 331–345. But the law has been changed by statute in OHIO and INDIANA. See, also, Hollis v. Brown, 33 Am. Law Reg. 114, 115, 159 Pa. St. 539, 28 Atl. 360; Harpel v. Fall, 63 Minn. 520, 65 N. W. 913; Holton v. Waller, 95 Iowa, 545, 64 N. W. 633. The maxim caveat emptor applies equally to the transfer of real as well as personal property. Thomp. Neg. p. 323.

[2] Mumford v. Brown, 6 Cow. (N. Y.) 475; Howard v. Doolittle, 3 Duer (N. Y.) 464; Doupe v. Genin, 45 N. Y. 119. And, of course, if the lessee, by the terms of the lease, assumes all risk, the lessor will not be liable for damages by reason of nonrepair. Fera v. Child, 115 Mass. 32. Per contra, if the agreement is otherwise. Moore v. Steljes, 69 Fed. 518; Laird v. McGeorge, 16 Misc. Rep. 70, 37 N. Y. Supp. 631; Schanda v. Sulzberger, 7 App. Div. 221, 40 N. Y. Supp. 116; Miller v. Rinaldo, 21 Misc. Rep. 470, 47 N. Y. Supp. 636; Wynne v. Haight, 27 App. Div. 7, 50 N. Y. Supp. 187; Willcox v. Hines, 100

and servants and others entering under the tenant's title assume the like risk.[3] But the landlord may neither impair the tenure by his own acts, or permit it to be impaired by the acts of third persons.[4] And so a tenant may maintain an action against his landlord for permitting a third person to construct a chimney obstructing plaintiff's windows.[5]

125. SAFE ACCESS TO RENTED PROPERTY—The tenant is entitled to reasonably safe ingress to and egress from the leased premises, and has recourse against the landlord for his failure of duty in this regard.

The landlord cannot compel the tenant to endanger himself in obtaining access to the demised premises; and when the tenant, in order to reach the leased property, is obliged to pass over other property belonging to the landlord, he is entitled to have them kept in a reasonably safe condition.[1]

If the owner agrees to make repairs, damage consequent on failure to perform the covenant may be actionable ex contractu. If damage result from negligence in making repairs under the agreement, recovery may be had ex delicto.[2] But the rule does not apply

Tenn. 538, 46 S. W. 297; Lane v. Cox [1897] 1 Q. B. 415; Dowling v. Nuebling, 97 Wis. 350, 72 N. W. 871; Haizlip v. Rosenberg, 63 Ark. 430, 39 S. W. 60. But see Feinstein v. Jacobs, 15 Misc. Rep. 474, 37 N. Y. Supp. 345.

[3] Nelson v. Brewery Co., 2 C. P. Div. 311; O'Brien v. Capwell, 59 Barb. (N. Y.) 497; Burdick v. Cheadle, 26 Ohio St. 393; Anderson v. Hayes (Wis.) 77 N. W. 891; Whitmore v. Paper Co., 91 Me. 297, 39 Atl. 1032, 40 L. R. A. 377; Robbins v. Jones, 15 C. B. (N. S.) 221, 240. Members of lessee's family. Clyne v. Holmes (N. J. Sup.) 39 Atl. 767.

[4] Hysore v. Quigley, 9 Houst. 348, 32 Atl. 960; Jefferson v. Jameson & Morse Co., 60 Ill. App. 587.

[5] Case v. Minot, 158 Mass. 577, 33 N. E. 700.

§ 125. [1] Totten v. Phipps, 52 N. Y. 354; Elliott v. Pray, 10 Allen (Mass.) 378; Gleason v. Boehm, 58 N. J. Law, 475, 34 Atl. 886; Feinstein v. Jacobs, 15 Misc. Rep. 474, 37 N. Y. Supp. 345; Harkin v. Crumbie, 14 Misc. Rep. 439, 35 N. Y. Supp. 1027; O'Dwyer v. O'Brien, 13 App. Div. 570, 43 N. Y. Supp. 815.

[2] Jag. Torts, p. 227; Clapper v. Kells, 78 Hun, 34, 28 N. Y. Supp. 1018; Randolph v. Feist, 23 Misc. Rep. 650, 52 N. Y. Supp. 109; Barman v. Spencer (Ind. Sup.) 49 N. E. 9; Robbins v. Atkins, 168 Mass. 45, 46 N. E. 425; Wert-

where the injury is sustained by the guest of the tenant, who comes on the leased premises under the tenant's invitation. In such case the injured party must look to the tenant for his compensation.[3]

It is hardly necessary to add that the tenant cannot throw the burden of liability on the landlord in any case where the injury is due to his improper or careless use of an appurtenance or appliance which, although defective, could have been safely used with due care, or need not have been used at all. Thus, if a tenement contains a defective chimney, and the tenant, knowing its condition, uses it carelessly or unnecessarily, he cannot complain if he is damaged thereby; nor, if such use result in injury to others, could he defend by showing a covenant to repair on the part of the landlord.[4]

WATER COURSES.

126. Every riparian owner is entitled to have the water flow in its natural channel, and any interference with its movement is a direct violation of such right, for which the injured party may obtain redress.[1]

heimer v. Saunders, 95 Wis. 573, 70 N. W. 824. Necessity of notice to landlord to fix liability. Marley v. Wheelwright, 172 Mass. 530, 52 N. E. 1066; Idel v. Mitchell, 158 N. Y. 134, 52 N. E. 740; Lynch v. Swan, 167 Mass. 510, 46 N. E. 51. But the fact that the landlord, after the cellar had become flooded with filth and water, gratuitously undertook to remove the same, and did so negligently, does not entitle the tenant to abandon the premises. Blake v. Dick, 15 Mont. 236, 38 Pac. 1072; Callahan v. Loughran, 102 Cal. 476, 36 Pac. 835.

[3] Robbins v. Jones, 15 C. B. (N. S.) 221, 240; Mellen v. Morrill, 126 Mass. 545; Marshall v. Heard, 59 Tex. 266; Moore v. Steel Co. (Pa. Sup.) 7 Atl. 198; Ganley v. Hall, 168 Mass. 513, 47 N. E. 416; Harkin v. Crumbie, 20 Misc. Rep. 568, 46 N. Y. Supp. 453; Hanson v. Beckwith (R. I.) 37 Atl. 702. Nor is it material that the injuries are sustained during the existence of a covenant on the part of the landlord to repair. Ploen v. Staff, 9 Mo. App. 309; Burdick v. Cheadle, 26 Ohio St. 393; Eyre v. Jordan, 111 Mo. 424, 19 S. W. 1095. But see Barman v. Spencer (Ind. Sup.) 49 N. E. 9.

[4] Boston v. Gray, 144 Mass. 53, 10 N. E. 509; Shindelbeck v. Moon, 32 Ohio St. 264; Reiner v. Jones (Sup.) 56 N. Y. Supp. 423; Pickard v. Smith, 10 C. B. (N. S.) 470.

§ 126. [1] Bellinger v. Railroad Co., 23 N. Y. 42. See, also, Pixley v. Clark, 35 N. Y. 520; Selden v. Canal Co., 24 Barb. (N. Y.) 362; Plattsmouth Water Co. v. Smith (Neb.) 78 N. W. 275.

Ordinarily, the question of want of due care or negligence does not arise in this class of cases, for the reason that the action depends on the immediate and direct violation of the right of the riparian owner to have the water flow in its natural channel; but, if the interference is pursuant to legislative authority, liability results for such injury only as arises from want of due care and skill in the performance of the work.[2]

SAME—CONSTRUCTION AND MAINTENANCE OF DAMS.

127. One may rightfully construct a dam on his own land, but he must so construct it as not to injure others having vested rights liable to be affected thereby.

Thus, one who builds a dam is liable to another riparian owner for damages caused by the consequent displacement of the water, whether it occurs by reason of flowage, overflow, or percolation.[1] But, when the injury is to other mills on the same stream, to entitle the injured party to redress it must appear either that the work was improperly done, or that the injury was direct and palpable.[2] In such cases the law raises a presumption of damage.[3]

128. RULE IN UNITED STATES—When one builds a milldam upon a proper model, and the work is well and substantially done, he is not liable in an action, though it break away, in consequence of which his neighbor's dam and mill below are destroyed. Negligence must be shown, in order to make him liable.[1]

[2] Bellinger v. Railroad Co., 23 N. Y. 47.

§ 127. [1] Pixley v. Clark, 35 N. Y. 520; Crittendon v. Wilson, 5 Cow. (N. Y.) 165.

[2] Robertson v. Miller, 40 Conn. 40; Hartzall v. Sill, 12 Pa. St. 248; Hoy v. Sterrett, 2 Watts (Pa.) 327; Shear. & R. Neg. (4th Ed.) § 730.

[3] Hatch v. Dwight, 17 Mass. 289; Woodman v. Tufts, 9 N. H. 88; Van Bergen v. Van Bergen, 3 Johns. Ch. (N. Y.) 282.

§ 128. [1] Livingston v. Adams, 8 Cow. (N. Y.) 175.

The foregoing is the rule almost universally followed in this country.[2] If, therefore, one rightfully constructs a dam, and, by reason of an unforeseen accumulation of water or ice, it bursts through, and floods the surrounding country, or washes away the dam of a lower mill owner, he will not be liable for the consequent damage, unless it appears that it was caused through his fault or negligence.[3] Of course, it will not be sufficient defense in such case to show that the dam was strong enough to resist ordinary floods;[4] it must appear that it was constructed with due diligence and care, and was strong enough to resist freshets reasonably within the range of probability.[5]

The English rule differs from the above. Under their decisions the accumulation of water, either in dams or reservoirs, by artificial means, is made analogous to the possession and confinement of wild and dangerous animals, which must, at the peril of the owner, be kept from doing harm. The question of due care and diligence in the construction of dams is, therefore, eliminated from their cases.[6]

SAME—OBSTRUCTION OF NAVIGABLE STREAMS.

129. The rights of the riparian owner and the navigator of a stream are reciprocal, and neither may unnecessarily or negligently interfere with the enjoyment by the other of his prerogative.

[2] Livingston v. Adams, 8 Cow. (N. Y.) 175; Pixley v. Clark, 32 Barb. (N. Y.) 268, reversed in 35 N. Y. 520; Losee v. Buchanan, 51 N. Y. 476, directly overruling Fletcher v. Rylands, L. R. 1 Exch. 265; Lapham v. Curtis, 5 Vt. 371; Todd v. Cochell, 17 Cal. 97; Inhabitants of Shrewsbury v. Smith, 12 Cush. (Mass.) 177; Sheldon v. Sherman, 42 N. Y. 484.

[3] Ang. Water Courses, § 336.

[4] Ang. Water Courses, § 336.

[5] Livingston v. Adams, 8 Cow. (N. Y.) 175; Pixley v. Clark, 32 Barb. (N. Y.) 268; Everett v. Flume Co., 23 Cal. 225; Gray v. Harris, 107 Mass. 492; Lapham v. Curtis, 5 Vt. 371; Town of Monroe v. Connecticut River Lumber Co. (N. H.) 39 Atl. 1019; Hunter v. Pelham Mills, 52 S. C. 279, 29 S. E. 727.

[6] Fletcher v. Rylands, L. R. 1 Exch. 265, affirmed in L. R. 3 H. L. 330; Smith v. Fletcher, L. R. 7 Exch. 305.

The rights of the riparian owner and one seeking to use the waters for legitimate purposes are reciprocal. The one has an absolute right to the peaceable enjoyment of his lands; the other, as a member of the public, has an equal right to navigate the stream; but neither may unnecessarily or negligently interfere with the other's enjoyment of his prerogative. Thus, keeping a boom fastened to the shore unnecessarily, or for too long a time, would create a nuisance,[1] and would be abatable by indictment. If, however, the owner of a wreck abandons it, he will not be responsible for obstructing the channel, nor to another vessel owner for damages caused thereby;[2] but, if he retains control of it, he is bound to exercise due care and diligence in its removal.[3] And if a bridge is built across a navigable stream, even with legislative sanction, it will still be an abatable nuisance if not constructed with due care and regard for the navigable properties of the stream.[4]

§ 129. [1] Weise v. Smith, 3 Or. 445.

[2] Winpenny v. Philadelphia, 65 Pa. St. 136; Rex v. Watts, 2 Esp. 675. But see Boston & Hingham Steamboat Co. v. Munson, 117 Mass. 34.

[3] Taylor v. Insurance Co., 37 N. Y. 275; Boston & Hingham Steamboat Co. v. Munson, 117 Mass. 34.

[4] Dugan v. Bridge Co., 27 Pa. St. 303; Monongahela Bridge Co. v. Kirk, 46 Pa. St. 112; Eastman v. Manufacturing Co., 44 N. H. 143; Lansing v. Smith, 8 Cow. (N. Y.) 146; Ely v. City of Rochester, 26 Barb. (N. Y.) 133.

CHAPTER VIII.

DANGEROUS INSTRUMENTALITIES.

RAILROADS—DEGREE OF CARE EXACTED IN OPERATING.

130. It is the duty of a railroad company to use ordinary care in the operation of its trains to avoid injury to those persons who, not being passengers or employés, are rightfully upon or near its tracks.

Many of the duties incident to the operation of railroads have been already enumerated and discussed under the heads of "Common Carriers" or "Master and Servant." It remains, however, to consider the relation of this class of carriers to that portion of the

general public whose rights are affected by involuntary contact with the operation of railroads, and the mutual duties that spring from such relation. Aside from its duties as a common carrier of goods or passengers, a railroad, in its general conduct and operation, is subject only to the application of those general rules of care and prudence which the law imposes upon any one who controls or operates a dangerous instrumentality. It is only in so far as the operation of railroads involves the use of unusually and obviously dangerous agencies which, in the absence of proportionate care, would endanger the lives and property of the general public, that the subject demands special attention. And in this particular it is evident that the chief source of danger is that of collision between railroad trains and persons or animals.

SAME—COLLISION WITH PERSONS—CARE REQUIRED OF RAILROAD.

131. It is the duty of the company to exercise towards a member of the public, rightfully upon or near its track, that degree of care which an ordinarily prudent person would exercise in operating a train in similar circumstances.

132. The care required in a given case must be in proportion to the liability of collision, and includes rigid observance of statutory requirements, and such other and further signals, lights, rate of speed, and regulations as circumstances reasonably require.

The speed and weight of a railroad train constitute a dangerous agency, raising the degree of actual care commensurate with its safe operation vastly higher than that required in driving a delivery wagon or a coach.[1] And therefore, while it is strictly accurate to say that no more than ordinary care for the safety of the nontraveling public is required in the operation of railroad trains, it is misleading, for "ordinary care," in such a sense, often

§§ 131–132. [1] Johnson v. Railroad Co., 6 Duer (N. Y.) 633, affirmed in 20 N. Y. 65.

amounts to very nearly the utmost care which the circumstances permit.[2]

But while the true test is doubtless the degree of care which an ordinarily prudent person, skilled in the management of trains, would have employed in the particular circumstances, it must be borne in mind that the circumstances themselves entitle the operator of the train to make certain presumptions. Thus, the engineer of a train approaching a crossing, and giving the proper and reasonable signals by ringing or whistling, may rightfully assume that a person upon the crossing, having ample time to do so, will cross before the arrival of the train, and to this extent, at least, the train has the right of way.[3] The same is also true of the operation of street cars, and the walking and driving public are bound, so far as they can reasonably do so, to keep out of the way of the cars. And so, if defendant's street car collides with plaintiff's wagon, which is being driven upon its tracks, it does not follow conclusively that the collision was due to defendant's negligence. It is essential, to a recovery in such a case, to show that defendant failed to exercise the degree of care which an ordinarily prudent person would have used in similar circumstances.[4]

Ordinary Care—Illustrations.

Illustrations of the care required of railroads towards those rightfully upon or near their tracks are almost innumerable. A railroad

[2] In Johnson v. Railroad Co., 20 N. Y. 65, the court charged that, in the circumstances, the defendants were "bound to exercise the utmost care and diligence, and, for the purpose of avoiding accidents endangering property and life, were bound to use all the means and measures of precaution that the highest prudence could suggest, and which it was in their power to employ." See, also, Weber v. Railroad Co., 58 N. Y. 451; Kay v. Railroad Co., 65 Pa. St. 269; Pennsylvania R. Co. v. Coon, 111 Pa. St. 430, 3 Atl. 234; Fallon v. Boston, 3 Allen (Mass.) 38; Fletcher v. Railroad Co., 1 Allen (Mass.) 9.

[3] Black v. Railroad Co., 38 Iowa, 515; Madison & I. R. Co. v. Taffe, 37 Ind. 361, 364; Pennsylvania Co. v. Krick, 47 Ind. 368; Illinois Cent. R. Co. v. Benton, 69 Ill. 174.

[4] Gumb v. Railway Co., 53 N. Y. Super. Ct. 466. See, also, Com. v. Boston & W. R. Corp., 101 Mass. 201. But see Bernhard v. Railway Co., 68 Hun, 369, 22 N. Y. Supp. 821; Harvey v. Railroad Co., 35 App. Div. 307, 55 N. Y. Supp. 20; De Ioia v. Railroad Co., 37 App. Div. 455, 56 N. Y. Supp. 22; Lefkowitz v. Railway Co. (Sup.) 56 N. Y. Supp. 215; Cawley v. Railway Co., 101 Wis. 145, 77 N. W. 179.

company is liable to one rightfully standing on its platform for injuries resulting from being struck by a mail bag [5] or timber [6] thrown from its train; for letting off steam or hot water in a negligent manner.[7] Whether it is the duty of a railroad to warn persons passing a crossing that there is danger from steam escaping is a question for the jury.[8] Unnecessary and extraordinary use of the whistle is negligence.[9] It is negligence to back a train, for purposes of coupling, without giving customary signals.[10] And, although a signal is not required by statute, if reasonable precaution requires it, it should be given;[11] and, conversely, the giving of statutory signals does not always discharge the company from negligence.[12] Where plaintiff's intestate, in crossing defendant's tracks at their intersection with a city street, on a dark night, was struck by an engine moving backwards, the charge that "the company was bound to have so much light, and so located, that a person reasonably diligent, and of natural powers of observation, might have been able to discover it," was held correct.[13] As a matter of law, it is not negligence if an engineer, seeing danger 400 feet ahead, and doing everything in his power, is not able to check his train.[14] It is for the jury to determine, in the circumstances, whether the

[5] Galloway v. Railway Co., 56 Minn. 346, 57 N. W. 1058; Carpenter v. Railroad Co., 97 N. Y. 494.

[6] Toledo, W. & W. Ry. Co. v. Maine, 67 Ill. 298; Fletcher v. Railroad Co., 168 U. S. 135, 18 Sup. Ct. 35.

[7] Texas & P. Ry. Co. v. Woodall, 2 Willson, Civ. Cas. Ct. App. § 471.

[8] Lewis v. Railroad Co., 60 N. H. 187.

[9] Philadelphia & R. R. Co. v. Killips, 88 Pa. St. 405. And see Gibbs v. Railway Co., 26 Minn. 427, 4 N. W. 819; Billman v. Railroad Co., 76 Ind. 166; Pennsylvania R. Co. v. Barnett, 59 Pa. St. 259. Negligently blowing whistle and scaring horses. Chicago, B. & Q. R. Co. v. Yorty, 158 Ill. 321, 42 N. E. 64; Gulf, C. & S. F. Ry. Co. v. Spence (Tex. Civ. App.) 32 S. W. 329; Rodgers v. Railway Co., 150 Ind. 397, 49 N. E. 453.

[10] Romick v. Railway Co., 62 Iowa, 167, 17 N. W. 458.

[11] Bradley v. Railroad Co., 2 Cush. (Mass.) 539.

[12] Bradley v. Railroad Co., 2 Cush. (Mass.) 539; Thompson v. Railroad Co., 110 N. Y. 636, 17 N. E. 690; Vandewater v. Railroad Co., 135 N. Y. 583, 32 N. E. 636.

[13] Cheney v. Railroad Co., 16 Hun (N. Y.) 415; Purnell v. Railroad Co., 122 N. C. 832, 29 S. E. 953.

[14] Ex parte Stell, 4 Hughes, 157, Fed. Cas. No. 13,358.

so-called "flying switch" is safe and prudent.[15] Although not required by law to keep a flagman at a crossing, the company is liable for the negligence of one voluntarily so placed.[16] So, also, in the operation of a gate voluntarily placed at a crossing.[17] But one for whose benefit a signal was not intended cannot complain of its omission, and it was so held where the death of one killed at a farm crossing was attributed to defendant's failure to give customary signals for the highway crossing beyond.[18]

133. CARE PROPORTIONED TO DANGER—The degree of actual care required of the company increases in proportion to the danger of accident arising from the location of the track or crossing, or any other circumstance of which the company has knowledge, and which tends to conceal, obscure, or otherwise increase the danger of collision.

Where the track parallels the highway, or runs upon it, or where crossings are unusually numerous or frequented, the danger of accident from the operation of trains is greatly increased, and ordinary care in these circumstances may require a very high degree of diligence.[1] Circumstances may require a greater degree of care

[15] White v. Railroad Co., 136 Mass. 321; Howard v. Railroad Co., 32 Minn. 214, 20 N. W. 43. But a flying switch over a highway has been held gross and criminal negligence. Brown v. Railroad Co., 32 N. Y. 597; O'Connor v. Railroad Co., 94 Mo. 150, 7 S. W. 106; Chicago & A. R. Co. v. O'Neil, 64 Ill. App. 623.

[16] Sweeny v. Railroad Co., 10 Allen (Mass.) 368; Kissenger v. Railroad Co., 56 N. Y. 538. And even the absence of a gate or flagman may impute negligence, Eaton v. Railroad Co., 129 Mass. 364; or may be for the jury, Lesan v. Railroad Co., 77 Me. 85.

[17] Glushing v. Sharp, 96 N. Y. 676; Palmer v. Railroad Co., 112 N. Y. 234, 19 N. E. 678.

[18] Vandewater v. Railroad Co., 135 N. Y. 583, 32 N. E. 636; Reynolds v. Railroad Co., 16 C. C. A. 435, 69 Fed. 808; Atlanta & Central Air-Line Ry. Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550. Per contra, Galveston, H. & S. A. Ry. Co. v. Garteiser, 9 Tex. Civ. App. 456, 29 S. W. 939.

§ 133. [1] Toledo, W. & W. R. Co. v. Harmon, 47 Ill. 298; Weber v. Railroad Co., 58 N. Y. 451; Dyer v. Railroad Co., 71 N. Y. 228; Thompson v. Railroad Co., 110 N. Y. 636, 17 N. E. 690; Houston & T. C. R. Co. v. Laskowski (Tex.

than is comprehended in such ordinary precautions as a slow rate of speed,[2] ringing the bell,[3] and sounding the whistle,[4] and it was held that it was not error to charge that the engineer must "keep a lookout to see whether he is running down foot passengers who are crossing the railroad track upon the highways of the city."[5] Where the danger is increased by the darkness of night, suitable rear and head lights must be used, and the number and character is for the jury to determine in the circumstances.[6] In approaching crowded or much-used crossings, the engineer, in addition to ordinary signals, should slacken speed, so that he can readily place it under control if it becomes necessary;[7] but an instruction that a train approaching a crossing should be under control has been held erroneous.[8] Where the location of the crossing is such that the traveler cannot see the train, or readily hear the signals, the engineer must observe every reasonable precaution.[9] The proximity in which trains are run over public crossings may also constitute neg-

Civ. App.) 47 S. W. 59. Causing an obstruction of the view from a crossing by piling wood or erecting buildings, Mackay v. Railroad Co., 35 N. Y. 75; or permitting weeds to grow in right of way, with same result, Indianapolis & St. L. R. Co. v. Smith, 78 Ill. 112,—is negligence.

[2] Chicago, B. & Q. R. Co. v. Dougherty, 12 Ill. App. 181; Chicago & A. R. Co. v. Dillon, 123 Ill. 570, 15 N. E. 181.

[3] Vandewater v. Railroad Co., 74 Hun, 32, 26 N. Y. Supp. 397; Barry v. Railroad Co., 92 N. Y. 289.

[4] Indianapolis & St. L. R. Co. v. Stout, 53 Ind. 143.

[5] Cheney v. Railroad Co., 16 Hun (N. Y.) 415.

[6] Cheney v. Railroad Co., 16 Hun (N. Y.) 415; Indianapolis & St. L. R. Co. v. Galbreath, 63 Ill. 436; Baltimore & O. S. W. Ry. Co. v. Alsop, 71 Ill. App. 54.

[7] Powell v. Railway Co., 59 Mo. App. 626; Lafayette & I. R. R. Co. v. Adams, 26 Ind. 76; Maginnis v. Railroad Co., 52 N. Y. 215. But this does not apply to crossings seldom frequented. Warner v. Railroad Co., 44 N. Y. 465; Chicago, R. I. & P. Ry. Co. v. Ohlsson, 70 Ill. App. 487.

[8] Cohen v. Railroad Co., 14 Nev. 376. See, also, Telfer v. Railroad Co., 30 N. J. Law, 188; Chicago & A. R. Co. v. Robinson, 9 Ill. App. 89.

[9] Grippen v. Railroad Co., 40 N. Y. 34; Eilert v. Railroad Co., 48 Wis. 606, 4 N. W. 769; Richardson v. Railroad Co., 45 N. Y. 846; Baltimore & P. R. Co. v. Webster, 6 App. D. C. 182; Willet v. Railroad Co., 114 Mich. 411, 72 N. W. 260. It is negligence on the part of the company to permit weeds to grow in its right of way adjacent to a crossing so as to obstruct the view of one about to cross. Indianapolis & St. L. R. Co. v. Smith, 78 Ill. 112; Chicago, B. & Q. R. Co. v. Lee, 87 Ill. 454.

ligence, if it is so great as to make the customary signals unavailing. This was so held in a case where plaintiff was waiting for a long train to pass in order to cross. So soon as the train had passed, and after looking up and down the track so far as was possible, she attempted to cross, but was injured by another train, following closely behind the first.[10] To constitute a public crossing, it is not necessary that it should be a highway. When the public have for a long time openly, habitually, and with the acquiescence of the railroad company crossed a railroad at a point not a traveled way, such acquiescence amounts to a license, and the company is bound to exercise reasonable care to avoid injury to persons crossing at that point;[11] and this is true even if such crossing is contrary to statute,[12] or in violation of the rules of the company.[13] It is for the jury to determine in such case as to the sufficiency and reasonableness of the warning.[14] But where the company has merely permitted an indiscriminate crossing,[15] or the act is in itself a trespass,[16] the company will be relieved of liability by

[10] Chicago & E. I. R. Co. v. Boggs, 101 Ind. 522; Golden v. Railroad Co., 187 Pa. St. 635, 41 Atl. 302, 43 Wkly. Notes Cas. 106; but this would not be negligence at a place not a public crossing, Philadelphia & R. R. Co. v. Spearen, 47 Pa. St. 300. And see French v. Railroad Co., 116 Mass. 537.

[11] Norfolk & W. R. Co. v. De Board's Adm'r, 91 Va. 700, 22 S. E. 514; Hansen v. Railway Co., 105 Cal. 379, 38 Pac. 957; Swift v. Railroad Co., 123 N. Y. 645, 25 N. E. 378; Taylor v. Canal Co., 113 Pa. St. 162, 8 Atl. 43; Byrne v. Railroad Co., 104 N. Y. 362, 10 N. E. 539; Cleveland, C., C. & St. L. R. Co. v. Adair, 12 Ind. App. 569, 39 N. E. 672, and 40 N. E. 822; Boothby v. Railroad Co., 90 Me. 313, 38 Atl. 155; Johnson v. Railway Co., 7 N. D. 284, 75 N. W. 250; Seymour v. Railroad Co., 69 Vt. 555, 38 Atl. 236; Smith v. Railway Co., 90 Fed. 783. But the federal court holds that a railroad is liable to a bare licensee for gross negligence only. Cleveland, C., C. & St. L. R. Co. v. Tartt, 12 C. C. A. 618, 64 Fed. 823.

[12] Davis v. Railway Co., 58 Wis. 646, 17 N. W. 406; Townley v. Railroad Co., 53 Wis. 626, 11 N. W. 55.

[13] Delaney v. Railroad Co., 33 Wis. 67. But see Matze v. Railroad Co., 1 Hun (N. Y.) 417; Hansen v. Railway Co., 105 Cal. 379, 38 Pac. 957.

[14] Byrne v. Railroad Co., 104 N. Y. 362, 10 N. E. 539; Swift v. Railroad Co., 123 N. Y. 645, 25 N. E. 378.

[15] Harrison v. Railroad Co., 29 L. T. (N. S.) 844.

[16] Matze v. Railroad Co., 1 Hun (N. Y.) 417; Felton v. Aubrey, 20 C. C. A. 436, 74 Fed. 350.

showing the very least degree of care, falling little short of gross negligence.[17]

134. SIGNALS—Violation of statutes requiring the giving of certain signals is generally held to constitute negligence per se.[1]

It should be observed, however, that the mere fact of omission to give certain signals required by statute or ordinance is not conclusive of violation, for extenuating circumstances may be shown, which would relieve the company from the penalty imposed by the law, thus negativing the presumption of violation.[2] Moreover, to render the railroad liable, it must appear that the injury was due to such failure to give statutory signals.[3] The mere giving of statutory signals does not, however, in all cases relieve the company of liability,—as in the case of an injury caused by running a train at a high rate of speed through a village;[4] and the question of rea-

[17] Roth v. Depot Co., 13 Wash. 525, 43 Pac. 641; Mitchell v. Railroad Co. (N. H.) 34 Atl. 674; Kansas City, Ft. S. & M. R. Co. v. Cook, 13 C. C. A. 364, 66 Fed. 115; Thomas v. Railway Co., 93 Iowa, 248, 61 N. W. 967.

§ 134. [1] Cordell v. Railroad Co., 64 N. Y. 535; Chicago & E. I. R. Co. v. Boggs, 101 Ind. 522; Pennsylvania R. Co. v. Ogier, 35 Pa. St. 60; Chicago & N. E. Ry. Co. v. Miller, 46 Mich. 532, 9 N. W. 841; Prewitt v. Railway Co., 134 Mo. 615, 36 S. W. 667; Gulf, C. & S. F. Ry. Co. v. Calvert, 11 Tex. Civ. App. 297, 32 S. W. 246. Other courts have merely held that violation of the statute was some evidence, but not conclusive, of negligence. Hanlon v. Railroad Co., 129 Mass. 310; Lamb v. Railway Co. (Mo. Sup.) 48 S. W. 659; Simons' Adm'r v. Railway Co., 96 Va. 152, 31 S. E. 7; Walsh v. Railroad Co., 171 Mass. 52, 50 N. E. 453; Houston & T. C. R. Co. v. Rogers (Tex. Civ. App.) 39 S. W. 1112; Hunter v. Railway Co. (Mont.) 57 Pac. 140; Chicago, St. P., M. & O. Ry. Co. v. Brady, 51 Neb. 758, 71 N. W. 721; Missouri Pac. Ry. Co. v. Geist, 49 Neb. 489, 68 N. W. 640.

[2] Hanlon v. Railroad Co., 129 Mass. 310; Karle v. Railroad Co., 55 Mo. 476.

[3] Atchison, T. & S. F. R. Co. v. Morgan, 31 Kan. 77, 1 Pac. 298; Chicago & A. R. Co. v. Robinson, 106 Ill. 142; Chicago, B. & Q. R. Co. v. Harwood, 90 Ill. 425; Houston & T. C. R. Co. v. Nixon, 52 Tex. 19; Baltimore & O. S. W. Ry. Co. v. Conoyer, 149 Ind. 524, 48 N. E. 352; Atlantic & D. Ry. Co. v. Rieger, 95 Va. 418, 28 S. E. 590.

[4] Thompson v. Railroad Co., 110 N. Y. 636, 17 N. E. 690; Zimmer v. Railroad Co., 7 Hun (N. Y.) 552. In the following cases the statutory warning was held sufficient: Lake Shore & M. S. R. Co. v. Elson, 15 Ill. App. 80; Chicago, B. & Q. R. Co. v. Dougherty, 110 Ill. 521.

sonableness and sufficiency of the signals used may be submitted to the jury. And, where it appeared that plaintiff was familiar with the custom of defendant to give warning of the approach of trains, evidence was held admissible that at the time of the accident the custom was not followed.[5] In the absence of a statute imposing upon the company the duty of giving certain signals on approaching crossings, failure to give signals is not, per se, negligence, and in such cases it is for the jury to determine whether the omission is negligent.[6] In the absence of any statute governing the giving of signals, the question of reasonableness and sufficiency is for the jury.[7]

SAME—CARE REQUIRED OF PERSONS.

135. It is the duty of a traveler in proximity to or about to cross a railroad track to use that degree of care which a person of ordinary prudence would exercise in similar circumstances. This rule requires of one about to cross a railroad that he should look and listen, unless

(a) The company, through its servants or rules, relieves him of the precaution by assurances of safety, or

(b) Local conditions, as the conformation of the land or obstructions or other causes, render the precaution useless, or unless

(c) By reason of some infirmity or incapacity of the traveler the usual rule is abrogated or modified.

The duties of a person approaching a railroad track are in many respects similar to those of the company. Neither the train nor the person has an absolute right of way, regardless of the rights of the other. Each must be governed by circumstances, and observe that degree of caution which they require. When a collision

[5] Vandewater v. Railroad Co., 74 Hun, 32, 26 N. Y. Supp. 397. Defendant held liable in such case even where plaintiff failed to exercise ordinary care. Chicago, B. & Q. R. Co. v. Johnson, 53 Ill. App. 478.

[6] Sauerborn v. Railroad Co., 69 Hun, 429, 23 N. Y. Supp. 478.

[7] Mitchell v. Railroad Co. (N. H.) 34 Atl. 674.

occurs without negligence on the part of either the company or the traveler, neither will be heard to complain of the other.[1] It is equally evident that where a collision results from the mutual fault of both parties neither will have a right of action.

The way traveler should always exercise a degree of caution proportioned to the danger, and this rule requires that on approaching a railroad crossing he should look in both directions, and listen for approaching trains.[2] And it is probably not going too far to hold that in certain cases he should stop before going on the crossing,[3] or even get down from his wagon, if driving, and approach on foot, for purposes of a more careful survey.[4] The test is what

§ 135. [1] Cosgrove v. Railroad Co., 13 Hun (N. Y.) 329; Rothe v. Railroad Co., 21 Wis. 256; Evansville & C. R. Co. v. Lowdermilk, 15 Ind. 120.

[2] Brown v. Railroad Co., 22 Minn. 165; Stackus v. Railroad Co., 7 Hun (N. Y.) 559; Chicago & R. I. R. Co. v. McKean, 40 Ill. 218; Chicago, R. I. & P. R. Co. v. Houston, 95 U. S. 697; Linfield v. Railroad Co., 10 Cush. (Mass.) 562; Davis v. Railroad Co., 47 N. Y. 400; Weber v. Railroad Co., 58 N. Y. 451; Louisville, N. A. & C. Ry. Co. v. Stephens, 13 Ind. App. 145, 40 N. E. 148; Sprow v. Railroad Co., 163 Mass. 330, 39 N. E. 1024; Gulf, C. & S. F. Ry. Co. v. Scott (Tex. Civ. App.) 27 S. W. 827; Philadelphia & R. R. Co. v. Peebles, 14 C. C. A. 555, 67 Fed. 591; Baltimore & O. R. Co. v. Griffith, 159 U. S. 603, 16 Sup. Ct. 105; Smith v. Railroad Co., 87 Me. 339, 32 Atl. 967; Vreeland v. Railroad Co., 109 Mich. 585, 67 N. W. 905; Howe v. Railroad Co., 62 Minn. 71, 64 N. W. 102; Judson v. Railway Co., 63 Minn. 248, 65 N. W. 447; struck by a closely following car (for jury), Bowen v. Railroad Co., 89 Hun, 594, 35 N. Y. Supp. 540; Collins v. Railroad Co., 92 Hun, 563, 36 N. Y. Supp. 942; Davidson v. Railroad Co., 171 Pa. St. 522, 33 Atl. 86; Martin v. Railroad Co., 176 Pa. St. 444, 35 Atl. 183; Cleveland, C., C. & St. L. Ry. Co. v. Miller, 149 Ind. 90, 49 N. E. 445; Little Rock & F. S. Ry. Co. v. Blewett (Ark.) 45 S. W. 548; Chicago, B. & Q. R. Co. v. Thorson, 68 Ill. App. 288; Mayes v. Railroad Co., 71 Mo. App. 140; Northern Pac. R. Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763; Muscarro v. Railroad Co. (Pa. Sup.) 43 Atl. 527; Conkling v. Railroad Co. (N. J. Err. & App.) 43 Atl. 666; Jencks v. Railroad Co., 33 App. Div. 635, 53 N. Y. Supp. 623; Atchison, T. & S. F. Ry. Co. v. Holland (Kan. Sup.) 56 Pac. 6.

[3] Pennsylvania Canal Co. v. Bentley, 66 Pa. St. 30; Wilds v. Railroad Co., 29 N. Y. 315, 328; Nelson v. Railroad Co. (Minn.) 78 N. W. 1041; Ritzman v. Railroad Co., 187 Pa. St. 337, 40 Atl. 975; Decker v. Railroad Co., 181 Pa. St. 465, 37 Atl. 570. But see Judson v. Railroad Co., 158 N. Y. 597, 53 N. E. 514. Burden of proof, Steele v. Railway Co. (Wash.) 57 Pac. 820; Manley v. Canal Co., 69 Vt. 101, 37 Atl. 279.

[4] Pennsylvania R. Co. v. Beale, 73 Pa. St. 504.

would be expected of a person of ordinary prudence in similar circumstances.[5]

It not infrequently happens that a view of the track may be obtained from some particular point only on the highway, more or less remote from the crossing. In such case it is not conclusive of negligence that the traveler did not look at the one open point of view, but the question of negligence is for the jury to determine in the circumstances.[6] It is otherwise if the view is, in general, open and unobstructed for a short distance only, close to the track.[7] It is not requisite that the person should take every possible precaution, and it is error to charge that it is the duty of the person "to look and listen at all points" on approaching a crossing.[8] In Bellefontaine Railway Co. v. Hunter,[9] Ray, C. J., thus defines the mutual duties of the traveler and the company: "In the case before us each party had a right of passage, limited by that maxim of equity, 'Sic utere tuo ut alienum non lædas.' Upon each rested the obligation, in the exercise of this right, to use such reasonable degree of foresight, skill, capacity, and care as would be consistent with a proper regard for the safety of all others exercising the same right and using the like precautions. We do not say that such care must be used by each as would prevent the possibility of injury to himself or another. There are inevitable accidents. But such care is required as would reasonably, and under all ordinary circumstances, avoid collision with one using like caution,—such care as a prudent man, in the exercise of his usual diligence, will observe. It is true that prudent men are sometimes careless. When so, they must accept the consequences of their departure from their usual line of

[5] McNown v. Railroad Co., 55 Mo. App. 585; Baker v. Railroad Co. (Mo. Sup.) 48 S. W. 838.

[6] Massoth v. Canal Co., 64 N. Y. 524. See, also, Pepper v. Southern Pac. Co., 105 Cal. 389, 38 Pac. 974; Cleveland, C., C. & St. L. R. Co. v. Smith, 78 Ill. App. 429; White v. Southern Pac. Co. (Cal.) 54 Pac. 956; Central R. Co. v. Smalley (N. J. Err. & App.) 39 Atl. 695; Tilton v. Railroad Co., 169 Mass. 253, 47 N. E. 998.

[7] Campbell's Adm'r v. Railroad Co. (Va.) 21 S. E. 480; Atchison, T. & S. F. R. Co. v. Holland (Kan. Sup.) 56 Pac. 6; Stewart v. Railroad Co. (Mich.) 77 N. W. 643.

[8] Winey v. Railway Co., 92 Iowa, 622, 61 N. W. 218.

[9] 33 Ind. 335, at page 365.

conduct, and the exception is not to mark the amount of care exacted by the law."

136. FAILURE TO GIVE SIGNALS—Failure on the part of the company to give customary or statutory signals does not relieve a person approaching an unobstructed crossing from the duty to look and listen.

"Where a person knowingly about to cross a railroad track may have an unobstructed view of the railroad, so as to know of the approach of a train a sufficient time to clearly avoid any injury from it, he cannot, as a matter of law, recover, although the railroad company may have been also negligent, or have neglected to perform a statutory requirement." [1] This rule has been slightly modified in a few carefully considered cases to the extent of holding, where the railroad company fails to give statutory signals, one is not debarred from recovery by reason of being incautiously or imprudently on the tracks, provided he keeps a proper lookout.[2] The great

§ 136. [1] Artz v. Railroad Co., 34 Iowa, 153. See, also, Ernst v. Railroad Co., 39 N. Y. 61; Baxter v. Railroad Co., 41 N. Y. 502; Nicholson v. Railway Co., Id. 525; Morris & E. R. Co. v. Haslan, 33 N. J. Law, 147; Chicago & A. R. Co. v. Fears, 53 Ill. 115; Toledo & W. Ry. Co. v. Goddard, 25 Ind. 185; Cleveland, C. & C. R. Co. v. Terry, 8 Ohio St. 570; North Pennsylvania R. Co. v. Heileman, 49 Pa. St. 60; Parker v. Adams, 12 Metc. (Mass.) 415; Gangawer v. Railroad Co., 168 Pa. St. 265, 32 Atl. 21; Caldwell v. Railroad Co., 58 Mo. App. 453; Johnson's Adm'r v. Railway Co., 91 Va. 171, 21 S. E. 238; Conkling v. Railroad Co. (N. J. Err. & App.) 43 Atl. 666; Baker v. Railroad Co. (Mo. Sup.) 48 S. W. 838; Blackburn v. Pacific Co. (Or.) 55 Pac. 225; Walsh v. Railroad Co., 171 Mass. 52, 50 N. E. 453; Gulf, C. & S. F. Ry. Co. v. Hamilton (Tex. Civ. App.) 42 S. W. 358; Rangeley's Adm'r v. Railway Co., 95 Va. 715, 30 S. E. 386; Severy v. Railway Co., 6 Okl. 153, 50 Pac. 162; Schneider v. Railway Co., 99 Wis. 378, 75 N. W. 169; Mesic v. Railroad Co., 120 N. C. 489, 26 S. E. 633. Traveler cannot rely solely on custom to have flagman at crossing. Smith v. Railroad Co., 141 Ind. 92, 40 N. E. 270.

[2] Baltimore & O. R. Co. v. State, 33 Md. 542. And see Cliff v. Railroad Co., L. R. 5 Q. B. 258; Baltimore & O. S. W. Ry. Co. v. Conoyer, 149 Ind. 524, 48 N. E. 352. The extreme opposite view holds it to be negligence per se to go on the track in front of an approaching train, notwithstanding precautions of stopping, looking, and listening. Sheehan v. Railroad Co., 166 Pa. St. 354, 31 Atl. 120.

weight of American authority is, however, opposed to even this slight modification of the rule. Yet the rule as laid down is not absolutely inflexible, being governed to some extent by circumstances; as if a person actuated by fright, and to escape from a runaway team, should, without preliminary caution, run upon the tracks.[3] And if one, having with due caution come upon a crossing where the tracks are numerous, is confused by the smoke and noise of passing trains, and is injured by a train coming from an opposite direction, and which he failed to observe, although he might have done so had he looked, the question of his negligence may be submitted to the jury.[4]

137. ASSURANCE OF SAFETY BY AGENTS—If the positive acts or omissions of the agents of the company are such as would lead an ordinarily prudent person to believe that a safe crossing was afforded, the traveler may be justified in omitting some or all of the ordinary precautions.[1]

Thus, where defendant's flagman, stationed at a crossing, signaled to plaintiff to cross, and he did so, looking straight ahead, and was injured by an approaching train, it was held that he could recover.[2] So, also, where a tacit assurance of safety was extended to plaintiff by leaving the gate open.[3] And where plaintiff attempted to cross on seeing the gate raised, and was injured, although he might have seen the train, the court said: "The raising

[3] Moore v. Railroad Co., 47 Iowa, 688; Pratt v. Railway Co., 107 Iowa, 287, 77 N. W. 1064.

[4] Greany v. Railroad Co., 101 N. Y. 419, 5 N. E. 425; Haycroft v. Railroad Co., 64 N. Y. 636. But see Purdy v. Railroad Co., 87 Hun, 97, 33 N. Y. Supp. 952.

§ 137. [1] Chaffee v. Railroad Corp., 104 Mass. 108; Wheelock v. Railroad Co., 105 Mass. 203; Clark v. Railroad Co., 164 Mass. 434, 41 N. E. 666; Steel v. Railway Co., 107 Mich. 516, 65 N. W. 573; Waldele v. Railroad Co., 4 App. Div. 549, 38 N. Y. Supp. 1009; Chicago & A. R. Co. v. Blaul, 70 Ill. App. 518.

[2] Sweeny v. Railroad Co., 10 Allen (Mass.) 368.

[3] Palmer v. Railroad Co., 112 N. Y. 234, 19 N. E. 678; Oldenburg v. Railroad Co., 124 N. Y. 414, 26 N. E. 1021; Walsh v. Railroad Co., 171 Mass. 52, 50 N. E. 453; Chicago & A. R. Co. v. Redmond, 70 Ill. App. 119.

of the gate was substantial assurance to him of safety, just as significant as if the gateman had beckoned to him, or invited him to come on, and that any prudent man would not be influenced by it is against all human experience. The conduct of the gateman cannot be ignored in passing upon plaintiff's conduct, and it was properly to be considered by the jury with all the other circumstances of the case."[4]

138. OBSTRUCTED VIEW—If the view of one approaching a crossing in a vehicle is obstructed by natural or artificial causes, he is not necessarily negligent if he does not alight, and go forward on foot, to determine the safety of the crossing.[1]

And where, in similar circumstances, he approaches the crossing on foot, it is not per se negligence if he does not stop, but is for the jury.[2] The rule of ordinary care is in no degree abated by these decisions, but is rather exemplified. When obstructions intercept the view, the danger is increased, and the traveler should approach with increased caution. If he cannot see, he should listen the more intently.[3] And, if the conditions are such that he can neither see

[4] Glushing v. Sharp, 96 N. Y. 676. See, also, Lindeman v. Railroad Co., 42 Hun (N. Y.) 306. Per contra, Denver & R. G. R. Co. v. Gustafson, 21 Colo. 393, 41 Pac. 505. Plaintiff, at the invitation of agent, attempted to cross at a dangerous place. Warren v. Railroad Co., 8 Allen (Mass.) 227. But compare Hickey v. Railroad Co., 14 Allen (Mass.) 429, where permission to do a negligent act is distinguished from an invitation. An invitation to cross by a flagman or other agent does not, however, entirely relieve the traveler from the duty of ordinary care, and it cannot be held, as matter of law, that one acting on such an invitation is, ipso facto, free from negligence. Chicago, B. & Q. R. Co. v. Spring, 13 Ill. App. 174.

§ 138. [1] Mackay v. Railroad Co., 35 N. Y. 75; Dolan v. Canal Co., 71 N. Y. 285; Kellogg v. Railroad Co., 79 N. Y. 72; Southern Ry. Co. v. Prather (Ala.) 24 South. 836; Houston & T. C. R. Co. v. Pereira (Tex. Civ. App.) 45 S. W. 767.

[2] Link v. Railroad Co., 165 Pa. St. 75, 30 Atl. 820; Northern Pac. R. Co. v. Austin, 12 C. C. A. 97, 64 Fed. 211; Lake Shore & M. S. Ry. Co. v. Anthony, 12 Ind. App. 126, 38 N. E. 831; Hubbard v. Railroad Co., 162 Mass. 132, 38 N. E. 366; Whalen v. Railroad Co., 58 Hun, 431, 12 N. Y. Supp. 527, distinguishing Kellogg v. Railroad Co., 79 N. Y. 72.

[3] Hoffmann v. Railroad Co., 67 Hun, 581, 22 N. Y. Supp. 463; Beisiegel v.

nor hear, ordinary care requires that he should stop, and it is negligence not to do so.[4]

Where a crossing is obstructed for an unreasonable length of time by cars standing on the track, there is good authority for holding that it is not negligence for the foot traveler to pass over the cars,[5] or between them if separated;[6] but, in any event, he must use ordinary care, and not needlessly incur danger,—as when one attempted to cross between two cars by putting a foot on either side of the pin head, where they would necessarily be caught if the train moved.[7] Other courts have held that any attempt to cross by passing between or over the cars is negligence which will prevent a recovery.[8]

It is not quite clear why a person about to cross a railroad should be permitted to relax his vigilance in any degree by reason of the fact that a train has just passed, yet some decisions embody this holding.[9]

Railroad Co., 34 N. Y. 622; Chicago, R. I. & P. Ry. Co. v. Williams, 59 Kan. 700, 54 Pac. 1047; Stewart v. Railroad Co. (Mich.) 77 N. W. 643; Keppleman v. Railway Co. (Pa. Sup.) 42 Atl. 697; Central R. Co. of New Jersey v. Smalley (N. J. Err. & App.) 39 Atl. 695. Attempt not negligence when view obstructed by smoke of train which has just passed. Chicago & N. W. Ry. Co. v. Hansen, 166 Ill. 623, 46 N. E. 1071. Contra, Manley v. Railroad Co., 18 App. Div. 420, 45 N. Y. Supp. 1108; Hoveuden v. Railroad Co., 180 Pa. St. 244, 36 Atl. 731. Where plaintiff heard whistle, but drove on, hoping to cross in time, he could not recover. Pennsylvania Co. v. Morel, 40 Ohio St. 338.

[4] Flemming v. Railroad Co., 49 Cal. 253, where the rattling of plaintiff's wagon prevented his hearing and the dust prevented seeing.

[5] Rauch v. Lloyd, 31 Pa. St. 358; Phillips v. Railroad Co., 80 Hun, 404, 30 N. Y. Supp. 333; Weber v. Railroad Co., 54 Kan. 389, 38 Pac. 569; San Antonio & A. P. Ry. Co. v. Bergsland, 12 Tex. Civ. App. 97, 34 S. W. 155.

[6] Baltimore & O. R. Co. v. Fitzpatrick, 35 Md. 32. But see Lewis v. Railroad Co., 38 Md. 588; Mahar v. Railway Co., 19 Hun (N. Y.) 32; Lake Erie & W. R. Co. v. Mackey, 53 Ohio St. 370, 41 N. E. 980.

[7] Hudson v. Railway Co., 123 Mo. 445, 27 S. W. 717.

[8] Stillson v. Railroad Co., 67 Mo. 671; Gahagan v. Railroad Co., 1 Allen (Mass.) 187; O'Mara v. Canal Co., 18 Hun (N. Y.) 192. But see Phillips v. Railroad Co., 80 Hun, 404, 30 N. Y. Supp. 333. Traveler held negligent in climbing over bumpers, although using great care. Magoon v. Railroad Co., 67 Vt. 177, 31 Atl. 156; Wherry v. Railway Co., 64 Minn. 415, 67 N. W. 223.

[9] Greany v. Railroad Co., 101 N. Y. 419, 5 N. E. 425; McNamara v. Railroad Co., 136 N. Y. 650, 32 N. E. 675; Northrup v. Railway Co., 37 Hun (N. Y.) 295; Beckwith v. Railroad Co., 54 Hun, 446, 7 N. Y. Supp. 719, 721; Gray v.

139. INFIRM TRAVELERS—Although the exercise of ordinary care is required of those who are physically infirm by reason of age or otherwise, yet the standard by which that degree of care must be measured is somewhat relaxed, and must conform to what would reasonably be expected from persons of that particular age or physical condition.[1]

"The old, the lame, and infirm are entitled to the use of the streets, and more care must be exercised towards them by engineers than towards those who have better powers of motion. The young are entitled to the same rights, and cannot be required to exercise as great foresight and vigilance as those of maturer years." [2] But those persons who are afflicted with deafness,[3] or imperfect vision,[4] being aware of their infirmities, should take added precautions in approaching places of unusual danger, such as railroad crossings.

Railroad Co., 172 Pa. St. 383, 33 Atl. 697; Bowen v. Railroad Co., 89 Hun, 594, 35 N. Y. Supp. 540; Baker v. Railroad Co. (Mo. Sup.) 48 S. W. 838; Pinney v. Railway Co., 71 Mo. App. 577.

§ 139. [1] Elkins v. Railroad Co., 115 Mass. 190; Costello v. Railroad Co., 65 Barb. (N. Y.) 92; Philadelphia & R. R. Co. v. Spearen, 47 Pa. St. 300; Chicago & A. R. Co. v. Becker, 84 Ill. 483; McGovern v. Railroad Co., 67 N. Y. 417; Paducah & M. R. Co. v. Hoehl, 12 Bush (Ky.) 41; Haas v. Railroad Co., 41 Wis. 44; deafness, New York, N. H. & H. R. Co. v. Blessing, 14 C. C. A. 394, 67 Fed. 277.

[2] O'Mara v. Railroad Co., 38 N. Y. 445; Allen v. Railway Co., 106 Iowa, 602, 76 N. W. 848; Chicago, R. I. & P. Ry. Co. v. Ohlsson, 70 Ill. App. 487; Smeltz v. Railroad Co., 186 Pa. St. 364, 40 Atl. 479; Atchison, T. & S. F. R. Co. v. Cross, 58 Kan. 424, 49 Pac. 599; Carmer v. Railway Co., 95 Wis. 513, 70 N. W. 560.

[3] Illinois Cent. R. Co. v. Buckner, 28 Ill. 299; Cleveland, C. & C. R. Co. v. Terry, 8 Ohio St. 570; Ormsbee v. Railroad Corp., 14 R. I. 102; Central R. Co. v. Feller, 84 Pa. St. 226; Chicago, R. I. & P. Ry. Co. v. Pounds, 27 C. C. A. 112, 82 Fed. 217; Phillips v. Railway Co., 111 Mich. 274, 69 N. W. 496.

[4] Peach v. City of Utica, 10 Hun (N. Y.) 477; Sleeper v. Sandown, 52 N. H. 244; Davenport v. Ruckman, 37 N. Y. 568; Winn v. City of Lowell, 1 Allen (Mass.) 177.

140. CONTRIBUTORY NEGLIGENCE — Failure of the traveler to use ordinary care, within the foregoing definition, when approaching a railroad crossing, or otherwise coming into proximity with railroad tracks, constitutes contributory negligence which will prevent a recovery, provided the omission was the proximate cause of the injury.[1]

When it appears that, in the existing conditions, the ordinary precautions, such as looking and listening, would have been useless, their omission is not negligence which will prejudice plaintiff's right to recover.[2] Thus, where two trains were approaching one another at a crossing, the one carrying a headlight, and making much noise, and the other approaching in comparative quiet, without any light, and the traveler was struck and killed by the latter, it was held that, as it would have been useless for deceased to have

§ 140. [1] Duvall v. Railroad Co., 105 Mich. 386, 63 N. W. 437; Smith v. Railroad Co., 141 Ind. 92, 40 N. E. 270; Bates v. Railroad Co., 84 Hun, 287, 32 N. Y. Supp. 337; even if railroad is also negligent, Louisville, N. A. & C. Ry. Co. v. Stephens, 13 Ind. App. 145, 40 N. E. 148; and he cannot recover even if the crossing is improperly constructed, Tobias v. Railroad Co., 103 Mich. 330, 61 N. W. 514. See, also, Sheehan v. Railroad Co., 166 Pa. St. 354, 31 Atl. 120; Miller v. Railroad Co., 81 Hun, 152, 30 N. Y. Supp. 751; Nelson v. Railroad Co., 88 Wis. 392, 60 N. W. 703. In the following cases the question was held properly submitted to the jury: Link v. Railroad Co., 165 Pa. St. 75, 30 Atl. 820; Connerton v. Canal Co., 168 Pa. St. 339, 32 Atl. 416; Wilcox v. Railroad Co., 88 Hun, 263, 34 N. Y. Supp. 744; Crosby v. Railroad Co., 88 Hun, 196, 34 N. Y. Supp. 714; New York, N. H. & H. R. Co. v. Blessing, 14 C. C. A. 394, 67 Fed. 277; Miles v. Railroad Co., 86 Hun, 508, 33 N. Y. Supp. 729; Meddaugh v. Railway Co., 86 Hun, 620, 33 N. Y. Supp. 793; Cincinnati, N. O. & T. P. Ry. Co. v. Farra, 13 C. C. A. 602, 66 Fed. 496; Smith v. Railroad Co. (Ky.) 30 S. W. 209; Lake Shore & M. S. Ry. Co. v. Anthony, 12 Ind. App. 126, 38 N. E. 831; Hubbard v. Railroad Co., 162 Mass. 132, 38 N. E. 366; Struck v. Railway Co., 58 Minn. 298, 59 N. W. 1022; Lynch v. Railroad Co., 16 C. C. A. 151, 69 Fed. 86; Howe v. Railroad Co., 62 Minn. 71, 64 N. W. 102.

[2] Struck v. Railway Co., 58 Minn. 298, 59 N. W. 1022; Texas & P. Ry. Co. v. Neill (Tex. Civ. App.) 30 S. W. 369; Smedis v. Railroad Co., 88 N. Y. 13; Judson v. Railway Co., 63 Minn. 248, 65 N. W. 447; Philadelphia & R. R. Co. v. Peebles, 14 C. C. A. 555, 67 Fed. 591; Derk v. Railway Co., 164 Pa. St. 243, 30 Atl. 231; Reeves v. Railroad Co., 92 Iowa, 32, 60 N. W. 243; Jensen v. Railroad Co., 102 Mich. 176, 60 N. W. 57; Pepper v. Railroad Co., 105 Cal. 389, 38 Pac. 974; Sprow v. Railroad Co., 163 Mass. 330, 39 N. E. 1024.

looked and listened for the latter train, his attention being presumptively engrossed with the former, his omission to do so was immaterial, and therefore no assumption to that effect could be based on the evidence.[3]

Effect on Statutory Liability.

Where the failure of railroad companies is, by statute, made negligence per se, the right of recovery by the traveler, notwithstanding contributory negligence, is not thereby changed.[4] Statutes of this kind have the effect merely of establishing in certain cases the negligence of the railroad,[5] but they cannot be construed to relieve the traveler of the duty of exercising ordinary care.[6]

Contributory Negligence not Conclusive against Plaintiff.

Neither is the fact of plaintiff's contributory negligence conclusive against his right to recover in all cases.[7] If the plaintiff's own negligence exposes him to injury, he may yet recover if defendant's failure to use ordinary care, after discovering his danger, was the

[3] Smedis v. Railroad Co., 88 N. Y. 13.

[4] Dascomb v. Railroad Co., 27 Barb. (N. Y.) 221; Chicago, R. I. & P. Ry. Co. v. Kennedy, 2 Kan. App. 693, 43 Pac. 802; Central Texas & N. W. Ry. Co. v. Nycum (Tex. Civ. App.) 34 S. W. 460; Miller v. Railroad Co., 144 Ind. 323, 43 N. E. 257; Judson v. Railway Co., 63 Minn. 248, 65 N. W. 447; Collins v. Railroad Co., 92 Hun, 563, 36 N. Y. Supp. 942; Steinhofel v. Railway Co., 92 Wis. 123, 65 N. W. 852; Alabama G. S. R. Co. v. Anderson, 109 Ala. 299, 19 South. 516. But see Lloyd v. Railway Co., 128 Mo. 595, 29 S. W. 153, and 31 S. W. 110.

[5] Shirk v. Railroad Co., 14 Ind. App. 126, 42 N. E. 656; Pittsburg, C., C. & St. L. Ry. Co. v. Shaw, 15 Ind. App. 173, 43 N. E. 957; Texas & P. Ry. Co. v. Brown, 11 Tex. Civ. App. 503, 33 S. W. 146; Chicago, M. & St. P. R. Co. v. Walsh, 157 Ill. 672, 41 N. E. 900.

[6] Baltimore & O. R. Co. v. Talmage, 15 Ind. App. 203, 43 N. E. 1019; Collins v. Railroad Co., 92 Hun, 563, 36 N. Y. Supp. 942; Texas & P. Ry. Co. v. Cody, 166 U. S. 606, 17 Sup. Ct. 703; Comer v. Shaw, 98 Ga. 543, 25 S. E. 733; Payne v. Railroad Co., 136 Mo. 562, 38 S. W. 308.

[7] Davies v. Mann, 10 Mees. & W. 546; Green v. Railroad Co., 11 Hun (N. Y.) 333; Cleveland, C., C. & I. R. Co. v. Elliott, 28 Ohio St. 340; Trow v. Railroad Co., 24 Vt. 487; Isbell v. Railroad Co., 27 Conn. 393; Lovett v. Salem & S. D. R. Co., 9 Allen (Mass.) 557; Underwood v. Waldron, 33 Mich. 232; Lane v. Atlantic Works, 107 Mass. 104; Illinois Cent. R. Co. v. Hoffman, 67 Ill. 287; Donaldson v. Railroad Co., 21 Minn. 293; Kuhn v. Railroad Co., 42 Iowa, 420; Wright v. Brown, 4 Ind. 95; Tuff v. Warman, 5 C. B. (N. S.) 573.

proximate cause of the injury.[8] Thus, where one was walking between the double tracks of a railroad, with an umbrella over her head, and was visible at a long distance, and those in charge of the train made no effort to avoid injury after they saw her peril, the case was for the jury.[9] In an earlier case the court said: "Though the deceased may have incautiously gotten upon the track of defendant's road, yet, if he could not, at the time of the collision, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, assuming that there were such, the right to recover exists."[10]

Presumptions.

It by no means follows as a presumption that the omission of that which is beneficial in its object is harmful. Thus, an engineer may, contrary to custom and the dictates of prudence, fail to ring the bell on approaching a crossing, but the traveler may, nevertheless, have been fully warned in other ways of the approach of the train, and in such case the company could not be held responsible for the failure to give the customary signals.[11] On the other hand, in certain circumstances, there is a presumption that, had the customary or proper signal been given, its warning would have been heeded, and the injury avoided. "The very object of requiring the engineer to sound an alarm before reaching the crossing is to put the way traveler on his guard, and when the engineer neglects the necessary signals he deprives the traveler of one of the means upon which he has a right to rely for protection against the danger

[8] Chamberlain v. Railway Co., 133 Mo. Sup. 587, 33 S. W. 437, and 34 S. W. 842; Pickett v. Railroad Co., 117 N. C. 616, 23 S. E. 264; Chaffee v. Railroad Co. (R. I.) 35 Atl. 47; Comer v. Barfield, 102 Ga. 485, 31 S. E. 89; Texas Midland R. Co. v. Tidwell (Tex. Civ. App.) 49 S. W. 641; Baltimore & O. R. Co. v. Anderson, 29 C. C. A. 235, 87 Fed. 413; Norton v. Railroad Co., 122 N. C. 910, 29 S. E. 886; Pittsburg, C., C. & St. L. Ry. Co. v. Lewis (Ky.) 38 S. W. 482; Western Maryland R. Co. v. Kehoe, 86 Md. 43, 37 Atl. 799; Dlauhi v. Railway Co., 139 Mo. 291, 40 S. W. 890; Baltimore & O. R. Co. v. Few's Ex'rs, 94 Va. 82, 26 S. E. 406.

[9] Kreis v. Railway Co., 131 Mo. 533, 33 S. W. 64.

[10] Northern Cent. Ry. Co. v. State, 29 Md. 420.

[11] Dascomb v. Railroad Co., 27 Barb. (N. Y.) 221; Steves v. Railroad Co., 18 N. Y. 422. Knowledge of danger. Douglas v. Railway Co., 100 Wis. 405, 76 N. W. 356.

of collision." [12] But the burden of proving that the injury resulted from the failure to give the signal has been held to be on the plaintiff.[13] Where there are no obstructions to the view, and the injured person was of good eyesight, it is a warranted presumption that he did not look and listen.[14] And, where no negligence is shown on the part of the railroad company, no presumption will be raised that the deceased took ordinary precautions to avoid the accident.[15] But, in the absence of any evidence to the contrary, there is generally a presumption that a person approaching a dangerous place exercised ordinary care.[16] When the traveler has a fair view of the train, and the usual or statutory signals are made to give warning of its approach, the company's servants have generally the right to presume that they will be observed.[17]

SAME—COLLISION WITH ANIMALS.

141. Where the common law regarding fences is in force, cattle running at large and coming upon railroad property are trespassers, and the company is not responsible for their injury,[1] unless

[12] Beisiegel v. Railroad Co., 34 N. Y. 622. Presumption of safety of crossing from absence of flagman. Martin v. Railroad Co. (Del. Super.) 42 Atl. 442; Chicago & A. R. Co. v. Blaul, 175 Ill. 183, 51 N. E. 895.

[13] Galena & C. U. R. Co. v. Loomis, 13 Ill. 548.

[14] Kelsay v. Railway Co., 129 Mo. Sup. 362, 30 S. W. 339; Tobias v. Railway Co., 103 Mich. 330, 61 N. W. 514; Seamans v. Railroad Co., 174 Pa. St. 421, 34 Atl. 568; Schofield v. Railway Co., 114 U. S. 615, 5 Sup. Ct. 1125; Lesan v. Railroad Co., 77 Me. 85; Wilcox v. Railroad Co., 39 N. Y. 358.

[15] Livermore v. Railroad Co., 163 Mass. 132, 39 N. E. 789. Per contra, Chicago, R. I. & P. Ry. Co. v. Hinds, 56 Kan. 758, 44 Pac. 993; Reynolds v. Railroad Co., 58 N. Y. 248.

[16] Huntress v. Railroad Co., 66 N. H. 185, 34 Atl. 154; Haverstick v. Railroad Co., 171 Pa. St. 101, 32 Atl. 1128; Missouri Pac. Ry. Co. v. Moffatt (Kan. Sup.) 55 Pac. 837; Louisville & N. R. Co. v. Clark's Adm'r (Ky.) 49 S. W. 323; Chesapeake & O. Ry. Co. v. Steele, 29 C. C. A. 81, 84 Fed. 93; Houston & T. C. R. Co. v. Laskowski (Tex. Civ. App.) 47 S. W. 59.

[17] St. Louis, A. & T. H. R. Co. v. Manly, 58 Ill. 300; Chicago, B. & Q. R. Co. v. Harwood, 80 Ill. 88; Chicago, B. & Q. R. Co. v. Damerell, 81 Ill. 450.

§ 141. [1] Munger v. Railroad Co., 4 N. Y. 349; Corwin v. Railroad Co., 13 N. Y. 42; Pittsburgh, C. & St. L. Ry. Co. v. Stuart, 71 Ind. 500; Vanhorn

(a) The injury is caused by the willful or wanton act of the company, or unless

(b) The injury is due to the failure of the company to use ordinary care after discovering the presence of the cattle on the track.

Under the common law there was no obligation resting upon landowners to so fence or guard their property that cattle could not enter upon it, but, on the contrary, the owners of cattle were required to keep them from straying off their lands.[2] In those states, therefore, which have retained this feature of the common law,[3] cattle become trespassers when they go upon the property of a railroad,[4] and it is immaterial whether it happens through the negligence of their owners or not,[5] provided it does not occur through the negligent or wrongful act of the company, such as breaking down the fence which inclosed them. In such an event the railroad would, of course, be liable if they escaped through the breach thus made, and wandered upon the track, and were injured.[6] But even those states which still adhere to the common law regarding fences in general have, in many instances, indirectly modified it by statutory enactments requiring railroads to fence their right of way or tracks. Subject to the modifications hereinafter made, however, the proposition holds good that, where cattle are trespassers upon railroad property, the company is not responsible for their injury.[7]

v. Railway Co., 63 Iowa, 67, 18 N. W. 679; Eames v. Railroad Co., 98 Mass. 560; Maynard v. Railroad Co., 115 Mass. 458; Pittsburgh, Ft. W. & C. Ry. Co. v. Methven, 21 Ohio St. 586; Moser v. Railroad Co., 42 Minn. 480, 44 N. W. 530; New York & E. R. Co. v. Skinner, 19 Pa. St. 298; Johnson v. Railway Co., 43 Minn. 207, 45 N. W. 152; North Pennsylvania R. Co. v. Rehman, 49 Pa. St. 101.

[2] Wiseman v. Booker, 3 C. P. Div. 184; Dawson v. Railroad Co., L. R. 8 Exch. 8; Buxton v. Railroad Co., L. R. 3 Q. B. 549; Manchester, S. & L. R. Co. v. Wallis, 14 C. B. 213.

[3] Wright v. Railroad Co., 18 Ind. 168.

[4] Munger v. Railroad Co., 4 N. Y. 349, affirmed in 5 Denio (N. Y.) 255.

[5] North Pennsylvania R. Co. v. Rehman, 49 Pa. St. 101; Munger v. Railroad Co., 4 N. Y. 349, affirmed in 5 Denio (N. Y.) 255; Corwin v. Railroad Co., 13 N. Y. 42; Spinner v. Railroad Co., 67 N. Y. 153.

[6] Wright v. Railroad Co., 18 Ind. 168.

[7] See cases cited under section 141, note 1, supra.

142. WANTON OR WILLFUL INJURY—In no event is the railroad justified in wantonly or willfully injuring animals upon its right of way.

The foregoing rule is evidently subject to the modification which governs all branches of negligence that one may not intentionally or wantonly inflict injury on another or on his property; hence there are few, if any, states where a railroad is not liable for injuries wantonly or willfully inflicted, even on trespassing animals.[1] And the weight of authority holds that, if the engineer could have escaped the collision by the exercise of that degree of care and diligence which an ordinarily prudent person of his vocation would use in similar circumstances, the company cannot avoid liability on the ground that the cattle were trespassers.[2] And, if the company exercises ordinary care after a timely discovery of the animals on the track, it is not, in the absence of special statute, liable for their injuries.[3] What is ordinary care in the circumstances is nearly always a question for the jury, and the mere fact that the engineer did not take some particular precaution—such as slackening the speed of the train on discovering the animals on the track—is not necessarily negligence.[4] In some states, however,—especially in the Eastern,—the interpretation that is given to "ordinary care" is so broad that railroad companies have been practically re-

§ 142. [1] Missouri, K. & T. Ry. Co. v. Meithvein (Tex. Civ. App.) 33 S. W. 1093; Magilton v. Railroad Co., 82 Hun, 308, 31 N. Y. Supp. 241.

[2] Eames v. Railroad Co., 98 Mass. 560; Toledo, P. & W. R. Co. v. Bray, 57 Ill. 514; Perkins v. Railroad Co., 29 Me. 307; Towns v. Railroad Co., 21 N. H. 364; Locke v. Railroad Co., 15 Minn. 351 (Gil. 283); Parker v. Railroad Co., 34 Iowa, 399; Louisville & N. R. Co. v. Wainscott, 3 Bush (Ky.) 149; Cincinnati & Z. R. Co. v. Smith, 22 Ohio St. 227; Needham v. Railroad Co., 37 Cal. 409; Bemis v. Railroad Co., 42 Vt. 375; Isbell v. Railroad Co., 27 Conn. 393; Pearson v. Railroad Co., 45 Iowa, 497; Chicago & N. W. R. Co. v. Barrie, 55 Ill. 226; Omaha & R. V. Ry. Co. v. Wright, 47 Neb. 886, 66 N. W. 842; Lake Erie & W. R. Co. v. Norris, 60 Ill. App. 112.

[3] Barnhart v. Railway Co., 97 Iowa, 654, 66 N. W. 902; McGhee v. Gaines, 98 Ky. 182, 32 S. W. 602; Lovejoy v. Railway Co., 41 W. Va. 693, 24 S. E. 599.

[4] Warren v. Railway Co., 59 Mo. App. 367, 1 Mo. App. Rep'r, 37; Scott v. Railroad Co., 72 Miss. 37, 16 South. 205; Granby v. Railroad Co., 104 Mich. 403, 62 N. W. 579.

lieved of responsibility for all injuries to trespassing animals,[5] while others hold squarely that, when animals are wrongfully on the track, and the company has neglected no duty imposed by statute, it need not exercise usual or ordinary care to avoid injuring them.[6] A few states have held that, if the stock escape without fault on the owner's part,—as by the negligence of an adjoining owner,—and stray onto the track, and are injured, the company must show itself free from negligence in order to escape liability.[7]

143. CARE AFTER DISCOVERY—Even if animals are wrongfully on the track, it is the duty of the railroad company, after discovering them, to use ordinary care to avoid doing them injury.

It is a generally accepted rule in nearly all states, whether cattle be lawfully on the track or not, that, after they are seen, or, in the exercise of ordinary care, should be seen, by those in charge of the train, ordinary care and diligence should be observed to prevent injuring them.[1] It should be observed in this connection, however,

[5] Darling v. Railroad Co., 121 Mass. 118; Maynard v. Railroad Co., 115 Mass. 458; Boyle v. Railroad Co., 39 Hun (N. Y.) 171; Price v. Railroad Co., 31 N. J. Law, 229; McCandless v. Railroad Co., 45 Wis. 365; Delta Electric Co. v. Whitcamp, 58 Ill. App. 141.

[6] Simmons v. Railway Co., 2 App. Div. 117, 37 N. Y. 532.

[7] Marietta & C. R. Co. v. Stephenson, 24 Ohio St. 48; Bulkley v. Railroad Co., 27 Conn. 479; Moriarty v. Railway Co., 64 Iowa, 696, 21 N. W. 143; Pearson v. Railroad Co., 45 Iowa, 497; Doran v. Railway Co., 73 Iowa, 115, 34 N. W. 619; Trout v. Railroad Co., 23 Grat. (Va.) 619.

§ 143. [1] Lafayette & I. R. Co. v. Shriner, 6 Ind. 141; Illinois Cent. R. Co. v. Phelps, 29 Ill. 447; Cincinnati & Z. R. Co. v. Smith, 22 Ohio St. 227; Jackson v. Railroad Co., 25 Vt. 150; Pritchard v. Railroad Co., 7 Wis. 232; Isbell v. Railroad Co., 27 Conn. 393; Williams v. Railroad Co., 2 Mich. 259; Bowman v. Railroad Co., 37 Barb. (N. Y.) 516; Delta Electric Co. v. Whitcamp, 58 Ill. App. 141; Omaha & R. V. Ry. Co. v. Wright, 47 Neb. 886, 66 N. W. 842; St. Louis, A. & T. H. R. Co. v. Stapp, 53 Ill. App. 600; Warren v. Railway Co., 59 Mo. App. 367, 1 Mo. App. Rep'r, 37; Denver & R. G. R. Co. v. Nye, 9 Colo. App. 94, 47 Pac. 654; Mooers v. Railroad Co., 69 Minn. 90, 71 N. W. 905; Chicago & N. W. Ry. Co. v. Smedley, 65 Ill. App. 644; Beattyville & C. G. R. Co. v. Maloney (Ky.) 49 S. W. 545; Louisville & N. R. Co. v. Brinckerhoff (Ala.) 24 South. 892.

that the primary duty of the railroad is to care for the safety of its passengers, and in those cases where cattle are not observed until it is too late to stop the train, and a collision appears unavoidable, it may be justifiable to increase, rather than diminish, the speed of the train, as the latter course might result in its derailment.[2]

There is a difference of opinion as to what degree of diligence satisfies the requirement of ordinary care in looking out for and seeing trespassing cattle.[3] In some states it is held that those in charge of the train should use greater diligence in this regard when the probability of meeting straying cattle is great,[4] and that they are bound to see cattle when the view is unobstructed for a considerable distance, and the cattle do not jump suddenly onto the track.[5] It would seem that no reasonable objection could be raised to the rule last stated, and, since ordinary care for the safety of the train requires a vigilant outlook for obstacles on the track, it is difficult to understand why, in all cases, those in charge of the train should not be held bound to see cattle upon the track, whose presence was discoverable in the exercise of ordinary care.

[2] Cleveland v. Railroad Co., 35 Iowa, 220; Owens v. Railroad Co., 58 Mo. 386; O'Connor v. Railroad Co., 27 Minn. 166, 6 N. W. 481; Parker v. Railroad Co., 34 Iowa, 399; Bellefontaine & I. R. Co. v. Schruyhart, 10 Ohio St. 116; Bemis v. Railroad Co., 42 Vt. 375; Louisville & A. R. Co. v. Ballard, 2 Metc. (Ky.) 177; East Tennessee, V. & G. R. Co. v. Selcer, 7 Lea (Tenn.) 557.

[3] Chicago & N. W. R. Co. v. Barrie, 55 Ill. 226; Jones v. Railroad Co., 70 N. C. 626; Harrison v. Railway Co., 6 S. D. 100, 60 N. W. 405; Louisville & N. R. Co. v. Bowen (Ky.) 39 S. W. 31.

[4] Campbell v. Railway Co., 59 Mo. App. 151, 1 Mo. App. Rep'r, 3; St. Louis S. W. Ry. Co. v. Russell, 64 Ark. 236, 41 S. W. 807; Chattanooga S. R. Co. v. Daniel (Ala.) 25 South. 197.

[5] Kean v. Chenault (Ky.) 41 S. W. 24; Yazoo & M. V. R. Co. v. Whittington, 74 Miss. 410, 21 South. 249. Thus, where cattle were observable for half a mile, Chicago & N. W. R. Co. v. Barrie, 55 Ill. 226; or where a horse runs for 200 yards in front of a train, Jones v. Railroad Co., 70 N. C. 626; but where a cow jumped suddenly onto the track, 200 yards ahead of the train, and the engineer used every means to stop the train, the company was held not liable, Proctor v. Railroad Co., 72 N. C. 579. See, also, Alabama G. S. R. Co. v. McAlpine, 75 Ala. 113.

144. FENCES—Although cattle upon the tracks of the railroad company may be illegally at large, yet the company will be liable for their injury if it has omitted to perform a statutory duty regarding fencing or guards, and the cattle become trespassers by reason of such omission.[1]

Statutory Duty.

But if, in such case, the negligence of the owner contributes to the injury, his right of recovery may be thereby defeated.[2] Generally the question of negligence on the part of the railroad company does not arise where there has been an omission of its statutory duty to build and maintain fences.[3] The liability in such cases is absolute. But if it should appear that the presence of the cattle on the track was not due to the omission to fence, no recovery can be had against the company, unless negligence is shown. If the company has fulfilled its duty in building fences, the further requirement to maintain them is satisfied by an exercise of ordinary care.[4] Hence if cattle should enter upon the tracks through a breach made by a freshet or an unusually strong wind, and suffer injury by collision, the company could successfully defend by showing that the fence was properly built, and that a reasonable time

§ 144. [1] Rogers v. Railroad Co., 1 Allen (Mass.) 16; McGhee v. Guyn (Ky.) 32 S. W. 615; Lake Erie & W. R. Co. v. Beam, 60 Ill. App. 68; Conolly v. Railroad Co., 4 App. Div. 221, 38 N. Y. Supp. 587; Vanduzer v. Railway Co., 58 N. J. Law, 8, 32 Atl. 376; Spinner v. Railroad Co., 67 N. Y. 153; Patrie v. Railroad Co. (Idaho) 56 Pac. 82.

[2] Hill v. Railroad Co., 67 N. H. 449, 32 Atl. 766. See "Contributory Negligence," post, pp. 346–348.

[3] Corwin v. Railroad Co., 13 N. Y. 42; Gorman v. Railroad Co., 26 Mo. 441; Gillam v. Railroad Co., 26 Minn. 268, 3 N. W. 353; Kelver v. Railroad Co., 126 N. Y. 365, 27 N. E. 553; Smith v. Railroad Co., 35 N. H. 356; Indianapolis & C. R. Co. v. Townsend, 10 Ind. 38; Veerhusen v. Railway Co., 53 Wis. 689, 11 N. W. 433; Fraysher v. Railway Co., 66 Mo. App. 573; Connolly v. Railroad Co., 158 N. Y. 675, 52 N. E. 1124.

[4] Toledo & C. S. Ry. Co. v. Eder, 45 Mich. 329, 7 N. W. 898; Case v. Railroad Co., 75 Mo. 668; Chicago & N. W. R. Co. v. Barrie, 55 Ill. 226; Lemmon v. Railroad Co., 32 Iowa, 151. Burden on plaintiff where impossible to build fences. Texas & P. Ry. Co. v. Scrivener (Tex. Civ. App.) 49 S. W. 649.

had not been afforded to ascertain and repair the break.[5] The rule has been thus stated: "After fences have once been erected as required by law, the company is only liable for a negligent failure to maintain such fences, and it is therefore entitled to a reasonable time in which to make repairs, after having knowledge of a defect therein, or after that period has elapsed in which, by the exercise of reasonable diligence, it could have had knowledge of such defect." [6] But the company must use diligence in making seasonable repairs,[7] and the lapse of sufficient time to afford reasonable opportunity to inspect will charge the company with knowledge of the defect.[8]

Sufficient Fences and Guards.

What constitutes a sufficient fence or guard varies in different states according to the statutes and the decisions of the courts. In all states fences must be sufficiently strong and high to restrain horses and cattle, and in some they must be sufficient to keep hogs and sheep from pushing through.[9] In every case the fence must be substantial enough to keep out the strongest, and even vicious, animals;[10] but not, necessarily, frightened or stampeded animals.[11] And, if a guard is ordinarily sufficient, the fact that in a particular instance cattle succeeded in passing it will not render the company liable.[12]

Contributory Negligence.

The fact that cattle are running at large in violation of the law is not generally sufficient to charge the owner with contributory

[5] Hodge v. Railroad Co., 27 Hun (N. Y.) 394.

[6] Clardy v. Railroad Co., 73 Mo. 576; Shear. & R. Neg. § 459.

[7] Brady v. Railroad Co., 1 Hun (N. Y.) 378; Spinner v. Railroad Co., 67 N. Y. 153; Chicago & N. W. R. Co. v. Harris, 54 Ill. 528; Peirce v. Radderman, 77 Ill. App. 619. And it is immaterial that the breach has been wrongfully made. Munch v. Railroad Co., 29 Barb. (N. Y.) 647.

[8] Corwin v. Railroad Co., 13 N. Y. 42; Ohio & M. R. Co. v. Clutter, 82 Ill. 123.

[9] Lee v. Railway Co., 66 Iowa, 131, 23 N. W. 299; Missouri Pac. Ry. Co. v. Bradshaw, 33 Kan. 533, 6 Pac. 917; New York, C. & St. L. Ry. Co. v. Zumbaugh, 17 Ind. App. 171, 46 N. E. 548. Gates must be strongly constructed, Hill v. Railway Co., 66 Mo. App. 184.

[10] Cincinnati, H. & I. R. Co. v. Jones, 111 Ind. 259, 12 N. E. 113.

[11] Chicago & A. R. Co. v. Utley, 38 Ill. 410.

[12] Jones v. Railway Co., 59 Mo. App. 137.

negligence,[13] but turning stock loose on the highway adjoining unfenced depot grounds,[14] or with knowledge that cattle guards were insufficient, and that stock had repeatedly passed over them onto the tracks,[15] is contributory negligence sufficient to defeat a recovery. But where fences were necessarily down during a repair of the roadway near a railroad crossing, and a boy left cows in an open lot near by, and they strayed onto the track, and were injured, the railroad was liable.[16] And in a majority of cases where injuries are caused to cattle through the failure of the railroad to perform its statutory duty of fencing, the contributory negligence of the owner in permitting them to stray upon the tracks, even though they may be unlawfully at large, does not constitute a defense.[17] If the owner of cattle has a right to use land adjoining a railroad, he cannot be debarred from that use by the failure of the company to fence its tracks, and may recover from the company for injuries inflicted by it upon his stock, although he turned them loose with full knowledge of the existing conditions.[18] And if, in the above circumstances, the cattle escaped onto the track through an insufficient fence, built by the owner himself, either for his own convenience or by contract with the railroad company, the owner would not be barred from recovery.[19] But failure of the owner or custodian occupying land adjacent to a railroad to keep gates at

[13] Atchison, T. & S. F. R. Co. v. Cupello, 61 Ill. App. 432.

[14] Schneekloth v. Railway Co., 108 Mich. 1, 65 N. W. 663.

[15] La Flamme v. Railway Co., 109 Mich. 509, 67 N. W. 556. But see Gulf, C. & S. F. Ry. Co. v. Cash, 8 Tex. Civ. App. 569, 28 S. W. 387.

[16] Brady v. Railroad Co., 1 Hun (N. Y.) 378. See, also, Flint & P. M. Ry. Co. v. Lull, 28 Mich. 510; Indianapolis & C. R. Co. v. Parker, 29 Ind. 471.

[17] Corwin v. Railroad Co., 13 N. Y. 42; Shepard v. Railroad Co., 35 N. Y. 641; Anderson v. Railway Co., 93 Iowa, 561, 61 N. W. 1058; Wabash R. Co. v. Perbex, 57 Ill. App. 62; Atchison, T. & S. F. R. Co. v. Cupello, 61 Ill. App. 432; Galveston, H. & S. A. Ry. Co. v. Wessendorf (Tex. Civ. App.) 39 S. W. 132; Missouri, K. & T. Ry. Co. v. Bellows (Tex. Civ. App.) 39 S. W. 1000; Chicago & E. I. R. Co. v. Blair, 75 Ill. App. 659.

[18] Gardner v. Smith, 7 Mich. 410; Shepard v. Railroad Co., 35 N. Y. 641; Wilder v. Railroad Co., 65 Me. 332; Kuhn v. Railroad Co., 42 Iowa, 420; Cleveland, C., C. & I. R. Co. v. Scudder, 40 Ohio St. 173; Gulf, C. & S. F. Ry. Co. v. Cash, 8 Tex. Civ. App. 569, 28 S. W. 387.

[19] Illinois Cent. R. Co. v. Swearingen, 33 Ill. 289; Norris v. Railroad Co., 39 Me. 273.

farm crossings closed, will preclude recovery for consequent injuries to his cattle.[20]

The negligence of the owner may be of such a character as to amount to a willful exposure of his cattle to injury. In such case the owner's conduct is equivalent to an abandonment, and there can be no recovery, "for the legislature cannot be presumed to have intended that one who abandons his property shall nevertheless recover its value." [21]

Cattle not Trespassers.

Where animals are rightfully on the track of a railroad, the latter is liable to the owner for injuries caused by its negligence; that is, the company is responsible for its failure to use ordinary care.[22] Cattle are rightfully upon a railroad when crossing it on highways under care of a proper custodian,[23] or, having escaped from the control of their custodian, who is using all proper diligence for their recapture, have continued on or come upon its tracks.[24]

FIRES.

145. The common law of England imposed liability upon the originator of a fire irrespective of negligence, but it has been uniformly held in the United States that he who permits a fire to start upon his own land is liable for injurious consequences to another's

[20] Ranney v. Railroad Co., 59 Ill. App. 130. And see Indianapolis, P. & C. R. Co. v. Shimer, 17 Ind. 295; Illinois Cent. R. Co. v. McKee, 43 Ill. 119; Pittsburg, C. & St. L. Ry. Co. v. Smith, 26 Ohio St. 124; Lake Erie & W. R. Co. v. Weisel, 55 Ohio St. 155, 44 N. E. 923; Harding v. Railroad Co., 100 Iowa, 677, 69 N. W. 1019.

[21] Welty v. Railroad Co., 105 Ind. 55, 4 N. E. 410. And see Bunnell v. Railway Co., 13 Utah, 314, 44 Pac. 927; McCann v. Railway Co., 96 Wis. 664, 71 N. W. 1054; Case v. Railroad Co., 59 N. J. Law, 471, 37 Atl. 65.

[22] Fritz v. Railroad Co., 22 Minn. 404; Lane v. Railroad Co., 31 Kan. 525, 3 Pac. 341.

[23] Lane v. Railroad Co., 31 Kan. 525, 3 Pac. 341; White v. Railroad Co., 30 N. H. 188.

[24] Louisville & N. R. Co. v. Williams, 105 Ala. 379, 16 South. 795; Tonawanda R. Co. v. Munger, 5 Denio (N. Y.) 255.

property only when he has been guilty of negligence, either in permitting the fire to start or in extinguishing it.

Negligence the Gist of the Liability.

At common law a person using dangerous instrumentalities acts at his peril, and is responsible for any damages not caused by extraordinary natural consequences, or by the intervention of strangers;[1] and it was well settled that one who kindled a fire, either in his house or in his field, must see that it did no harm, or answer for damages done,[2]—that is, irrespective of negligence or intervening agencies, the originator of the fire must answer in damages for injurious results. Such has never been the law in this country, the decisions being uniform that negligence or misconduct is the gist of the liability.[3] Nor does the destruction of property by fire raise any presumption of negligence, except, in some states, in the case of railroad fires.[4]

SAME—INTENTIONAL FIRES.

146. A person may intentionally set out a fire, for a legitimate purpose, without becoming responsible for damage caused thereby, provided he uses ordinary care in the circumstances.

It follows that one may set fire to his own land, whether timber, grass, or stubble, for a legitimate purpose,—such as to clear or otherwise improve it,—without incurring liability for injurious consequences to adjoining owners, provided he uses ordinary care

§ 145. [1] Fletcher v. Rylands, L. R. 1 Exch. 265, 279.

[2] Tubervil v. Stamp, 1 Salk. 13.

[3] Clark v. Foot, 8 Johns. (N. Y.) 421; Bachelder v. Heagan, 18 Me. 32; Stuart v. Hawley, 22 Barb. (N. Y.) 619; Barnard v. Poor, 21 Pick. (Mass.) 378; Dewey v. Leonard, 14 Minn. 153 (Gil. 120); Higgins v. Dewey, 107 Mass. 494; Grannis v. Cummings, 25 Conn. 165; McCully v. Clarke, 40 Pa. St. 399; Miller v. Martin, 16 Mo. 508; Fahn v. Reichart, 8 Wis. 255; Sturgis v. Robbins, 62 Me. 289; Tourtellot v. Rosebrook, 11 Metc. (Mass.) 460; Fraser v. Tupper, 29 Vt. 409.

[4] Bryan v. Fowler, 70 N. C. 596. As to railroad fires, see post, pp. 353–360.

in the selection of the time, and is not negligent in other respects.[1] The rule is thus stated in a Maine case:[2] "Every person has a right to kindle a fire on his own land for the purposes of husbandry, if he does it at a proper time, and in a suitable manner, and uses reasonable care and diligence to prevent it spreading, and doing injury to the property of others. The time may be suitable, and the manner prudent, and yet, if he is guilty of negligence in taking care of it, and it spreads, and injures the property of another, in consequence of such negligence, he is liable in damages for the injury done. The gist of the action is negligence, and if that exists in either of these particulars, and injury is done in consequence thereof, the liability attaches; and it is immaterial whether the proof establishes gross negligence, or only a want of ordinary care on the part of the defendant." And, in general, it is immaterial for what purpose the fire is kindled by the landowner or occupant, provided it is a lawful one. If it spreads to and injures property on adjoining land, he who seeks to enforce liability therefor must affirmatively prove negligence, either in the inception or subsequent handling of the fire.[3] But the burden of proof would seem to be on the defendant to establish his freedom from negligence, where he has either intentionally or accidentally set fire upon land not his own;[4] otherwise it is upon the plaintiff.[5] And where the fire is set upon the land of another the originator is, in general, liable for whatever damage results.[6]

§ 146. [1] Clark v. Foot, 8 Johns. (N. Y.) 421; Bachelder v. Heagan, 18 Me. 32; Stuart v. Hawley, 22 Barb. (N. Y.) 619; Dewey v. Leonard, 14 Minn. 153 (Gil. 120); Fahn v. Reichart, 8 Wis. 255; Fraser v. Tupper, 29 Vt. 409; Hays' Adm'r v. Miller, 6 Hun (N. Y.) 320; Hanlon v. Ingram, 3 Iowa, 81; Dolby v. Hearn, 1 Marv. 153, 37 Atl. 45; Lillibridge v. McCann (Mich.) 75 N. W. 288.

[2] Hewey v. Nourse, 54 Me. 256.

[3] Tourtellot v. Rosebrook, 11 Metc. (Mass.) 460; Bachelder v. Heagan, 18 Me. 32; Ellsworth v. Ellingson, 96 Iowa, 154, 64 N. W. 774.

[4] Cleland v. Thornton, 43 Cal. 437; Jordan v. Wyatt, 4 Grat. (Va.) 151.

[5] Bachelder v. Heagan, 18 Me. 32; Clark v. Foot, 8 Johns. (N. Y.) 421; Stuart v. Hawley, 22 Barb. (N. Y.) 619; Dewey v. Leonard, 14 Minn. 153 (Gil. 120); Miller v. Martin, 16 Mo. 508; Fahn v. Reichart, 8 Wis. 255; Fraser v. Tupper, 29 Vt. 409.

[6] Finley v. Langston, 12 Mo. 120.

SAME—ACCIDENTAL FIRES.

147. When damage is caused by fires accidental in their origin, the test of liability is the degree of care exercised by the defendant.

When fires originate without any deliberate intent, the usual test of ordinary care applies.[1] Where the servants of defendant left oil and inflammable material close to a stove, which was constantly growing hotter, thus producing a conflagration, which destroyed plaintiff's property, it was held that a verdict of negligence was warranted.[2]

Proximate Damage from Negligent Fires.

To what extent a person is liable for damage caused by his negligence in starting or permitting a fire to spread, is a question involving much difficulty, and embracing many conflicting decisions. It has already been observed [3] that, in theory, at least, there is no escape from the conclusion that there is no limit to the liability of a person for the direct, natural results of his negligence. If between the act of the person and the damage complained of there intervenes an act or condition legally sufficient to break the causal connection, to obliterate the influence of the primary cause, and make the results its own offspring, the original actor cannot be held responsible. The proposition is simple; the difficulty lies in its application to concrete cases. In discussing this subject, the supreme court of the United States says: "One of the most valuable of the criteria furnished us by the authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote." [4] The great weight of authority in this country undoubtedly holds that the mere intervention of space

§ 147. [1] Spaulding v. Railway Co., 30 Wis. 110; Webb v. Railroad Co., 49 N. Y. 420; Lansing v. Stone, 37 Barb. (N. Y.) 15.

[2] Read v. Railroad Co., 44 N. J. Law, 280.

[3] See "Negligence," ante, pp. 17-33.

[4] Mutual Ins. Co. v. Tweed, 7 Wall. 44.

does not make the damage remote. Thus, if the defendant negligently starts a fire, which communicates to the land of B., and thence to the land of C., and so on through succeeding holdings to the property of the plaintiff, the mere fact of the remoteness of the plaintiff's property from the place where the fire originated will not preclude his recovery from the defendant.[5] In Perley v. Eastern R. Co.,[6] the court says: "The fact, therefore, that the fire passes through the air, driven by a high wind, and that it is communicated to the plaintiff's property from other intermediate property of other men, does not make his loss a remote consequence of the escape of the fire from the engine. * * * If, when the cinder escapes through the air, the effect which it produces upon the first combustible substance against which it strikes is proximate, the effect must continue to be proximate as to everything which the fire consumes in its direct course. As a matter of fact, the injury to the plaintiff was as immediate and direct as an injury would have been which was caused by a bullet, fired from the train, passing over the intermediate lots, and wounding the plaintiff as he stood upon his own lot." In the latter case a locomotive set fire to grass near the track, and the fire crossed the land of A., B., and C. before reaching and destroying the property of the plaintiff, who was allowed to recover. In another case where recovery was permitted the fire was communicated from dry grass on the defendant's right

[5] Hart v. Railroad Co., 13 Metc. (Mass.) 99; Perley v. Railroad Co., 98 Mass. 414; Powell v. Deveney, 3 Cush. (Mass.) 300; Vandenburgh v. Truax, 4 Denio (N. Y.) 464; Cleaveland v. Railway Co., 42 Vt. 449; Toledo, P. & W. Ry. Co. v. Pindar, 53 Ill. 447; Milwaukee & St. P. Ry. Co. v. Kellogg, 94 U. S. 469; Missouri Pac. R. Co. v. Texas & P. R. Co., 31 Fed. 526; Atkinson v. Transportation Co., 60 Wis. 141, 18 N. W. 764; Delaware, L. & W. R. Co. v. Salmon, 39 N. J. Law, 300; Hoyt v. Jeffers, 30 Mich. 181; Billman v. Railroad Co., 76 Ind. 166; Henry v. Railroad Co., 50 Cal. 176; Small v. Railroad Co., 55 Iowa, 582, 8 N. W. 437; Sibley v. Railroad Co., 32 Minn. 526, 21 N. W. 732; Ingersoll v. Railroad Co., 8 Allen (Mass.) 438; Annapolis & E. R. Co. v. Gantt, 39 Md. 115; Coates v. Railway Co., 61 Mo. 38. In direct conflict with this rule are Ryan v. Railroad Co., 35 N. Y. 210; Pennsylvania R. Co. v. Kerr, 62 Pa. St. 353; Chicago, R. I. & P. Ry. Co. v. McBride, 54 Kan. 172, 37 Pac. 978; Chicago & E. R. Co. v. Luddington, 10 Ind. App. 636, 38 N. E. 342.

[6] 98 Mass. 414, at pages 418, 419.

of way to the adjoining fields, and thence traveled nearly a mile before destroying plaintiff's property.[7] In Poeppers v. Missouri, K. & T. Ry. Co.,[8] the fire, which originated in dry grass beside defendant's road, extended a distance of about eight miles before reaching and destroying the property for which plaintiff was allowed to recover. In some states the liability of railroad companies for damages caused by fire originating from their locomotives is affected by special statutes.

SAME—RAILROAD FIRES.

148. In the absence of special statute, it is the well-settled law, both of England and the United States, that the gist of liability for fires set by locomotives is negligence.[1]

In a few states, by statutory enactment, the question of negligence is entirely eliminated, and railroad companies are liable, ipso facto, for any damage resulting from fires kindled by their engines.[2]

149. DEGREE OF CARE—A railroad company chartered with the right to use steam as a motive power is liable for fires kindled by its engines only when it has failed to use that degree of care in their operation which a prudent man, skilled in the particular business, would exercise.

[7] Burlington & M. R. Co. v. Westover, 4 Neb. 268.

[8] 67 Mo. 715.

§ 148. [1] Philadelphia & R. R. Co. v. Yeiser, 8 Pa. St. 366; Frankford & B. Turnpike Co. v. Philadelphia & T. R. Co., 54 Pa. St. 345; Philadelphia & R. R. Co. v. Yerger, 73 Pa. St. 121; Illinois Cent. R. Co. v. Mills, 42 Ill. 407; Indiana & C. R. Co. v. Paramore, 31 Ind. 143; Jackson v. Railroad Co., 31 Iowa, 176; Kansas Pac. Ry. Co. v. Butts, 7 Kan. 308; Ellis v. Railroad Co., 2 Ired. (N. C.) 138; Morris & E. R. Co. v. State, 36 N. J. Law, 553; Burroughs v. Railroad Co., 15 Conn. 124; Home Ins. Co. v. Pennsylvania R. Co., 11 Hun (N. Y.) 182; McHugh v. Chicago & N. W. Ry. Co., 41 Wis. 78; Woodson v. Railway Co., 21 Minn. 60; Continental Trust Co. v. Toledo, St. L. & K. C. R. Co., 89 Fed. 637.

[2] Perley v. Railroad Co., 98 Mass. 414; Simmonds v. Railroad Co., 52 Conn. 264; Rowell v. Railroad Co., 57 N. H. 132.

In Vaughan v. Taff Vale R. Co.,[1] Cockburn, C. J., says: "When the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence: that, if damage results from the use of such thing, independently of negligence, the party using it is not responsible."

Such negligence as will render the company liable may be otherwise stated to be the failure to use every reasonable precaution to guard against setting fires.[2] It goes without saying that the reasonableness of a precaution may depend entirely on the prevailing conditions, the same care not being required when the ground is covered with snow, or drenched with rain, as when the land is suffering from a drought, and materials along the route have become dry and inflammable like tinder. The care, therefore, as in other cases, must be proportioned to the danger.

Construction of Engines.

Locomotives should be supplied with all well-known and tested appliances for preventing the escape of sparks,[3] and, even when such appliances have been adopted, the company is not excused if sparks escape through negligent usage, as overcrowding the en-

§ 149. [1] 5 Hurl. & N. 679.

[2] Jackson v. Railroad Co., 31 Iowa, 176; Huyett v. Railroad Co., 23 Pa. St. 373; Illinois Cent. R. Co. v. McClelland, 42 Ill. 355; Bass v. Railroad Co., 28 Ill. 9. And see Rood v. Railroad Co., 18 Barb. (N. Y.) 80; Philadelphia & R. R. Co. v. Yeiser, 8 Pa. St. 366; Burroughs v. Railroad Co., 15 Conn. 124; Baltimore & S. R. Co. v. Woodruff, 4 Md. 242; Indiana, B. & W. Ry. Co. v. Craig, 14 Ill. App. 407; St. Louis S. W. Ry. Co. v. Knight (Tex. Civ. App.) 49 S. W. 250; St. Louis & S. F. Ry. Co. v. Hoover, 3 Kan. App. 577, 43 Pac. 854. But the fact that, after a fire has been negligently started by a railroad company on its right of way, employés used every effort to extinguish it, will not relieve the company from liability. Chicago & E. R. Co. v. Luddington, 10 Ind. App. 636, 38 N. E. 342.

[3] Menominee River Sash & Door Co. v. Milwaukee & N. R. Co., 91 Wis. 447, 65 N. W. 176; Watt v. Railroad Co., 23 Nev. 154, 44 Pac. 423. And failure to use a spark arrester is negligence per se. Anderson v. Steamboat Co., 64 N. C. 399; Bedell v. Railroad Co., 44 N. Y. 367. Relative merits of smoke-consuming appliances a question for jury. American Strawboard Co. v. Chicago & A. R. Co., 75 Ill. App. 420.

gine.[4] The company need not experiment with every new invention that is offered. Failure to adopt a particular appliance is negligence only when it has been found effective, and generally adopted.[5] An instruction to the effect that defendant was guilty of negligence unless his boat was provided with all the means and appliances which science has discovered to prevent the escape of fire is erroneous.[6] But, to relieve the company from liability, it is not sufficient to show that the machinery used was such as was in common and general use, and had been approved by experience.[7] The requirement that engines should use the best-known appliances to prevent injury to property by fire has been held both reasonable [8] and unreasonable.[9]

Combustibles on Right of Way.

Ordinary care on the part of a railroad company to prevent the kindling and spread of fires requires that it should keep its property adjacent to the tracks free from inflammable materials, and failure to do so is evidence of negligence.[10] Such failure, however, is not conclusive against the railroad, the question of negligence being for the determination of the jury on the facts,[11] and the com-

[4] Toledo, P. & W. Ry. Co. v. Pindar, 53 Ill. 447; Atchison, T. & S. F. R. Co. v. Huitt, 1 Kan. App. 788, 41 Pac. 1051.

[5] Frankford & B. Turnpike Co. v. Philadelphia & T. R. Co., 54 Pa. St. 345; Steinweg v. Railway Co., 43 N. Y. 123; Paris, M. & S. P. Ry. Co. v. Nesbitt, 11 Tex. Civ. App. 608, 33 S. W. 280; Spaulding v. Railroad Co., 30 Wis. 110. And mistaken judgment in choosing a poorer instead of a better contrivance is not necessarily negligence. Hoff v. Railroad Co., 45 N. J. Law, 201.

[6] Read v. Morse, 34 Wis. 315.

[7] Pittsburgh, C. & St. L. R. Co. v. Nelson, 51 Ind. 150.

[8] Watt v. Railroad Co., 23 Nev. 154, 44 Pac. 423.

[9] Paris, M. & S. P. Ry. Co. v. Nesbitt, 11 Tex. Civ. App. 608, 33 S. W. 280.

[10] Pittsburgh, C. & St. L. R. Co. v. Nelson, 51 Ind. 150; Clarke v. Railway Co., 33 Minn. 359, 23 N. W. 536; Kellogg v. Railway Co., 26 Wis. 223; Ohio & M. R. Co. v. Shanefelt, 47 Ill. 497; Eddy v. Lafayette, 163 U. S. 456, 16 Sup. Ct. 1082; Louisville & N. R. Co. v. Miller, 109 Ala. 500, 19 South. 983; Blue v. Railroad Co., 117 N. C. 644, 23 S. E. 275; New York, P. & N. R. Co. v. Thomas, 92 Va. 606, 24 S. E. 264; Briant v. Railroad Co., 104 Mich. 307, 62 N. W. 365; Black v. Railroad Co., 115 N. C. 667, 20 S. E. 713, 909; Watt v. Railroad Co., 23 Nev. 154, 44 Pac. 423; Mobile & O. R. Co. v. Stinson, 74 Miss. 453, 21 South. 14.

[11] Illinois Cent. R. Co. v. Mills, 42 Ill. 408; Richmond & D. R. Co. v.

pany is not relieved from liability for negligence in this respect, although it used the newest and most-approved spark arresters.[12]

Proof of Cause of Fire.

The burden of proving that the fire in question was set by defendant's locomotives is upon the plaintiff, but it need not be shown beyond a reasonable doubt, or by a preponderance of testimony. It is sufficient if the evidence reasonably warrants the conclusion.[13] But the mere fact that a fire started upon the right of way of a railroad is insufficient to support a verdict for damages caused thereby,[14] although very slight evidence is enough to support a verdict against the railroad when no other cause or theory for the origin of the fire is presented.[15] It is not essential that the origin of the fire be traced to a particular engine, and evidence that on previous occasions different engines of defendant on the same road had dropped live coals or emitted sparks, is competent as tending to show habitual negligence, and will be sufficient to support a finding that the fire complained of was set in the same way.[16] Very slight evidence as to the origin of the fire entitles the question to submission to the jury.[17]

Medley, 75 Va. 499; Brown v. Railroad Co., 4 App. Div. 465, 38 N. Y. Supp. 655; Taylor v. Railroad Co., 174 Pa. St. 171, 34 Atl. 457; Padgett v. Railroad Co., 7 Kan. App. 736, 52 Pac. 578; Waters v. Railroad Co. (N. J. Sup.) 43 Atl. 670.

[12] Texas & P. Ry. Co. v. Ross, 7 Tex. Civ. App. 653, 27 S. W. 728; Galveston, H. & S. A. Ry. Co. v. Polk (Tex. Civ. App.) 28 S. W. 353; New York, P. & N. R. Co. v. Thomas, 92 Va. 606, 24 S. E. 264; Toledo, P. & W. Ry. Co. v. Endres, 57 Ill. App. 69; Chicago & A. R. Co. v. Glenny, 70 Ill. App. 510; Tutwiler v. Railway Co., 95 Va. 443, 28 S. E. 597; Chicago & E. R. Co. v. Bailey, 19 Ind. App. 163, 46 N. E. 688; International & G. N. R. Co. v. Newman (Tex. Civ. App.) 40 S. W. 854.

[13] Watt v. Railroad Co., 23 Nev. 154, 44 Pac. 423, and 46 Pac. 52; Lakeside & M. R. Co. v. Kelly, 10 Ohio Cir. Ct. R. 322, 3 Ohio Dec. 319; Sheldon v. Railroad Co., 29 Barb. (N. Y.) 226.

[14] Taylor v. Railroad Co., 174 Pa. St. 171, 34 Atl. 457.

[15] Kenney v. Railroad Co., 70 Mo. 243; Cole v. Railway Co., 105 Mich. 549, 63 N. W. 647; Fremantle v. Railroad Co., 10 C. B. (N. S.) 89.

[16] Field v. Railroad Co., 32 N. Y. 339; Sheldon v. Railroad Co., 14 N. Y. 218. And see Frier v. Canal Co., 86 Hun, 464, 33 N. Y. Supp. 886; Piggot v. Railroad Co., 3 C. B. 229.

[17] Cole v. Railway Co., 105 Mich. 549, 63 N. W. 647.

Proof of Negligence.

By the great weight of authority, a presumption of defendant's negligence arises when the setting of the fire has been brought home to the railroad company.[18] In Field v. New York Cent. R. Co.[19] the court says: "Undoubtedly, the burden of proving that the injury complained of was caused by defendants' negligence was upon the plaintiff. To show negligence, however, it was not necessary that he should have proved affirmatively that there was something unsuitable or improper in the construction or condition or management of the engine that scattered the fire communicated to his premises. It often occurs, as in this case, that the same evidence which proves the injury shows such attending circumstances as to raise a presumption of the offending party's negligence, so as to cast on him the burden of disproving it. Then the injury was caused by dropping from the defendants' engine coals of fire. The fact that the sparks or coals were scattered at all upon their roadway, in such quantities as to endanger property on abutting premises, raised an inference of some weight that the engines were improperly constructed or managed. But this was not all. It was conceded and proved that, if the engine is properly constructed, and in order, no fire of any amount will escape to be distributed along the track. * * * It was legitimately to be inferred from these facts that the scattering of coals of fire from the defendants' engines, which were found upon their track, and which produced

[18] Piggot v. Railroad Co., 3 C. B. 229; Bass v. Chicago, B. & Q. R. Co., 28 Ill. 9; Fitch v. Railroad Co., 45 Mo. 322; Illinois Cent. R. Co. v. Mills, 42 Ill. 407; Case v. Railroad Co., 59 Barb. (N. Y.) 644; Bedford v. Railroad Co., 46 Mo. 456; Spaulding v. Railroad Co., 30 Wis. 110; Slossen v. Railroad Co., 60 Iowa, 215, 14 N. W. 244 (statutory); Chicago & A. R. Co. v. Pennell, 110 Ill. 435 (statutory); Lowery v. Railway Co., 99 N. Y. 158, 1 N. E. 608; Green Ridge R. Co. v. Brinkman, 64 Md. 52, 20 Atl. 1024; Ellis v. Railroad Co., 24 N. C. 138; McCready v. Railroad Co., 2 Strob. (S. C.) 356; Cleaveland v. Railroad Co., 42 Vt. 449 (statutory); Simpson v. Railroad Co., 5 Lea (Tenn.) 456; Burlington & M. R. Co. v. Westover, 4 Neb. 268; International & G. N. R. Co. v. Timmermann, 61 Tex. 660; Sibilrud v. Railroad Co., 29 Minn. 58, 11 N. W. 146; Edwards v. Bonner, 12 Tex. Civ. App. 236, 33 S. W. 761; Gulf, C. & S. F. Ry. Co. v. Johnson (Tex. Sup.) 50 S. W. 563; Texas M. R. Co. v. Hooten (Tex. Civ. App.) 50 S. W. 499.

[19] 32 N. Y. 339.

the injury, was the result either of defectiveness in the machinery, or neglect in repairing it." Pennsylvania and Ohio are exceptions to this rule, having held that it rests with the plaintiff to show defendant's failure to observe some necessary precaution.[20] This presumption of negligence is generally held to be rebutted by proof that the engine was equipped with the best appliances, and was carefully handled;[21] but when the origin of the fire is proved to be from sparks emitted from defendant's engine, and the latter proves that the engine was equipped with the best appliances, and properly handled, the question whether the statutory presumption of negligence on the part of defendant has been rebutted has been held to be for the jury.[22] But where it appears by the uncontradicted evidence that defendant used the best spark arrester known, it is error to submit to the jury the question of defendant's negligence in using such arrester.[23] It has been held to be sufficient evidence that a spark arrester is defective to show that for a considerable time prior to the fire complained of it has emitted sparks which presumably set fire to the right of way.[24]

Contributory Negligence.

The owner or occupant of property must use ordinary care to preserve his property from destruction or injury by fire which threat-

[20] Philadelphia & R. R. Co. v. Yerger, 73 Pa. St. 121; Jennings v. Railroad Co., 93 Pa. St. 337; Ruffner v. Cincinnati, H. & D. R. Co., 34 Ohio St. 96.

[21] Searles v. Railroad Co., 101 N. Y. 661, 5 N. E. 66; Brown v. Railroad Co., 19 S. C. 39; Lake Erie & W. Ry. Co. v. Gossard, 14 Ind. App. 244, 42 N. E. 818. But see Lake Erie & W. R. Co. v. Holderman, 56 Ill. App. 144; Menominee River Sash & Door Co. v. Milwaukee & N. R. Co., 91 Wis. 447, 65 N. W. 176; Cleveland, C., C. & St. L. Ry. Co. v. Case, 71 Ill. App. 459; Louisville & N. R. Co. v. Dalton (Ky.) 43 S. W. 431. Evidence not sufficient to show careful handling. Atchison, T. & S. F. R. Co. v. Huitt, 1 Kan. App. 788, 41 Pac. 1051.

[22] Burud v. Railroad Co., 62 Minn. 243, 64 N. W. 562; Callaway v. Sturgeon, 58 Ill. App. 159.

[23] Frace v. Railroad Co. (reversing [Sup.] 22 N. Y. Supp. 958) 143 N. Y. 182, 38 N. E. 102; Menominee River Sash & Door Co. v. Milwaukee & N. R. Co., 91 Wis. 447, 65 N. W. 176.

[24] Louisville, N. A. & C. Ry. Co. v. McCorkle, 12 Ind. App. 691, 40 N. E. 26; Peck v. Railroad Co., 37 App. Div. 110, 55 N. Y. Supp. 1121; McTavish v. Railway Co. (N. D.) 79 N. W. 443.

ens it,[25] but he is not bound to anticipate the negligence of a railroad company in the operation of its engines.[26] He may, without subjecting himself to the charge of contributory negligence, use his land for any legitimate purpose;[27] and may either cut his grass, or permit it to stand and become dry, as he may see fit;[28] and he may so use his property, in the exercise of ordinary care, although he may know that the neighboring railroad has, through its negligence, set frequent fires.[29] He may erect his buildings in close proximity to the railroad,[30] and roof them with what material he may choose.[31] As has been aptly stated by Shearman and Redfield:[32] "For, if the frequent recurrence of sparks large enough to set thatched roofs on fire is to make it an act of negligence in a peasant owner to cover his house with a thatched roof, then a few more sparks will preclude him from using shingles."

In a certain class of cases where the owner has placed or permitted inflammable matter, otherwise than in due natural course,

[25] Illinois Cent. R. Co. v. McClelland, 42 Ill. 355; St. Louis & S. F. Ry. Co. v. Stevens, 3 Kan. App. 176, 43 Pac. 434; Gulf, C. & S. F. Ry. Co. v. Jagoe (Tex. Civ. App.) 32 S. W. 717; Texas Pac. Ry. Co. v. Leon & H. Blum Land Co. (Tex. Civ. App.) 49 S. W. 253.

[26] Ernst v. Railroad Co., 35 N. Y. 9; Fox v. Sackett, 10 Allen (Mass.) 535; Reeves v. Railroad Co., 30 Pa. St. 454; New York, C. & St. L. R. Co. v. Grossman, 17 Ind. App. 652, 46 N. E. 546; Mobile & O. R. Co. v. Stinson, 74 Miss. 453, 21 South. 14, 522.

[27] Kalbfleisch v. Railroad Co., 102 N. Y. 520, 7 N. E. 557.

[28] Philadelphia & R. R. Co. v. Schultz, 93 Pa. St. 341; Pittsburgh, C. & St. L. Ry. Co. v. Jones, 86 Ind. 496; Richmond & D. R. Co. v. Medley, 75 Va. 499; Fitch v. Railroad Co., 45 Mo. 322; Vaughan v. Railroad Co., 3 Hurl. & N. 743; Union Pac. Ry. Co. v. Ray, 46 Neb. 750, 65 N. W. 773; Padgett v. Railroad Co., 7 Kan. App. 736, 52 Pac. 578.

[29] Snyder v. Railway Co., 11 W. Va. 14.

[30] Burke v. Railroad Co., 7 Heisk. (Tenn.) 451; Grand Trunk R. Co. v. Richardson, 91 U. S. 454. But see Briant v. Railroad Co., 104 Mich. 307, 62 N. W. 365; Cleveland, C., C. & St. L. Ry. Co. v. Scantland, 151 Ind. 488, 51 N. E. 1068. Failure to replace broken glass in window facing track in building filled with hay not negligence. Wild v. Railroad, 171 Mass. 245, 50 N. E. 533.

[31] Burke v. Railroad Co., 7 Heisk. (Tenn.) 451; Alpern v. Churchill, 53 Mich. 607, 19 N. W. 549; Louisville & N. R. Co. v. Malone, 116 Ala. 600, 22 South. 897.

[32] Shear. & R. Neg. (4th Ed.) § 680.

to accumulate in close proximity to a railroad, and where it is liable to be ignited by sparks from passing engines, the question of his contributory negligence has been held properly submitted to the jury.[33] It is impossible, however, to draw any rational distinction in principle between exposing a cord of wood or a barn to the danger arising from fire from locomotives. If one may rightfully, and without incurring the charge of contributory negligence, place his dwelling house within two feet of a railroad track, where engines are constantly passing, it is difficult to see why he may not with equal impunity pile his wood in a similar place. The reasoning of the court in Vaughan v. Taff Vale R. Co.,[34] which has been so frequently followed in the United States, would seem to be convincing. A person ought not to be charged with negligence because he does not change his legitimate mode of conducting his business, in order to accommodate himself to the negligent conduct of his neighbor. His right to make an unrestricted use of his own property should not be curtailed by the fear that his neighbor will make a negligent use of his. He is not required to spend time, money, and labor in endeavoring to make his property proof against another's careless conduct.[35] We conclude that the true rule in these cases is that a plaintiff is not responsible for the mere condition of his premises lying alongside a railroad, but, in order to be held for contributory negligence, must have been guilty of the omission of some positive duty, which, concurring with the negligence of the defendant company, is the proximate cause of his injury.[36]

ANIMALS.

150. Animals feræ naturæ are presumptively dangerous, and their owner is responsible for their injurious acts, caused by his negligence, regardless of his knowledge of their individual dispositions.

[33] Murphy v. Railway Co., 45 Wis. 222; Collins v. Railroad Co., 5 Hun (N. Y.) 499; Niskern v. Railway Co., 22 Fed. 811; Omaha Fair & Exposition Ass'n v. Missouri Pac. Ry. Co., 42 Neb. 105, 60 N. W. 330; Coates v. Railway Co., 61 Mo. 38.

[34] 3 Hurl & N. 743.

[35] Thomp. Neg. p. 168.

[36] Philadelphia & R. R. Co. v. Hendrickson, 80 Pa. St. 182.

The right of recovery for injuries caused by animals rests on the same basis as that for harm done by any other dangerous instrumentality, and the gist of the action is, in every instance, negligence. If a man negligently permits fire to escape from his control, to the damage of his neighbor's property, he is liable; and if he negligently permits his bull, confessedly dangerous, to escape from the pasture, and gore his neighbor, the latter may recover therefor. When the instrumentality is admittedly dangerous, no difficulty arises. Hence there is little controversy where the harm is done by animals feræ naturæ. It is a matter of common knowledge that animals of this class, following their natural instincts, are liable to do mischief to those with whom they come in contact. Against the owners of such animals a conclusive presumption arises of knowledge as to the disposition and characteristics of that species.[1] And if such animals as bears, monkeys, lions, etc., are permitted to run at large, or are left in a place where they may do injury, a presumption of negligence arises.[2] And it would seem that this presumption has in some cases been held conclusive, the court saying in one instance, "The gist of the action is the keeping the animal after knowledge of its mischievous propensities." [3] But this conclusion is not supported by reason or analogy. If a person lawfully keeps a wild animal for a useful purpose, his obligation to so confine it that it cannot injure other people is not greater or otherwise than it is in the case of fire, or any other dangerous instrumentality. And it is therefore believed that the gist of the action for injuries caused by a wild beast or by any confessedly dangerous animal, whether the injury is inflicted while the animal is confined or at large, is negligence on the part of its owner or keeper.[4] And it has been held that no recovery can be had against the owner of a savage dog, kept for the protection of

§ 150. [1]Besozzi v. Harris, 1 Fost. & F. 92 (injuries by a bear, previously tame and inoffensive); May v. Burdett, 9 Q. B. 101 (a mischievous monkey).

[2] Id.

[3] May v. Burdett, 9 Q. B. 101; Brown v. Carpenter, 26 Vt. 638; Van Leuven v. Lyke, 1 N. Y. 515; Scribner v. Kelley, 38 Barb. (N. Y.) 14. And see Shear. & R. Neg. (4th Ed.) § 629.

[4] Earl v. Van Alstine, 8 Barb. (N. Y.) 630; Scribner v. Kelley, 38 Barb. (N. Y.) 14; Laverone v. Mangianti, 41 Cal. 140; Ulery v. Jones, 81 Ill. 403; Canefox v. Crenshaw, 24 Mo. 199.

the household, and which was allowed to go loose in the yard at night, where it attacked and bit the plaintiff, who had negligently entered the yard, knowing that the dog was loose, and inclined to bite.[5] One may not, however, place a dangerous dog in a position where he is liable to do harm to one coming innocently on his premises.[6] The utmost that can be said of the conduct of one who undertakes to exercise restraint upon an animal confessedly dangerous is that the act of keeping raises a presumption of negligence in the event of injury caused by the animal.[7]

Control of Animals.

The right of action for injuries caused by animals lies not only against the owner, but equally against him having the right of control.[8] Where animals are the subject of joint ownership, an action for injuries caused thereby will lie against either or both owners, although but one had the custody or actual control at the time of the injury.[9] And so, if the defendant had the right of control, although he had parted with the possession of the animal, he is none the less liable for its mischievous acts.[10] Where, however, the animal is in the possession of a bailee, the right of control having been temporarily suspended, it seems that the action will not lie against the owner.[11] A person may be liable for injuries caused by an animal kept by him contrary to the wish of

[5] Brock v. Copeland, 1 Esp. 203; Woodbridge v. Marks, 17 App. Div. 139, 45 N. Y. Supp. 156.

[6] Sarch v. Blackburn, 4 Car. & P. 297; Curtis v. Mills, 5 Car. & P. 489. Nor even to a trespasser without notice. Loomis v. Terry, 17 Wend. (N. Y.) 496.

[7] Earl v. Van Alstine, 8 Barb. (N. Y.) 630.

[8] Barnum v. Vandusen, 16 Conn. 200; Lyons v. Merrick, 105 Mass. 71; Ward v. Brown, 64 Ill. 307; Tewksbury v. Bucklin, 7 N. H. 518.

[9] Oakes v. Spaulding, 40 Vt. 347. Notice of vicious propensities of dog to one of several joint keepers is notice to all. Hayes v. Smith, 8 Ohio Dec. 92.

[10] Marsh v. Jones, 21 Vt. 378.

[11] Tewksbury v. Bucklin, 7 N. H. 518; Rossell v. Cottom, 31 Pa. St. 525; Eck v. Hocker, 75 Ill. App. 641. Liability of one temporarily harboring a dog. O'Donnell v. Pollock, 170 Mass. 441, 49 N. E. 745; Bush v. Wathen (Ky.) 47 S. W. 599. Sufficiency of evidence of harboring. Boylan v. Everett, 172 Mass. 453, 52 N. E. 541; Plummer v. Ricker (Vt.) 41 Atl. 1045.

the owner,[12] or habitually harbored, regardless of any question of ownership.[13]

SAME—DOMESTIC ANIMALS.

151. In order to charge the owner of animals not confessedly dangerous for damage done by them, it is essential to allege and prove that he had notice of such harmful propensities, and that, knowing this, he negligently permitted the injury to be inflicted.[1]

Domestic animals, or those mansuetæ naturæ, under the common law, were those in which an absolute property right might be vested, but the term is now used to indicate those species of animals useful to man which, either by nature or successive generations of captivity, have come to be generally regarded as peaceable and harmless, including horses,[2] cattle,[3] bees,[4] dogs,[5] etc.

Scienter.

To establish knowledge on the part of the owner of the dangerous character of the animal, it is sufficient to prove facts which would indicate a vicious or dangerous disposition to a person of ordinary observation and prudence.[6] Nor is it essential that previous instances of injury or viciousness should be numerous; three,[7]

[12] Mitchell v. Chase, 87 Me. 172, 32 Atl. 867.

[13] Bundschuh v. Mayer, 81 Hun, 111, 30 N. Y. Supp. 622; Shulz v. Griffith, 103 Iowa, 150, 72 N. W. 445, 40 Lawy. Rep. Ann. 117.

§ 151. [1] Wormley v. Gregg, 65 Ill. 251; Vrooman v. Lawyer, 13 Johns. (N. Y.) 339; Earl v. Van Alstine, 8 Barb. (N. Y.) 630; Van Leuven v. Lyke, 1 N. Y. 515; Marsh v. Jones, 21 Vt. 378; Norris v. Warner, 59 Ill. App. 300; Short v. Bohle, 64 Mo. App. 242, 2 Mo. App. Rep'r, 1103.

[2] Cox v. Burbidge, 13 C. B. (N. S.) 430.

[3] Vrooman v. Lawyer, 13 Johns. (N. Y.) 339.

[4] Earl v. Van Alstine, 8 Barb. (N. Y.) 630.

[5] Perkins v. Mossman, 44 N. J. Law, 579; Woolf v. Chalker, 31 Conn. 121; Fairchild v. Bentley, 30 Barb. (N. Y.) 147.

[6] Kittredge v. Elliott, 16 N. H. 77; Linnehan v. Sampson, 126 Mass. 506; Cockerham v. Nixon, 33 N. C. 269; Hayes v. Smith, 8 Ohio Dec. 92; Trinity & S. Ry. Co. v. O'Brien (Tex. Civ. App.) 46 S. W. 389.

[7] Wheeler v. Brant, 23 Barb. (N. Y.) 324; Bauer v. Lyons, 23 App. Div. 205, 48 N. Y. Supp. 729.

two,[8] or even one[9] instance may be sufficient, according to the circumstances or the nature of the injury.[10] The previous instances of vicious conduct need not be entirely similar to the one for which recovery is demanded.[11] It is sufficient if the previous act is of such a character as to reasonably lead to the belief that the animal is likely to do harm;[12] and so defendant's knowledge that his dog had previously attacked sheep would impute to him a knowledge of his mischievous nature sufficient to establish the scienter in an action for injuries caused by the same dog biting plaintiff's horse.[13] In an action for worrying sheep, proof that the same dog had habitually attacked men and hogs was held competent.[14] In general, however, evidence of this nature is not conclusive of knowledge, and should be submitted to the jury.[15] And it was so held in an action for damage done to plaintiff's horse by a bull, evidence being received of a previous attack by the bull upon a man.[16] But evidence that a dog habitually bit other animals will not support an action for attacking a man.[17] Nor is the vicious propensity of a dog, established by proof that at the command of his master he was accustomed to drive trespassing cattle from the premises.[18] It has been held that the fact that a dog is commonly kept confined is evidence from which the jury may infer knowledge of his vicious character,[19] but it is submitted that this proposition would hold

[8] Buckley v. Leonard, 4 Denio (N. Y.) 500; McConnell v. Lloyd, 9 Pa. Super. Ct. 25, 43 Wkly. Notes Cas. 245.

[9] Loomis v. Terry, 17 Wend. (N. Y.) 496; Kittredge v. Elliott, 16 N. H. 77; Woolf v. Chalker, 31 Conn. 131.

[10] Tupper v. Clark, 43 Vt. 200.

[11] Pickering v. Orange, 2 Ill. 338, 492; Kittredge v. Elliott, 16 N. H. 77.

[12] McCaskill v. Elliot, 5 Strob. (S. C.) 196; Byrne v. Morel (Ky.) 49 S. W. 193.

[13] Jenkins v. Turner, 1 Ld. Raym. 109. See, also, Hartley v. Harriman, 1 Holt, N. P. 617.

[14] Pickering v. Orange, 2 Ill. 338, 492.

[15] Turner v. Craighead, 83 Hun, 112, 31 N. Y. Supp. 369.

[16] Cockerham v. Nixon, 33 N. C. 269.

[17] Keightlinger v. Egan, 65 Ill. 235.

[18] Spray v. Ammerman, 66 Ill. 309.

[19] Goode v. Martin, 57 Md. 606; Flansburg v. Basin, 3 Ill. App. 531; Godeau v. Blood, 52 Vt. 251; Warner v. Chamberlain, 7 Houst. 18, 30 Atl. 638.

good only in the event that no other satisfactory explanation for the confinement was forthcoming. When it appears that the animal was well known to be of a fierce and dangerous disposition, it is not always necessary to point out previous instances of actual injury to sustain an action for damage committed by it.[20]

The knowledge of the servant becomes notice to the master only where the former occupies a position making his admissions binding on the latter.[21]

Contributory Negligence.

The fact that plaintiff was a technical trespasser on the premises where he was injured will not prevent his recovery.[22] To sustain the defense of contributory negligence, the fault of the complaining party must have been a naturally proximate cause of the injury,[23] and so it was held that one who wrongfully enters a yard, and is injured by a dog kept there for the purpose of protection, cannot recover.[24] It is doubtless imprudent to step on a dog's tail, but is not necessarily such negligence on the part of plaintiff as will prevent his recovery for a consequent bite.[25] As one may rightfully assume that a vicious dog will not be allowed to run at large, it is not negligence in a parent to permit his child to play with a strange dog on the street, nor for a person to tread on a dog's toes.[26] But one who deliberately kicks, teases, or abuses a dog cannot legally complain if he is consequently injured.[27]

[20] Earhart v. Youngblood, 27 Pa. St. 331; Flansburg v. Basin, 3 Ill. App. 531; Curtis v. Mills, 5 Car. & P. 489; Rider v. White, 65 N. Y. 54.

[21] Jeffrey v. Bigelow, 13 Wend. (N. Y.) 518; Clowdis v. Irrigation Co., 118 Cal. 315, 50 Pac. 373; Friedmann v. McGowan (Del. Super.) 42 Atl. 723; Brown v. Green (Del. Super.) 42 Atl. 991; Baldwin v. Casella, L. R. 7 Exch. 325. And see Applebee v. Percy, L. R. 9 C. P. 647.

[22] Marble v. Ross, 124 Mass. 44; Woolf v. Chalker, 31 Conn. 121; Loomis v. Terry, 17 Wend. (N. Y.) 496; Rider v. White, 65 N. Y. 54; Shulz v. Griffith, 103 Iowa, 150, 72 N. W. 445, 40 Lawy. Rep. Ann. 117.

[23] Shehan v. Cornwall, 29 Iowa, 99.

[24] Sarch v. Blackburn, 4 Car. & P. 297. And see Buckley v. Gee, 55 Ill. App. 388.

[25] Woolf v. Chalker, 31 Conn. 121.

[26] Smith v. Pelah, 2 Strange, 1264.

[27] Keightlinger v. Egan, 65 Ill. 235; Bush v. Wathen (Ky.) 47 S. W. 599.

SAME—COMMUNICATING DISEASE.

152. In the absence of statute, a person may keep diseased animals upon his own land without subjecting himself to liability for communicating the disease to the healthy animals of his adjoining neighbor.[1]

This is but an extension of the rule that sanctions the unqualified use of one's own premises for any legitimate purpose, provided such use stops short of being a nuisance. And one may keep diseased animals as above stated, although he has knowledge that his neighbor's healthy animals are liable to come upon the premises and suffer infection, provided such neighbor is warned of the danger.[2] It would be otherwise, however, if he negligently permitted his diseased cattle to transmit the disease by coming in contact with other cattle outside his premises.[3] And it is a general rule that the owner of diseased animals is liable for their transmission of the disease while they are trespassing, whether such owner has knowledge of their condition or not.[4] But in such case the scienter may be proved, although not pleaded, to enhance the damages.[5] So, also, where contagion and injury result from reliance on misrepresentations made by the owner of diseased animals, recovery may be had; as where the owner of land upon which a licensee had pastured diseased sheep relied upon the misrepresentations of the latter that the pasture was free from contagion.[6]

In the sale of infected animals the rule of caveat emptor applies,[7] unless the buyer was misled or put off his guard either by misrepresentation or fraud.[8]

§ 152. [1] Fisher v. Clark, 41 Barb. (N. Y.) 329.

[2] Walker v. Herron, 22 Tex. 55; Fisher v. Clark, 41 Barb. (N. Y.) 329.

[3] Earp v. Faulkner, 34 Law T. (N. S.) 284; Fultz v. Wycoff, 25 Ind. 321; Hite v. Blandford, 45 Ill. 9; Grimes v. Eddy, 126 Mo. 168, 28 S. W. 756. And see, also, Selvege v. Railway Co., 135 Mo. 163, 36 S. W. 652; Croff v. Cresse, 7 Okl. 408, 54 Pac. 558.

[4] Barnum v. Vandusen, 16 Conn. 200; Anderson v. Buckton, 1 Strange, 192.

[5] Barnum v. Vandusen, 16 Conn. 200.

[6] Eaton v. Winnie, 20 Mich. 157.

[7] Hill v. Balls, 2 Hurl. & N. 299.

[8] Mullett v. Mason, L. R. 1 C. P. 559.

FIREARMS.

153. The bearer of loaded firearms is bound to exercise the utmost diligence in their handling, and he is liable for any injury caused by their discharge, unless it appear that he was entirely without fault.[1]

The degree of diligence requisite to constitute ordinary care is proportioned to the danger to be apprehended. As the danger to be apprehended from the possible discharge of a gun directed towards another person in near proximity is of the gravest nature, —practically a certainty,—the law exacts the highest degree of care of the person handling it. Under the old common-law procedure an action for trespass vi et armis did not admit of the defense of inadvertence or absence of intent. To relieve himself of liability, the defendant was obliged to show that the injury was inevitable, and occurred without the slightest fault on his part; and it was so held where the defendant, a soldier, had accidentally shot a comrade while exercising,[2] and likewise where defendant's gun was accidentally discharged in some unexplained manner, and killed plaintiff's mare.[3] And where defendant, drawing a pistol in a crowded room, accidentally discharged it, and killed plaintiff's husband, it was held that the circumstances brought the action within the statute providing civil damages for death caused by "willful neglect."[4] But one using firearms in a wilderness need not exercise the same extreme care required in a populous neighborhood;[5] although a hunter may be liable for shooting another,

§ 153. [1]Morgan v. Cox, 22 Mo. 373; Seltzer v. Saxton, 71 Ill. App. 229; Chaddock v. Tabor, 115 Mich. 27, 72 N. W. 1093. Necessity of averment of absence of contributory negligence of plaintiff. Kleineck v. Reiger (Iowa) 78 N. W. 39.

[2] Weaver v. Ward, Hob. 134. See, also, Underwood v. Hewson, 1 Strange, 596.

[3] Tally v. Ayres, 3 Sneed (Tenn.) 677. And see Chataigne v. Bergeron, 10 La. Ann. 699; Castle v. Duryee, *41 N. Y. 169, 32 Barb. (N. Y.) 480.

[4] Chiles v. Drake, 2 Metc. (Ky.) 146, 154. At a fox hunt, defendant tried to shoot the fox, and killed plaintiff's dog. Wright v. Clark, 50 Vt. 130.

[5] Bizzell v. Booker, 16 Ark. 308. And see People v. Chappell, 27 Mich. 486, for construction of statute as to negligent use of firearms in MICHIGAN.

even if he did not know of his presence.[6] One who negligently discharges firearms upon or near the highway is liable for resulting injuries, although such injuries are induced by fright, and are not caused by the missile; as, where plaintiff's horse was frightened by the report of a gun, and ran away, and broke the carriage.[7] The extreme rigor of the foregoing rule, which practically holds one liable for all injuries caused by a firearm while in his possession or under his control, is seen in an English case decided early in the present century. The defendant, having occasion to use his loaded gun, sent his servant to the keeper in whose possession it was, with instruction to the latter to remove the priming, and send it by the servant. The priming was removed, and the gun given to the servant, who took it to the kitchen, and, knowing that the priming had been removed, aimed it in sport at plaintiff's child, when it was discharged, and seriously wounded the latter. The latter was allowed to recover, the court saying: "* * * And, though it was the defendant's intention to prevent all mischief, and he expected that this would be effectuated by taking out the priming, the event has unfortunately proved that the order to Leman was not sufficient. Consequently, as by this want of care the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible." [8]

EXPLOSIVES.

154. The degree of care required in keeping or using explosives is proportionate to the danger and the damage probably resultant on their explosion.

One who keeps nitroglycerine, powder, or other explosives is bound to use diligence commensurate with the danger involved in the keeping; and, as the danger may increase according to the amount stored, negligence may be predicated upon the quantity, without regard to the manner in which it is protected. And it has accordingly been held erroneous to charge that the defendant is not liable

[6] Hankins v. Watkins, 77 Hun, 360, 28 N. Y. Supp. 867.

[7] Cole v. Fisher, 11 Mass. 137.

[8] Dixon v. Bell, 5 Maule & S. 198. See, also, Babel v. Manning, 112 Mich. 24, 70 N. W. 327, 36 Lawy. Rep. Ann. 523.

unless it is found that the manner in which he kept the explosive was negligent.[1] But when the defendant carrier is ignorant of the fact that he is carrying a dangerous explosive, he is chargeable with ordinary care only.[2] But where one intrusts, without warning, to the care of another, a dangerous substance or instrumentality, whose true nature is not apparent, he is liable for results injurious to the bailee or third persons.[3] And to sustain a recovery in such circumstances it is sufficient to show that the defendant had knowledge of the dangerous nature of the substance, while the bailee had not.[4] It is not necessary to show any deception on the part of the defendant.[5]

POISONS.

155. A very high degree of care is required of those dealing in or handling poisons.

Apothecaries and others dealing in or handling poisons or other mischievous material are obligated to a very high degree of care to guard against any injury to others arising from their use. And if one sells a poisonous substance, which he has negligently mislabeled, thereby causing injury to a third person, the latter, or his personal representatives, may recover therefor.[1] Or if a person negligently exposes a poison under such circumstances that it is

§ 154. [1]Heeg v. Licht, 80 N. Y. 579. See, also, Mills v. Railway Co., 1 Marv. 269, 40 Atl. 1114; St. Mary's Woolen Mfg. Co. v. Bradford Glycerine Co., 14 Ohio Cir. Ct. 522, 7 Ohio Dec. 582; Kinney v. Koopman, 116 Ala. 310, 22 South. 593; Rudder v. Koopman, 116 Ala. 332, 22 South. 601; Simon v. Henry (N. J. Sup.) 41 Atl. 692. Joint liability for injuries. Prussak v. Hutton, 30 App. Div. 66, 51 N. Y. Supp. 761. Injunction to restrain keeping and vending of dynamite in thickly-settled community. McDonough v. Roat, 8 Kulp (Pa.) 433.

[2] Parrot v. Wells, Fargo & Co., 15 Wall. 524.

[3] Farrant v. Barnes, 11 C. B. (N. S.) 553; Brass v. Maitland, 6 El. & Bl. 470.

[4] Brass v. Maitland, 6 El. & Bl. 470; Williams v. East India Co., 3 East, 192. As to liability of vendor of explosive oil under MASSACHUSETTS statute, see Hourigan v. Nowell, 110 Mass. 470.

[5] Farrant v. Barnes, 11 C. B. (N. S.) 553.

§ 155. [1]Norton v. Sewall, 106 Mass. 143; Callahan v. Warne, 40 Mo. 131; Osborne v. McMasters, 40 Minn. 103, 41 N. W. 543. See, also, Wise v. Morgan (Tenn. Sup.) 48 S. W. 971.

likely to do harm to others, he is responsible for the consequences.[2] And in cases of this class it is not essential that any privity exist between the negligent person and the one who was injured. In the case of Thomas v. Winchester,[3] a manufacturer and dealer in vegetable extracts was sued by a stranger for damages suffered by the use of one of these preparations labeled as extract of dandelion, a harmless medicine, but which was in fact extract of belladonna, a poison, and a recovery was allowed. But liability attaches to the manufacturer, vendor, or custodian of poisons,[4] spoiled food,[5] or materials otherwise dangerous,[6] only when he has been negligent.[7] And so where a manufacturer used a dye, reasonably supposed to be harmless, and a purchaser of cloth colored by the material was poisoned thereby, the latter was not allowed to recover.[8]

[2] Crowhurst v. Board, 4 Exch. Div. 5; Kennedy v. Ryall, 67 N. Y. 379.

[3] 6 N. Y. 397. And see Osborne v. McMasters, 40 Minn. 103, 41 N. W. 543.

[4] Walton v. Booth, 34 La. Ann. 913 (sulphate of zinc sold as Epsom salts); Brown v. Marshall, 47 Mich. 576, 11 N. W. 392; Norton v. Sewall, 106 Mass. 143; Gwynn v. Duffield, 66 Iowa, 708, 24 N. W. 523. When a physician on a steamer gave calomel instead of quinine, the natural confusion aboard the ship was held to negative negligence. Allan v. Steamship Co., 132 N. Y. 91, 30 N. E. 482.

[5] Craft v. Parker, Webb & Co., 96 Mich. 245, 55 N. W. 812; contaminated water, Buckingham v. Water Co., 142 Pa. St. 221, 21 Atl. 824.

[6] As chloride of lime stored in a vessel. Brass v. Maitland, 6 El. & Bl. 470.

[7] In KENTUCKY it would appear that the liability is absolute, regardless of any question of negligence. Fleet v. Hollenkemp, 13 B. Mon. 219.

[8] Gould v. Woolen Co., 147 Mass. 315, 17 N. E. 531.

CHAPTER IX.

NEGLIGENCE OF ATTORNEYS, PHYSICIANS, AND PUBLIC OFFICERS.

NEGLIGENCE OF ATTORNEYS.

156. A lawyer is liable to his client for failure to possess such reasonable knowledge of the law, and to employ such diligence in its application to the matter in hand, as is common among members of the legal profession in that locality in similar circumstances.

"It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a case is bounded, or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that crassa negligentia, or lata culpa, mentioned in some of the cases, for which he is undoubtedly responsible. The cases, however, which have been cited and commented on at the bar, * * * appear to establish, in general, that he is liable for the consequences of ignorance or nonobservance of the rules of practice of this court,[1] for the want of care in the preparation of the cause for trial,[2] or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of

§ 156. [1]Caldwell v. Hunter, 10 Q. B. 69, 83; Bracey v. Carter, 12 Adol. & E. 373. Negligently suffering judgment by default. Godefroy v. Jay, 7 Bing. 413; Hoby v. Built, 3 Barn. & Adol. 350.

[2] Or bringing an action in a court not having jurisdiction. Williams v. Gibbs, 6 Nev. & M. 788; Cox v. Leech, 1 C. B. (N. S.) 617.

a cause as is usually and ordinarily allotted to his department of the profession; whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence or of nice or doubtful construction." [3]

The attorney is not bound to be absolutely accurate or exact, or to be familiar with abstruse, or unusual, or new points.[4] "God forbid," said the learned Chief Justice Abbott, "that it should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law." [5] The English attorney or solicitor is essentially the same as an American lawyer, and is required to exercise such diligence as is common with members of good standing in the profession, in similar circumstances.[6] He must exercise reasonable care and diligence only,[7] unless there has been an express stipulation for a higher degree of care.[8] It follows as of course that he cannot be liable for mistake on a debatable point, not yet settled in the courts, or one on which reputable and well-informed lawyers

[3] Tindal, C. J., in Godefroy v. Dalton, 6 Bing. 460, 467. An action for professional negligence will not lie against a barrister. Swinfen v. Chelmsford, 5 Hurl. & N. 890. See, also, Malone v. Gerth, 100 Wis. 166, 75 N. W. 972; Lawall v. Groman, 180 Pa. St. 532, 37 Atl. 98.

[4] Godefroy v. Dalton, 6 Bing. 460; Morrison v. Burnett, 56 Ill. App. 129.

[5] In Montriou v. Jefferys, 2 Car. & P. 113. And in Pitt v. Yalden, 4 Burrows, 2060, Lord Mansfield said: "That part of the profession which is carried on by attorneys is liberal and reputable, as well as useful to the public, when they conduct themselves with honor and integrity; and they ought to be protected where they act to the best of their skill and knowledge. But every man is liable to error, and I should be very sorry that it should be taken for granted that an attorney is answerable for every error or mistake. * * * A counsel may mistake as well as an attorney. Yet no one will say that a counsel who has been mistaken shall be charged with the debt. * * * Not only a counsel, but judges, may differ, or doubt, or take time to consider. Therefore an attorney ought not to be liable in cases of reasonable doubt." And see Laidler v. Elliott, 3 Barn. & C. 738.

[6] Kepler v. Jessupp, 11 Ind. App. 241, 37 N. E. 655; Isham v. Parker, 3 Wash. St. 755, 29 Pac. 835; Holmes v. Peck, 1 R. I. 242; Stevens v. Walker, 55 Ill. 151; Wilson v. Russ, 20 Me. 421; Stubbs v. Beene's Adm'r, 37 Ala. 627; Gambert v. Hart, 44 Cal. 542.

[7] O'Barr v. Alexander, 37 Ga. 195; Kepler v. Jessupp, 11 Ind. App. 241, 37 N. E. 655; Wilson v. Russ, 20 Me. 421; Strodtman v. Menard Co., 56 Ill. App. 120; Morrison v. Burnett, 56 Ill. App. 129.

[8] Babbitt v. Bumpus, 73 Mich. 331, 41 N. W. 417.

hold conflicting opinions.[9] The early standard acquitted the attorney if he acted honestly, and to the best of his ability,[10] but he is now held to a much higher degree of care and skill, which must, at least, compare reasonably with that of good practitioners at the same bar. He has accordingly been held liable in the following, among many other, cases: In not commencing an action against a debtor in failing circumstances;[11] or in time to avoid a bar by the statute of limitations;[12] or to properly conduct an appeal;[13] or in failing to notify client of an impending tax sale;[14] or to properly prepare a mechanic's lien;[15] or for failure, in an action for divorce, to take proper and customary steps to prevent the decree being subsequently opened;[16] for failing to observe the omission of the word "hundred," usually printed in the form of writ, and to insert it, thereby causing the loss of the debt;[17] for advising his client, unnecessarily, to relinquish his claim for the reimbursement of money which he had paid out as surety.[18] In general, in an action to recover for professional services, any evidence of negligence or want of skill in conducting the case, which, by reasonable inference, tended

[9] Watson v. Muirhead, 57 Pa. St. 161; Citizens' Loan, Fund & Savings Ass'n v. Friedley, 123 Ind. 143, 23 N. E. 1075; Potts v. Dutton, 8 Beav. 493; Taylor v. Gorman, 4 Ir. Eq. 550; Wilson v. Tucker, 3 Starkie, 154; Drax v. Scroope, 2 Barn. & Adol. 581; Stannard v. Ullithorne, 10 Bing. 491. And one is justified in relying on a decision of the supreme court of his state, so long as it is not overruled. Marsh v. Whitmore, 21 Wall. 178; Hastings v. Halleck, 13 Cal. 204.

[10] Lynch v. Com., 16 Serg. & R. (Pa.) 368; Crosbie v. Murphy, 8 Ir. C. L. 301; Gilbert v. Williams, 8 Mass. 51; although he was held liable for gross negligence, Baikie v. Chandless, 3 Camp. 17; Elkington v. Holland, 9 Mees. & W. 659. Expression of opinion as to the amount likely to be realized at judicial sale as creating liability. Reumping v. Wharton (Neb.) 76 N. W. 1076.

[11] Rhines' Adm'rs v. Evans, 66 Pa. St. 192.

[12] Fox v. Jones (Tex. App.) 14 S. W. 1007; King v. Fourchy, 47 La. Ann. 354, 16 South. 814; Drury v. Butler, 171 Mass. 171, 50 N. E. 527.

[13] Jamison v. Weaver, 81 Iowa, 212, 46 N. W. 996.

[14] Waln v. Beaver, 161 Pa. St. 605, 29 Atl. 114.

[15] Joy v. Morgan. 35 Minn. 184, 28 N. W. 237.

[16] Von Wallhoffen v. Newcombe, 10 Hun (N. Y.) 236.

[17] Varnum v. Martin, 15 Pick. (Mass) 440.

[18] Cochrane v. Little, 71 Md. 323, 18 Atl. 698.

to prejudice the client's case, is admissible in defense,[19] but not if the carelessness or lack of skill has been excused.[20]

The requisite degree of care and skill must be computed by comparison in similar circumstances.[21] "A metropolitan standard is not to be applied to a rural bar." [22] If the relation of client and attorney exists, to maintain an action against the former for negligence it is not essential that the service was performed for compensation; the liability may be incurred even if the service was gratuitous.[23]

In the examination of titles due diligence should be observed, and the records closely scrutinized. Mistakes arising from failure in this respect, as failure to note the existence of an incumbrance,[24] will render the attorney liable.[25] He is likewise liable for negligence in preparing and recording instruments.[26]

[19] 2 Greenl. Ev. § 143. And see, also, Caverly v. McOwen, 123 Mass. 574; Huntley v. Bulwer, 6 Bing. N. C. 111; Hopping v. Quin, 12 Wend. (N. Y.) 517; Weed v. Bond, 21 Ga. 195; Bowman v. Tallman, 2 Rob. (N. Y.) 385; Lewis v. Samuel, 8 Q. B. 685; Hill v. Allen, 2 Mees. & W. 283; Newman v. Schueck, 58 Ill. App. 328; Struckmeyer v. Lamb, 64 Minn. 57, 65 N. W. 930.

[20] Gleason v. Kellogg, 52 Vt. 14; Carr's Ex'x v. Glover, 70 Mo. App. 242.

[21] Hart v. Frame, 6 Clark & F. 193; Stannard v. Ullithorne, 10 Bing. 491; Gambert v. Hart, 44 Cal. 542; Walpole's Adm'r v. Carlisle, 32 Ind. 415; Bowman v. Tallman, 2 Rob. (N. Y.) 385; Watson v. Muirhead, 57 Pa. St. 161.

[22] Weeks, Attys. § 289; Pennington's Ex'rs v. Yell, 11 Ark. 212.

[23] Donaldson v. Haldane, 7 Clark & F. 762. But erroneous advice given offhand to a stranger, without compensation, does not carry liability. Fish v. Kelly, 17 C. B. (N. S.) 194. One falsely holding himself out as an attorney is accountable to his client with the same strictness as though he were an attorney. Miller v. Whelan, 158 Ill. 544, 42 N. E. 59.

[24] Pennoyer v. Willis (Or.) 32 Pac. 57; or at least the question of negligence will be for the jury, Pinkston v. Arrington, 98 Ala. 489, 13 South. 561.

[25] Watson v. Muirhead, 57 Pa. St. 161; Gore v. Brazier, 3 Mass. 523; Sprague v. Baker, 17 Mass. 586; Chase v. Heaney, 70 Ill. 268; Byrnes v. Palmer, 18 App. Div. 1, 45 N. Y. Supp. 479.

[26] Stott v. Harrison, 73 Ind. 17; Miller v. Wilson, 24 Pa. St. 114; preparing instruments, Elkington v. Holland, 9 Mees. & W. 659; White v. Reagan, 32 Ark. 281.

SAME—DAMAGE ESSENTIAL TO LIABILITY.

157. As in all other actions for negligence, damage proximately resulting from the carelessness complained of must be proved.

To sustain an action for negligence, it must appear reasonably certain that, had due diligence and skill been observed, the result would have been more favorable to the client.[1] Thus, if it is claimed that the attorney failed to use certain facts which had been communicated to him by the client, it must appear that they were susceptible of proof, and that, when proved, they would have varied the result.[2] But negligence cannot be proved by the opinion of another attorney.[3] To constitute negligence in failing to take an appeal, it must appear that, had it been taken, it would have been sustained.[4]

The measure of damages is the amount actually lost by the negligence of the attorney.[5]

Ordinarily, the question of negligence is for the jury, under proper instruction from the court.[6]

NEGLIGENCE OF PHYSICIANS.

158. The implied undertaking of a physician or surgeon is to have and to employ such reasonable skill and diligence as are ordinarily possessed and exercised in the profession by thoroughly educated physicians and surgeons in the particular locality.

§ 157. [1] Although the mere fact that another course might have been more advantageous to the client, is no proof of negligence, it appearing that the attorney acted in good faith. Harriman v. Baird, 6 App. Div. 518, 39 N. Y. Supp. 592.

[2] Hastings v. Halleck, 13 Cal. 204.

[3] Gambert v. Hart, 44 Cal. 542.

[4] Hays v. Ewing, 70 Cal. 127, 11 Pac. 602.

[5] Dearborn v. Dearborn, 15 Mass. 316; Huntington v. Rumnill, 3 Day (Conn.) 390; 2 Greenl. Ev. § 146; Lawall v. Groman, 180 Pa. St. 532, 37 Atl. 98.

[6] Pennington's Ex'rs v. Yell, 11 Ark. 212; Pinkston v. Arrington, 98 Ala. 489, 13 South. 561; Hunter v. Caldwell, 10 Q. B. 69. And see Gambert v. Hart, 44 Cal. 542; Abeel v. Swann, 21 Misc. Rep. 677, 47 N. Y. Supp. 1088.

A physician may make a special contract to perform an absolute cure,[1] but, in the absence of such agreement, he does not insure that his treatment will be successful, or even beneficial;[2] and a failure to effect a cure does not raise a presumption of want of skill or failure to exercise due diligence.[3] When, however, the failure to employ ordinary skill and diligence, due regard being had to the nature of the ailment and the standard of skill in the locality, results harmfully to the patient, the physician is liable for negligence.[4] The injury, however, need not be physical; actionable negligence may be predicated on an incorrect diagnosis, although treatment is neither asked nor given.[5] Not only must the medical practitioner use ordinary care and diligence, but he must be possessed of at least the ordinary skill and attainments of the profession. It has accordingly been held erroneous to instruct a jury that it was "entirely immaterial to the inquiry whether defendant, at the time he undertook the reduction of the dislocation, was or was not reputed to be, or was or was not, a skillful surgeon"; the court saying that, having undertaken a matter requiring skill and care, he was liable for the omission to exercise it.[6]

Although the law does not require the highest degree of skill and science,[7] yet in estimating the standard of due care regard must

§ 158. [1] See Leighton v. Sargent, 7 Fost. (N. H.) 460; Van Skike v. Potter, 53 Neb. 28, 73 N. W. 295. But an undertaking to "set, dress, take care of, and manage, as such physician and surgeon, said broken bone, in a proper, prudent, and skillful manner," is not a contract to effect a cure. Reynolds v. Graves, 3 Wis. 416.

[2] Ewing v. Goode, 78 Fed. 442.

[3] Lawson v. Conaway, 37 W. Va. 159, 16 S. E. 564; Wurdemann v. Barnes, 92 Wis. 206, 66 N. W. 111.

[4] Landon v. Humphrey, 9 Conn. 209; Carpenter v. Blake, 60 Barb. (N. Y.) 488; McNevins v. Lowe, 40 Ill. 209; Gramm v. Boener, 56 Ind. 497. Actual injury must result from the malpractice, to constitute actionable negligence. Ewing v. Goode, 78 Fed. 442.

[5] Harriott v. Plimpton, 166 Mass. 585, 44 N. E. 992.

[6] Carpenter v. Blake, 60 Barb. (N. Y.) 488. And see Cayford v. Wilbur, 86 Me. 414, 29 Atl. 1117.

[7] Cayford v. Wilbur, 86 Me. 414, 29 Atl. 1117; McCandless v. McWha, 22 Pa. St. 261, approved in Smothers v. Hanks, 34 Iowa, 286; Leighton v. Sargent, 7 Fost. (N. H.) 460; Peck v. Hutchinson, 88 Iowa, 320, 55 N. W. 511; McNevins v. Lowe, 40 Ill. 209; Wood v. Clapp, 4 Sneed (Tenn.) 65; Hewitt v. Eisenbart, 36 Neb. 794, 55 N. W. 252; Lawson v. Conaway, 37 W. Va. 159, 16 S. E.

be had to the advanced stage of the profession at the time; many of the methods formerly in vogue—as indiscriminate and extensive blood-letting—being no longer recognized by legitimate practitioners. And so the standard of ordinary care and skill may vary, even in the same state, according to the greater or less opportunity afforded by the locality for observation and practice, from which alone the highest skill can be acquired.[8]

Errors of judgment do not constitute legal negligence in the practice of medicine,[9] provided they are not made on a point which is well settled in the profession.[10] Nor is a physician in general practice liable for failure to call in a specialist to treat a disease not arising from his lack of skill in handling the original case.[11]

The different "schools" of medicine are not recognized as such in the courts. All systems of medicine are recognized in law, and the physician is required to regulate his practice according to the system which he elects and professes to follow. Thus the requisite degree of care and skill required of a homeopathic physician must be estimated according to the precepts and standards of that school,[12] and evidence to prove that defendant's treatment of a case was according to the botanic system of practicing medicine, which he professed and was known to follow, is admissible.[13] It is true,

564; Tefft v. Wilcox, 6 Kan. 46. And see Carpenter v. Blake, 60 Barb. (N. Y.) 488; Degnan v. Ransom, 83 Hun, 267, 31 N. Y. Supp. 966.

[8] Smothers v. Hanks, 34 Iowa, 286; Hewitt v. Eisenbart, 36 Neb. 794, 55 N. W. 252; Peck v. Hutchinson, 88 Iowa, 320, 55 N. W. 511; Whitesell v. Hill (Iowa) 66 N. W. 894; Pelky v. Palmer, 109 Mich. 561, 67 N. W. 561; McCracken v. Smathers, 122 N. C. 799, 29 S. E. 354.

[9] McClallen v. Adams, 19 Pick. (Mass.) 333. And see Twombly v. Leach, 11 Cush. (Mass.) 397. That information, and not treatment, was requested, will not excuse physician for mistaken diagnosis. Harriott v. Plimpton, 166 Mass. 585, 44 N. E. 992.

[10] Carpenter v. Blake, 60 Barb. (N. Y.) 488: Patten v. Wiggin, 51 Me. 594.

[11] Jones v. Vroom, 8 Colo. App. 143, 45 Pac. 234.

[12] Force v. Gregory, 63 Conn. 167, 27 Atl. 1116. And see Burnham v. Jackson, 1 Colo. App. 237, 28 Pac. 250; Martin v. Courtney (Minn.) 77 N. W. 813.

[13] Bowman v. Woods, 1 G. Greene (Iowa) 441; Com. v. Thompson, 6 Mass. 134; Patten v. Wiggin, 51 Me. 594; fractures near elbow joint, Wilmot v. Howard, 39 Vt. 447; fractures near shoulder, Baird v. Morford, 29 Iowa, 531; fractures near wrist, Smothers v. Hanks, 34 Iowa, 286; Ritchey v. West, 23

however, that certain principles of medicine are so well known and universally received that to ignore them would be negligence in law, no matter what the practice might be in the particular school to which the physician might belong.[14]

The right of the state to provide rules and tests for ascertaining the qualifications of applicants for authority to practice medicine is a proper exercise of the police power, which is constantly used by the legislatures. Such statutes do not modify the laws of negligence as applied to those licensed to practice thereunder; and if a person, acting as a medical practitioner, is guilty of malpractice, he is none the less liable because he has not conformed with the law.[15]

SAME—BURDEN OF PROOF—EVIDENCE—PLEADING.

159. The burden of proving the essential elements of negligence rests on the plaintiff in cases of malpractice, as in all other actions of a similar nature.

Ill. 385; Scudder v. Crossan, 43 Ind. 343; Stevenson v. Gelsthorpe, 10 Mont. 563, 27 Pac. 404; fractures near ankle, Almond v. Nugent, 34 Iowa, 300; and generally as to fractures, Young v. Mason, 8 Ind. App. 264, 35 N. E. 521; Gedney v. Kingsley, 62 Hun, 620, 16 N. Y. Supp. 792; dislocation, Carpenter v. Blake, 60 Barb. (N. Y.) 488; "Colles' fracture," Link v. Sheldon, 136 N. Y. 1, 32 N. E. 696; amputation, Alder v. Buckley, 1 Swan (Tenn.) 69; Howard v. Grover, 28 Me. 97. One of the most celebrated malpractice cases, in which the alleged malpractice consisted in opening an abscess, is Walsh v. Sayre, 52 How. Prac. (N. Y.) 335. Failure to discover serious rupture of perineum, Lewis v. Dwinell, 84 Me. 497, 24 Atl. 945; obstetric cases, Grannis v. Branden, 5 Day (Conn.) 260; frost bite, Kay v. Thomson, 10 Am. Law Reg. (N. S.) 594; Patten v. Wiggin, 51 Me. 594; liability of hospital physician for nurse, Perionowsky v. Freeman, 4 Fost. & F. 977; vaccination, Landon v. Humphrey, 9 Conn. 209; felons, Twombly v. Leach, 11 Cush. (Mass.) 397; erysipelas, Cochran v. Miller, 13 Iowa, 128; medical cases, Peck v. Martin, 17 Ind. 115; Com. v. Thompson, 6 Mass. 134; Rex v. Long, 4 Car. & P. 398–423; liability of one holding himself out as a physician, Matthei v. Wooley, 69 Ill. App. 654.

[14] As failure to remove the placenta after childbirth. Lynch v. Davis, 12 How. Prac. (N. Y.) 323; Moratzky v. Wirth, 67 Minn. 46, 69 N. W. 480.

[15] Ruddock v. Lowe, 4 Fost. & F. 519, note a, p. 521; Jones v. Fay, Id. 525, note a, p. 526. As to diploma as evidence of competency under statute and at common law, see Stough v. State, 88 Ala. 234, 7 South. 150; Townshend v. Gray, 62 Vt. 373, 19 Atl. 635.

Burden of Proof.

When the ignorance or lack of skill of the defendant is alleged, it must be proved.[1] In such cases proof of general skill is admissible, but ordinarily, where the issue is upon the treatment of a particular case, such evidence is not competent for the defense.[2]

Evidence.

Contributory negligence, either by way of pre-existing bodily conditions or failure to follow the directions of the defendant, is always proper matter of defense,—as the failure to keep an injured limb in a state of perfect quiet, thereby retarding or preventing recovery;[3] or the excessive use of alcoholic stimulants within a period not too remote to influence the patient's recovery.[4]

Pleading.

It is not essential that the complaint specifically allege negligence if the facts set out will fairly warrant no other conclusion than a lack of ordinary care and skill.[5]

NEGLIGENCE OF PUBLIC OFFICERS—GOVERNMENTAL OFFICERS.

160. Governmental officials are responsible only to the public at large, and their negligent acts in the performance of their duties cannot become the subject of private actions.

For purposes of convenience public officials may be separated into two general groups or classes: Those who serve the public collectively as a body, and those who serve the public distributively

§ 159. [1] Scudder v. Crossan, 43 Ind. 343; Kendall v. Brown, 86 Ill. 387. And see Pelky v. Palmer, 109 Mich. 561, 67 N. W. 561; Ewing v. Goode, 78 Fed. 442. In Iowa the burden of proof appears to be on plaintiff to prove his freedom from contributory negligence. Whitesell v. Hill, 66 N. W. 894.

[2] Holtzman v. Hoy, 118 Ill. 534, 8 N. E. 832; Mertz v. Detweiler, 8 Watts & S. (Pa.) 376; Lacy v. Kossuth Co., 106 Iowa, 16, 75 N. W. 689. Admissibility of nonexpert evidence. Williams v. Nally (Ky.) 45 S. W. 874.

[3] Geiselman v. Scott, 25 Ohio St. 86. See, also, Whitesell v. Hill (Iowa) 66 N. W. 894; Richards v. Willard, 176 Pa. St. 181, 35 Atl. 114.

[4] McCandless v. McWha, 25 Pa. St. 95.

[5] Crowty v. Stewart, 95 Wis. 490, 70 N. W. 558; Williams v. Nally (Ky.) 45 S. W. 874.

as individuals. Within the first division are included all governmental officials, both legislative, executive, and judicial, with all their subordinates and agents through whom the functions of general government are performed. Their duties are administrative, and are performed for the public at large. They enjoy a kind of sovereignty. Hence the acts of these officers as agents and representatives of the government cannot be made the subject of private actions by individuals who are personally aggrieved or injured thereby. They must, however, keep within the limit of their powers, and abstain from malicious or corrupt acts. With this proviso they are responsible to the people only[1] by public impeachment. The sovereignty of the judiciary reaches even further, and renders its members exempt from individual redress for their judicial acts, although they may be conceived in oppression and corruption.[2] But they may be held liable in a civil action if injury results from an act clearly outside their jurisdiction.[3] In Houlden v. Smith [4] Patterson, J., said: "Although it is clear that the judge of a court of record is not answerable at common law in an action for an erroneous judgment, or for the act of any officer of the court wrongfully done, * * * yet we have found no authority for saying that he is not answerable in an action for an act done by his command and authority when he has no jurisdiction."

SAME—MINISTERIAL OFFICERS.

161. By virtue of their offices the law raises an implied contract between ministerial officials and those individuals whom they serve, for the breach of which contract they become liable.

To the second class of public officers belong all those whose duties are purely ministerial; duties simple and definite, and with respect to which nothing is left to discretion.[1] They include sheriffs

§ 160. [1] Wright v. Defrees, 8 Ind. 298; Attorney General v. Brown, 1 Wis. 522.

[2] Bradley v. Fisher, 13 Wall. 335; Rains v. Simpson, 50 Tex. 495.

[3] Bradley v. Fisher, 13 Wall. 335.

[4] 14 Q. B. 841.

§ 161. [1] Friedman v. Mathes, 8 Heisk. (Tenn.) 488.

and constables, notaries public, clerks of court, and recorders of deeds. These officers are required, by statutes governing the various offices which they fill, to perform certain designated duties for any individual who may have occasion to resort to them, paying any statutory fee which may be required for the service demanded. For the performance of these duties the law raises an implied contract between the officer and the individual, and the latter may recover from the former any damages he may suffer from the failure of the officer to perform the required duty.

SAME—SHERIFFS AND CONSTABLES.

162. A sheriff is liable to the creditor named in the process for any damage he may sustain through the failure of the officer to exercise reasonable care and diligence in its execution.

Compensatory damages cannot, of course, be recovered without proof; but not even nominal damages can be recovered if it clearly appears that no actual damage was suffered,[1] although, in the absence of proof as to actual damage, nominal damage may be recovered.[2]

Liability to the creditor may generally be predicated upon the failure of the officer to use ordinary care and diligence in the execution of any valid process.[3] What constitutes reasonable diligence depends on the circumstances of the case, and is always a mixed question of law and fact.[4] If the creditor directs immediate service, informing the officer of the danger of delay,[5] greater diligence

§ 162. [1] Wylie v. Birch, 4 Q. B. 566.

[2] Humphrey v. Hathorn, 24 Barb. (N. Y.) 278; Selfridge v. Lithgow, 2 Mass. 374; Bales v. Wingfield, 4 Q. B. 580, note a.

[3] Dorrance's Adm'rs v. Com., 13 Pa. St. 160; Wolfe v. Dorr, 24 Me. 104; Barnard v. Ward, 9 Mass. 269; Peirce v. Partridge, 3 Metc. (Mass.) 44; Kittredge v. Bellows, 7 N. H. 399; Sherrill v. Shuford, 32 N. C. 200; Watkinson v. Bennington, 12 Vt. 404; Neal v. Price, 11 Ga. 297; Chittenden v. Crosby, 5 Kan. App. 534, 48 Pac. 209; Stiff v. McLaughlin, 19 Mont. 300, 48 Pac. 232.

[4] Whitsett v. Slater, 23 Ala. 626.

[5] Tucker v. Bradley, 15 Conn. 46; Smith v. Judkins, 60 N. H. 127; Peirce v. Partridge, 3 Metc. (Mass.) 44; Ranlett v. Blodgett, 17 N. H. 298; Root v. Wagner, 30 N. Y. 9.

and speed is necessary, although, in general, the officer may execute the process at any time before the return day.[6] But he must make a true return,[7] and within the allotted time.[8] No right of action for damages accrues to the individual whose property or person is seized under execution of process, whenever it appears that the writ is regular on its face, and that it was issued by a court of competent jurisdiction in respect to the subject-matter,[9] provided the writ does not disclose the actual want of jurisdiction in respect to the person.[10]

Unlawful Acts of Officer.

But for conduct under a defective writ, or for an unauthorized act, the officer becomes liable to the individual against whom he proceeds;[11] as for unlawfully breaking into a person's house to make a levy.[12] He is also liable when he makes a wrongful seizure,[13]

[6] On the general subject of diligence, see Parrott v. Dearborn, 104 Mass. 104; Crosby v. Hungerford, 59 Iowa, 712, 12 N. W. 582.

[7] Barnard v. Leigh, 1 Starkie, 43; Goodrich v. Starr, 18 Vt. 227; Blair v. Flack, 62 Hun, 509, 17 N. Y. Supp. 64.

[8] Hawkins v. Taylor, 56 Ark. 45, 19 S. W. 105; Atkinson v. Heer, 44 Ark. 174, followed in Wilson v. Young, 58 Ark. 593, 25 S. W. 870. By statute, Humphrey v. Hathorn, 24 Barb. (N. Y.) 278; Peck v. Hurlburt, 46 Barb. (N. Y.) 559; Jenkins v. McGill, 4 How. Prac. (N. Y.) 205; McGregor v. Brown, 5 Pick. (Mass.) 170. But at common law he was not liable in an action for failure to return the writ. Com. v. McCoy, 8 Watts (Pa.) 153; Moreland v. Leigh, 1 Starkie, 388. The writ must be returned to the proper office. Frink v. Scovel, 2 Day (Conn.) 480. Inability or failure to serve is no excuse for failure to return. Kidder v. Barker, 18 Vt. 454; Webster v. Quimby, 8 N. H. 382.

[9] Goldis v. Gately, 168 Mass. 300, 47 N. E. 96; Munns v. Loveland, 15 Utah, 250, 49 Pac. 743. See, also, Henline v. Reese, 54 Ohio St. 599, 44 N. E. 269, 56 Am. St. Rep. 36; Miller v. Hahn (Mich.) 74 N. W. 1051; O'Briant v. Wilkerson, 122 N. C. 304, 30 S. E. 126; Sears v. Lydon (Idaho) 49 Pac. 122; Johnson v. Randall (Minn.) 76 N. W. 791; State v. O'Neill (Mo. Sup.) 52 S. W. 240. Invalidity of process as defense by officer sued for failure to make arrest. Belcher v. Sheehan, 171 Mass. 513, 51 N. E. 19.

[10] Orr v. Box, 22 Minn. 485; Savacool v. Boughton, 5 Wend. (N. Y.) 170.

[11] Cases collected in McLendon v. State, 92 Tenn. 520, 22 S. W. 200.

[12] Welsh v. Wilson, 34 Minn. 92, 24 N. W. 327; Thompson v. State, 3 Ind. App. 371, 28 N. E. 996.

[13] Francisco v. Aguirre, 94 Cal. 180, 29 Pac. 495; McAllaster v. Bailey, 127 N. Y. 583, 28 N. E. 591; Tillman v. Fletcher, 78 Tex. 673, 15 S. W. 161; Walker v. Wonderlick, 33 Neb. 504, 50 N. W. 445; Rogers v. McDowell, 134 Pa. St. 424, 21 Atl. 166; Harris v. Tenney, 85 Tex. 254, 20 S. W. 82; Allen v. Kirk,

and may be jointly liable with his deputy,[14] or with the plaintiff in the original action.[15] The officer may also be liable to the defendant for subjecting him to oppression or undue hardship,[16] or for abusing process.[17] Liability likewise attaches when the sheriff intentionally takes property not covered by the writ. In such cases he is a trespasser ab initio, and is liable for all consequences of an unlawful entry and seizure.[18] * * * If the officer levies on and sells property which he knows, or should know, is exempt under the statute, he is liable to the debtor therefor.[19] The presumption being that the debtor would claim the privilege of exemption before sale, an officer may, in general, defend an action for failure to levy an execution on the ground that the debtor is a resident, and that his property did not exceed in value the amount of the exemption allowed by statute.[20]

Sufficient Levy.

It is the duty of the sheriff to exercise sound judgment and discretion in estimating the amount of property necessary to realize the demand of the writ, and for mistaken judgment in this respect he is liable to neither the creditor nor the debtor, if the levy re-

81 Iowa, 658, 47 N. W. 906; State v. Koontz, 83 Mo. 323; Palmer v. McMaster, 10 Mont. 390, 25 Pac. 1056; Whitney v Preston, 29 Neb. 243, 45 N. W. 619. For measure of damages, see Collins v. State, 3 Ind. App. 542, 30 N. E. 12; Mitchell v. Corbin, 91 Ala. 599, 8 South. 810.

[14] Frankhouser v. Cannon, 50 Kan. 621, 32 Pac. 379; Luck v. Zapp, 1 Tex. Civ. App. 528, 21 S. W. 418; State v. Dalton, 69 Miss. 611, 10 South. 578.

[15] Jones v. Lamon, 92 Ga. 529, 18 S. E. 423.

[16] Wood v. Graves, 144 Mass. 365, 11 N. E. 567; Baldwin v. Weed, 17 Wend. (N. Y.) 224; Page v. Cushing, 38 Me. 523.

[17] Holley v. Mix, 3 Wend. (N. Y.) 350.

[18] Grunberg v. Grant, 3 Misc. Rep. 230, 22 N. Y. Supp. 747. And see Williams v. Mercer, 139 Mass. 141, 29 N. E. 540; Armstrong v. Bell (Ky.) 42 S. W. 1131; Hyde v. Kiehl, 183 Pa. St. 414, 38 Atl. 998; Sharp v. Lamy (Sup.) 55 N. Y. Supp. 784; Berwald v. Ray, 8 Pa. Super. Ct. 365, 43 Wkly. Notes Cas. 217.

[19] Whittington v. Pence (Ky.) 38 S. W. 843, and 47 S. W. 877. And see Corry v. Tate, 48 S. C. 548, 26 S. E. 794; Parker v. Canfield (Mich.) 74 N. W. 296; Castile v. Ford, 53 Neb. 507, 73 N. W. 945; Second Nat. Bank of Monmouth v. Gilbert, 174 Ill. 485, 51 N. E. 584. Duty of officer to acquaint debtor with exemption rights. State v. Lindsay, 73 Mo. App. 473.

[20] Moss v. Jenkins, 146 Ind. 589, 45 N. E. 789.

sults in a deficiency or excess.[21] But the burden is on the officer to show that he exercised a sound discretion, and, if there is sufficient property of the debtor at hand to satisfy the debt, the officer will be prima facie liable for failure to make a sufficient levy.[22] So, likewise, the sheriff or other officer will be liable to the debtor if he makes an excessive levy, when the value of the property is easily ascertainable.[23] The mere fact that the property, after seizure, depreciates in value, or does not bring sufficient at the sale to satisfy the debt, will not support a charge of negligence against the officer making the levy.[24]

Negligence in Making Sale.

The officer must sell the property lawfully taken under process with reasonable diligence and business prudence, and in accordance with legal requirements; and, if he omits the latter in any respect, —as the posting of proper notices of the sale of real estate,[25]—he will be liable. As he is bound to make the sale with due diligence,[26] he will be responsible for any depreciation in the value of the goods consequent on a negligent delay.[27] The officer also renders himself liable to the judgment creditor if he makes any variation from the authorized terms; as accepting a check in lieu of cash.[28]

Officer as Bailee.

The liability of the sheriff for the forthcoming of goods levied on by him is similar to that of a common carrier, and unless deprived of the goods by the act of God, inevitable accident, or the public

[21] Com. v. Lightfoot, 7 B. Mon. (Ky.) 298. But where, there being abundant property at hand to satisfy the debt, and the officer failed to make a sufficient levy, and was held liable for his negligence, see Adams v. Spangler, 17 Fed. 133; Ransom v. Halcott, 18 Barb. (N. Y.) 56; Governor v. Powell, 9 Ala. 83.

[22] Ransom v. Halcott, 18 Barb. (N. Y.) 56; Adams v. Spangler, 17 Fed. 133; Gilbert v. Gallup, 76 Ill. App. 526. But see Conway v. Magill, 53 Neb. 370, 73 N. W. 702; Smith v. Heineman (Ala.) 24 South. 364.

[23] Holland v. Anthony, 19 R. I. 216, 36 Atl. 2.

[24] Governor v. Carter, 10 N. C. 328; Lynch v. Com., 6 Watts (Pa.) 495.

[25] Sexton v. Nevers, 20 Pick. (Mass.) 451.

[26] Dorrance v. Com., 13 Pa. St. 160; State v. Herod, 6 Blackf. (Ind.) 444.

[27] Carlile v. Parkins, 3 Starkie, 163. On failure to make sale with due diligence (at advertised time), he may become a trespasser ab initio. Bond v. Wilder, 16 Vt. 393.

[28] Robinson v. Brennan, 90 N. Y. 208.

enemy, he must answer for them in a proper action.[29] This liability is of very ancient origin, and founded on sound public policy.[30] The officer is responsible for moneys collected, and deposited in a solvent bank, which afterwards fails.[31] He is likewise liable for the escape of a prisoner, whether the negligence or fault be that of himself or his deputy. For the loss of goods attached on mesne process there is authority for holding that ordinary care will discharge the officer from liability.[32]

SAME—NOTARIES PUBLIC.

163. A notary public is liable for any loss or damage caused by his negligent failure to properly perform the duties strictly pertaining to his office.

In the United States the duties of a notary public are confined to taking acknowledgments of deeds and other instruments for the purpose of entitling them to record, presenting negotiable instruments, and protesting them for nonpayment, administering oaths, and, in many states, taking depositions, and even performing the marriage ceremony.[1] As these acts are purely ministerial, and, with few exceptions, must be performed in exact conformity with governing statutes, these officers are held very strictly accountable for a diligent and skillful performance of their duties. Thus the requisites of a formal acknowledgment of a deed are, as a rule, fully prescribed by statute, and it is inexcusable carelessness in the notary to omit to state therein that the person making

[29] Hartleib v. McLane's Adm'rs, 44 Pa. St. 510. Cf. Mitchell v. Com., 37 Pa. St. 187; Chapman v. Reddick (Fla.) 25 South. 673. But see, as to a lesser liability, Eastman v. Judkins, 59 N. H. 576; Browning v. Hanford, 5 Hill (N. Y.) 588. For criticism of latter case, see Phillips v. Lamar, 27 Ga. 228. And see Gilmore v. Moore, 30 Ga. 628; Bond v. Ward, 7 Mass. 123.

[30] Sly v. Finch, Cro. Jac. 514.

[31] Phillips v. Lamar, 27 Ga. 228, criticising Browning v. Hanford, 5 Hill (N. Y.) 591, in which latter case the sheriff was held liable for property delivered to a solvent receiptor, in whose hands it was accidentally burned. And see Gilmore v. Moore, 30 Ga. 628.

[32] Winborne v. Mitchell, 111 N. C. 13, 15 S. E. 882. So as to jailer. Saunders v. Perkins, 140 Pa. St. 102, 21 Atl. 257.

§ 163. [1] LOUISIANA and FLORIDA.

the acknowledgment was known to him,[2] and, if the grantee should suffer damage in consequence of such negligence, the notary would be liable.[3] A fortiori would he be liable for knowingly making a false certificate.[4] He is bound to know the truth of matters contained in his certificate, and will not be heard to excuse a mistake as to the identity of parties,[5] certainly not where there is a clear dereliction of duty.[6] He has even been held liable to a legatee for negligence in drawing a will.[7]

Protesting Notes and Bills.

In the performance of the duties attached to the protesting of negotiable instruments, the notary is not held to so high a degree of care and skill as in taking the acknowledgment of deeds, for the reason that these duties require the exercise of judgment and discretion, which are not required in taking acknowledgments. He is, however, bound to use ordinary diligence and care,[8] and if, by reason of his failure to use such ordinary care, the owner of the bill is damaged, the notary will be liable. It is the duty of the notary to personally make demand for the payment, and the duty cannot be delegated,[9] although, in view of a well-established custom to make such presentments by deputy, such delegation of authority has been sustained.[10] The notary is bound to know the residence of the holder of the obligation, to whom he should apply

[2] Fogarty v. Finlay, 10 Cal. 239.

[3] Id.

[4] Hatton v. Holmes, 97 Cal. 208, 31 Pac. 1131; People v. Butler, 74 Mich. 643, 42 N. W. 273; Heidt v. Minor, 113 Cal. 385, 45 Pac. 700; People v. Colby, 39 Mich. 456; State v. Plass, 58 Mo. App. 148. Cf. Com. v. Haines, 97 Pa. St. 228. Where notary acts as agent, in individual capacity, the principal cannot recover on the notarial bond. State v. Boughton, 58 Mo. App. 155.

[5] State v. Meyer, 2 Mo. App. 413.

[6] Com. v. Haines, 97 Pa. St. 228; Henderson v. Smith, 26 W. Va. 829; Scotten v. Fegan, 62 Iowa, 236, 17 N. W. 491; Brigham v. Bussey, 26 La. Ann. 676; Fox v. Thibault, 33 La. Ann. 33; Schmitt v. Drouet, 42 La. Ann. 1064, 8 South. 396.

[7] Weintz v. Kramer, 44 La. Ann. 35, 10 South. 416. Cf. Schmitt v. Drouet, 42 La. Ann. 1064, 8 South. 396.

[8] Shear. & R. Neg. (4th Ed.) § 597.

[9] Chenowith v. Chamberlin, 6 B. Mon. (Ky.) 60; Commercial Bank v. Barksdale, 36 Mo. 563; Onondaga County Bank v. Bates, 3 Hill (N. Y.) 53.

[10] Commercial Bank v. Varnum, 49 N. Y. 269.

for information essential to a legal protest and notice;[11] but he is not obligated to know where the parties or intermediate indorsers can be found.[12] It has been held that if the notary, acting on information furnished by the last indorser, misdirects a notice, he is not responsible;[13] otherwise, if he acts on information furnished by a stranger.[14]

Failure to make demand and protest at the proper time—to make it either before[15] or after[16] maturity of the bill—is certainly negligence for which he will be liable.

Proximate Cause of Loss.

To sustain an action against the notary for negligence, it must appear that the loss was the direct result of his omission of duty.[17] And if the holder of the bill has, by his own negligence, in any way contributed to cause the loss, or render it possible, he cannot recover from the notary.[18]

SAME—CLERKS OF COURT AND REGISTERS OF DEEDS.

164. Clerks of court, as well as town and county clerks, being ministerial officers, are bound to know the law applicable to their duties, and for any violation, omission, or negligent performance thereof are liable in damages to the party injured.

Such liability is independent of statutes, which in many states expressly provide for any dereliction in duty. Thus, if the clerk, on being informed that the right of recovery would shortly be barred by the statute of limitations, should neglect or refuse to issue a

11 Vandewater v. Williamson, 13 Phila. (Pa.) 140.

12 Mulholland v. Samuels, 8 Bush (Ky.) 63; Vandewater v. Williamson, 13 Phila. (Pa.) 140.

13 Bellemire v. Bank, 4 Whart. (Pa.) 105.

14 Citizens' Bank v. Howell, 8 Md. 530.

15 Stacy v. Bank, 12 Wis. 629; American Exp. Co. v. Haire, 21 Ind. 4.

16 Warren Bank v. Suffolk Bank, 10 Cush. (Mass.) 582; Fabens v. Bank, 23 Pick. (Mass.) 330.

17 Mechanics' Bank v. Merchants' Bank, 6 Metc. (Mass.) 13.

18 Swinyard v. Bowes, 5 Maule & S. 62; Franklin v. Smith, 21 Wend. (N. Y.) 624; Reed v. Darlington, 19 Iowa, 349.

citation, he would be liable to the creditor for the amount of the debt thereby lost.[1] When it is by law made the duty of a clerk of court, upon the filing of a præcipe by the moving party in an action, to issue process to the sheriff, whose duty it is to serve the same, and return it to the clerk, who must then receive and record the return, the clerk cannot defend an action for negligence in these duties by showing that the plaintiff failed to see to it that the duties had been properly performed.[2] And when it is his duty to pass on the sureties on a bond, and damage results from accepting those who are worthless or insufficient, he will be liable.[3] Mistakes of the clerk in making a certificate as to judgments entered in his office render him liable for any damage caused thereby.[4] And it is immaterial whether the search was made by himself or his deputy, or even by a volunteer.[5] He is also liable for negligently filing papers,[6] and for their loss or destruction;[7] and when he has failed to issue an execution when ordered by the plaintiff's attorney, an averment that the papers are lost, and that the costs, for that reason, could not be taxed, and the execution issued, is not a sufficient defense.[8]

In the same manner a register of deeds is liable for negligence or omission in the record of instruments, or in the performance of other duties incident to his office.[9] Where the clerk of court, ex officio the parish recorder, failed to properly record an act of sale,

§ 164. [1] Anderson v. Johett, 14 La. Ann. 614.

[2] Baltimore & O. R. Co. v. Weedon, 24 C. C. A. 249, 78 Fed. 584.

[3] McNutt v. Livingston, 7 Smedes & M. (Miss.) 641. And generally, see Brown v. Lester, 13 Smedes & M. (Miss.) 392; Governor v. Wiley, 14 Ala. 172; Governor v. Dodd, 81 Ill. 163; Johnson v. Schlosser, 146 Ind. 509, 45 N. E. 702, 36 Lawy. Rep. Ann. 59; Logan v. McCahan, 102 Iowa, 241, 71 N. W. 252.

[4] Maxwell v. Pike, 2 Me. 8; Ziegler v. Com., 12 Pa. St. 227; Chase v. Heaney, 70 Ill. 268. To make the clerk responsible, it is not necessary that a fee should be paid for the search. Harrison v. Brega, 20 U. C. Q. B. 324.

[5] Morange v. Mix, 44 N. Y. 315.

[6] Rosenthal v. Davenport, 38 Minn. 543, 38 N. W. 618.

[7] Toncray v. Dodge Co., 33 Neb. 802, 51 N. W. 235.

[8] Benjamin v. Shea, 83 Iowa, 392, 49 N. W. 989. And see People v. Bartels, 138 Ill. 322, 27 N. E. 1091.

[9] Welles v. Hutchinson, 2 Root (Conn.) 85; Johnson v. Brice (Wis.) 78 N. W. 1086.

reserving a vendor's lien for the unpaid portion of the purchase money, and which had been placed in his hands for that purpose, he was held liable for the consequent loss.[10]

[10] Baker v. Lee, 49 La. Ann. 874, 21 South. 588. See, also, Welles v. Hutchinson, 2 Root (Conn.) 85.

CHAPTER X.

DEATH BY WRONGFUL ACT.

RIGHT OF ACTION.

165. At common law no right of action accrues to the personal representatives of the deceased to recover damages suffered by reason of his wrongful death.

166. Under Lord Campbell's act, and in the states which have modeled their statutes thereon, whenever death is caused by wrongful act, neglect, or default such as would, if death had not ensued, have entitled the party injured to sustain an action, an action may be maintained to recover

(a) Such damages, consequent on the death, as directly result to the beneficiaries;

(b) Such action to be for the exclusive benefit of certain designated members of the family of the deceased.

The maxim, "Actio personalis moritur cum persona," applies, under the common law, to any right of action for an injury resulting in death, irrespective of the length of time which may intervene between the injury and death. Nor does any right of action survive to the master, parent, or husband for the recovery of damages for loss of services or society. The earliest case is that of Higgins v. Butcher,[1] in 1606. In that case the declaration stated that the defendant assaulted and beat the plaintiff's wife, of which

§§ 165–166. [1] Yel. 89.

she died, to his damage. To this it was objected that "the declaration was not good, because it was brought by the plaintiff for beating his wife; and that, being a personal tort to the wife, is now dead with the wife. * * * And by Tanfield, J., if a man beats the servant of J. S. so that he dies of the battery, the master shall not have an action against the other for the battery and loss of service, because, the servant dying of the extremity of the battery, it is now become an offense to the crown, being converted into a felony, and that drowns the particular offense and private wrong offered to the master, and his action is thereby lost." It does not appear that the question was again before the courts of England for about 200 years, when the leading case of Baker v. Bolton [2] was tried before Lord Ellenborough, and in which the great jurist instructed the jury that "in a civil court the death of a human being could not be complained of as an injury."

Lord Campbell's act,[3] entitled "An act for compensating the families of persons killed by accidents," was passed in 1846, and has stood as a model for similar acts in most of the states of this country. The act provides that: "Whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who 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 amounted in law to a felony."

It will be seen that this act creates a new cause of action, for, although the action can be maintained only when the death is caused under such circumstances as would have entitled the party injured to maintain an action had he survived, it cannot be main-

[2] 1 Camp. 493. The earlier cases in the United States in which this question was considered are: Cross v. Guthery, 2 Root (Conn.) 90, overruled in Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co., 25 Conn. 265; Ford v. Monroe, 20 Wend. (N. Y.) 210, overruled in Green v. Railroad Co., *41 N. Y. 294; Carey v. Railroad Co., 1 Cush. (Mass.) 475; Skinner v. Railroad Corp., 1 Cush. (Mass.) 475; Eden v. Railroad Co., 14 B. Mon. (Ky.) 204; James v. Christy, 18 Mo. 162; Shields v. Yonge, 15 Ga. 349.

[3] 9 & 10 Vict. c. 93, § 1.

tained to recover damages resulting from the personal injury to him, but lies only for the recovery of damages for the pecuniary loss resulting to his family from his death.[4] A large majority of the states have enacted laws embodying the substantial elements of Lord Campbell's act.[5] In these statutes the language, in some instances, varies materially, but the substance of the parent act is very generally preserved. The statutes of Connecticut,[6] Iowa,[7] New Hampshire,[8] and Tennessee[9] possess the distinguishing peculiarity of providing for a survival of the injured party's right of action, instead of creating a new and independent right. A peculiarity of the Maine[10] and Massachusetts[11] statutes is the granting of a remedy by way of indictment. Many of the statutes in force in the United States contain other peculiar provisions lying outside the province of the present discussion, which is intended to cover only the general principles of the act which are substantially common to the statutes of a large majority of the states.

The constitutionality of the various acts providing a remedy for wrongful death has been repeatedly upheld,[12] and rarely questioned.

[4] In Blake v. Railway Co., 18 Q. B. 93, 21 Law J. Q. B. 233, Coleridge, J., said: "This act does not transfer the right of action to his representatives, but gives to his representatives a totally new right of action, on different principles."

[5] Tiff. Death Wrongf. Act, § 24. IOWA, OREGON, and WASHINGTON, under the construction of the courts, give a recovery for the benefit of the estate, not the family, of the deceased, while NORTH CAROLINA, VIRGINIA, and WEST VIRGINIA hold the action to be maintainable notwithstanding that there are none of the relatives in existence for whose benefit the action is primarily given.

[6] Gen. St. 1888, §§ 1008, 1009, 1383.

[7] McClain's Ann. Code, §§ 3730–3732, 3734.

[8] Pub. St. 1891, c. 191, §§ 8–13.

[9] Mill. & V. Code, §§ 3130–3134.

[10] Rev. St. 1883, c. 51, §§ 68, 69; Id. c. 52, § 7.

[11] Pub. St. c. 112, § 212.

[12] Boston, C. & M. R. Co. v. State, 32 N. H. 215; Southwestern R. Co. v. Paulk, 24 Ga. 356; Board Internal Improvement of Shelby Co. v. Scearce, 2 Duv. (Ky.) 576; Louisville Safety-Vault & Trust Co. v. Louisville & N. R. Co. (Ky.) 17 S. W. 567; Carroll v. Railway Co., 88 Mo. 239.

The Wrongful Act.

The various American statutes, which were all modeled on Lord Campbell's act, in their qualification of the conduct resulting in death, although differing widely in phraseology, with very few exceptions make use of the words "wrongful" and "negligence" or "neglect." In the construction of these statutes, "wrongful act" is universally given its ordinary, accepted meaning, and although it includes, is not restricted to, malicious, willful, or intentional acts.[13] It is, however, essential to the right of action that the wrongful act should be of such a nature as would have given the injured party the right of recovery,[14] and it is believed that this essential element of the right of action exists even in those states where the express condition is not embodied in the statute.[15] If death is the result of an intentional act,—that is, if the killing is intentional,—the determination of the foregoing element will depend upon the excuse or justification which the defendant may be able to prove.[16] If the death is the alleged result of negligence, the question then becomes one of nonperformance of duty, to be determined by the law applicable to the particular division of the subject of negligence in which it falls.

Contributory Negligence.

It follows, as of course, that in such cases the defense of contributory negligence is always open;[17] and this is true even under statutes which do not expressly provide that the action is main-

[13] Baker v. Bailey, 16 Barb. (N. Y.) 54; McLean v. Burbank, 12 Minn. 530 (Gil. 438). And see Wells v. Sibley, 56 Hun, 644, 9 N. Y. Supp. 343.

[14] Neilson v. Brown, 13 R. I. 651; Martin v. Wallace, 40 Ga. 52; Wallace v. Cannon, 38 Ga. 199.

[15] Tiff. Death Wrongf. Act, § 63.

[16] White v. Maxcy, 64 Mo. 552; Morgan v. Durfee, 69 Mo. 469; Fraser v. Freeman, 56 Barb. (N. Y.) 234. The burden is not on plaintiff of proving his case beyond a reasonable doubt when self-defense is pleaded, March v. Walker, 48 Tex. 372; and the plea of self-defense does not cause the burden to shift, Nichols v. Winfrey, 79 Mo. 544. Per contra, Brooks v. Haslam, 65 Cal. 421, 4 Pac. 399.

[17] Even where the action is by the parent for the death of a minor child employed without the parent's consent. Texas & P. Ry. Co. v. Carlton, 60 Tex. 397; Texas & N. O. Ry. Co. v. Crowder, 61 Tex. 262, 63 Tex. 502, 70 Tex. 222, 7 S. W. 709. Per contra, under employer's liability act. Code Ala. 1886, §§ 2590, 2591; Williams v. Railroad Co., 91 Ala. 635, 9 South. 77.

tainable only when the injured person might have maintained an action,[18] and, a fortiori, where the statute provides for a survival of the original cause of action.[19] And where the doctrine of comparative negligence prevails, the modification of the rule of contributory negligence applies equally under the statutory action.[20] If, however, the action is for death by "willful neglect" under the statute, the defense of contributory negligence will not lie.[21]

Imputed Negligence.

The doctrine of imputed negligence has already been discussed.[22] In those states where this doctrine, as established in Hartfield v. Roper,[23] is still adhered to in actions brought in behalf of injured infants, it is equally available as a defense in all actions to recover for the infant's death.[24] But the important distinction noticed in the consideration of this subject[25] between actions brought for the benefit of the child and those brought for the benefit of the parent

[18] Gay v. Winter, 34 Cal. 153; Noyes v. Railroad Co. (Cal.) 24 Pac. 927; Bertelson v. Railway Co., 5 Dak. 313, 40 N. W. 531; Rowland v. Cannon, 35 Ga. 105; Southwestern R. Co. v. Johnson, 60 Ga. 667; Berry v. Railroad Co., 72 Ga. 137; Central R. Co. v. Thompson, 76 Ga. 770; Central R. & B. Co. v. Kitchens, 83 Ga. 83, 9 S. E. 827; Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318; Pennsylvania R. Co. v. Lewis, 79 Pa. St. 33; Pennsylvania R. Co. v. Bell, 122 Pa. St. 58, 15 Atl. 561; Helfrich v. Railway Co., 7 Utah, 186, 26 Pac. 295.

[19] Quinn v. Railroad Co., 56 Conn. 44, 12 Atl. 97; Lane v. Railroad Co., 69 Iowa, 443, 29 N. W. 419; Newman v. Railway Co., 80 Iowa, 672, 45 N. W. 1054; Beck v. Manufacturing Co., 82 Iowa, 286, 48 N. W. 81; Knight v. Railroad Co., 23 La. Ann. 462; Murray v. Railroad Co., 31 La. Ann. 490; Weeks v. Railroad Co., 32 La. Ann. 615; Nashville & C. R. Co. v. Smith, 6 Heisk. (Tenn.) 174; Canning v. Railway Co. (Sup.) 50 N. Y. Supp. 506.

[20] Chicago, B. & Q. R. Co. v. Triplett, 38 Ill. 482; Toledo, W. & W. Ry. Co. v. O'Connor, 77 Ill. 391; Chicago & A. R. Co. v. Fietsam, 123 Ill. 518, 15 N. E. 169; Florida C. & P. R. Co. v. Foxworth (Fla.) 25 South. 338.

[21] Louisville, C. & L. R. Co. v. Mahony's Adm'x, 7 Bush (Ky.) 235; Claxton's Adm'r v. Railroad Co., 13 Bush (Ky.) 636; Louisville & N. R. Co. v. Brice, 84 Ky. 298, 1 S. W. 483; Union Warehouse Co. v. Prewitt's Adm'r (Ky.) 50 S. W. 964; Louisville & N. R. Co. v. Orr (Ala.) 26 South. 35.

[22] See ante, pp. 61–74.

[23] 21 Wend. (N. Y.) 615, 34 Am. Dec. 273.

[24] Philadelphia & R. R. Co. v. Boyer, 97 Pa. St. 91; Payne v. Railroad Co., 39 Iowa, 523; Stafford v. City of Oskaloosa, 57 Iowa, 749, 11 N. W. 668; Alabama G. S. R. Co. v. Burgess, 116 Ala. 509, 22 South. 913.

[25] See ante, pp. 61–74.

should be carefully observed in considering the question of contributory negligence of the parent or guardian as a defense in actions to recover for the death of the infant. As has been already stated,[26] in an action by the parent in his own behalf for injuries to his minor child, the contributory negligence of the parent is a good defense. At the present time this consideration is of the more importance for the reason that in a very large majority of cases brought to recover for the death of infants the parents are the only persons entitled, under the statute, to the benefit of the action. In such cases no valid reason can be assigned why the contributory negligence of the parents should not operate as a bar to the action, even if the administrator is the nominal plaintiff, and such is undoubtedly the generally accepted rule.[27] In a Maryland case [28] the court observed in its decision that to allow recovery in cases where the party entitled to the action was guilty of contributory negligence would be to allow parties to take advantage of their own wrongful or negligent conduct. In an Iowa case,[29] however, where the action was brought by the administrator for the death of a child, in which the contributory negligence of the parents was set up in defense, it was held that their negligence would not defeat the action, the court saying: "* * * It is

[26] See ante. pp. 61–73.

[27] Baltimore & O. R. Co. v. State, 30 Md. 47; Hurst v. Railway Co., 84 Mich. 539, 48 N. W. 44; Pennsylvania R. Co. v. James, *81 Pa. St. 194. In the latter case the court says: "A distinction is taken between the case of a father or mother bringing an action for the death of a child and a child bringing an action for a personal injury. In the former case the contributory negligence of the parent may be used in defense, while in the latter case the negligence of an infant of tender years will not be available." Pittsburg, A. & M. Ry. Co. v. Pearson, 72 Pa. St. 169; Philadelphia & R. R. Co. v. Long, 75 Pa. St. 257; Pennsylvania R. Co. v. Lewis, 79 Pa. St. 33; Westerberg v. Railroad Co., 142 Pa. St. 471, 21 Atl. 878; Williams v. Railway Co., 60 Tex. 205, distinguishing Galveston, H. & H. Ry. Co. v. Moore, 59 Tex. 64, in which case Hartfield v. Roper is distinctly repudiated. Same effect, Cook v. Navigation Co., 76 Tex. 353, 13 S. W. 475; Reilly v. Railroad Co., 94 Mo. 600, 7 S. W. 407; Koons v. Railroad Co., 65 Mo. 592; St. Louis, I. M. & S. R. Co. v. Freeman, 36 Ark. 41; Westerfield v. Levis, 43 La. Ann. 63, 9 South. 52.

[28] Baltimore & O. R. Co. v. State, 30 Md. 47. And see Hurst v. Railway Co., 84 Mich. 539, 48 N. W. 44.

[29] Wymore v. Mahaska Co., 78 Iowa, 396, 43 N. W. 264. And see Walters v. Railroad Co., 41 Iowa, 71.

claimed that, * * * since they inherited his estate, the rule which would bar a negligent parent from recovering in such a case in his own right ought to apply. But plaintiff seeks to recover in the right of the child, and not for the parents. It may be that a recovery in this case will result in conferring an undeserved benefit upon the father, but that is a matter which we cannot investigate. If the facts are such that the child could have recovered had his injuries not been fatal, his administrator can recover the full amount of damages which the estate of the child has sustained." The same rule has been adopted in Virginia where the action was brought by the father as administrator of the infant.[30] But where there are persons entitled to the benefit of the action other than those whose negligence has contributed to the injury, such negligence is not a defense to the action.[31] In one of the Ohio cases cited [32] the court seems to have decided against the validity of the defense of contributory negligence of a beneficiary under the action, on the double ground that the suit was brought by the husband as administrator, and was prosecuted for the benefit of the children as well as the husband of the deceased. On commenting on the decisions in the last-named states, Mr. Tiffany says: "So far as the Ohio decisions rest on the ground that the contributory negligence of one of the beneficiaries of the action cannot be permitted to defeat it where the other beneficiaries are free from negligence, their reasoning is unassailable. So far, however, as they rest on the ground that the right of the administrator to maintain the action depends upon exactly the same conditions that would have determined the right of the party injured, the Ohio cases, in common with those in Iowa and Virginia, are open to the criticism that they make the right of the party injured to maintain an action the

[30] Norfolk & W. R. Co. v. Groseclose's Adm'r, 88 Va. 267, 13 S. E. 454 (per curiam): "Hence, when the facts are such that the child could have recovered, had his injuries not been fatal, his administrator may recover, without regard to the negligence or presence of the parents at the time the injuries are received, and although the estate is inherited by the parents."

[31] Cleveland, C. & C. R. Co. v. Crawford, 24 Ohio St. 631; Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350; Consolidated Traction Co. v. Hone, 59 N. J. Law, 275, 35 Atl. 899; Wolf v. Railroad Co., 55 Ohio St. 517, 45 N. E. 708.

[32] Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350.

sole test of the right of the beneficiaries to recover damages for his death, instead of treating it merely as one of the conditions of their right." [33]

SAME—INSTANTANEOUS DEATH.

167. The period within which death results from the injury does not affect the right of action under the statute.

It is immaterial whether death is instantaneous, or ensues after an appreciable interval.[1] The point was settled in an early New York case [2] in the following terse language: "The provision settles the question, and leaves nothing for debate or doubt. No one would question the right of the intestate in this case, if he had survived the injury, to maintain an action for it. * * * The statute gives the action to the personal representative of the individual injured when the injury causes his death, and it makes no distinction between cases where the death was immediate or instantaneous and where it was consequential." [3]

Under statutes which provide for a survival of the common-law cause of action, and which do not provide for the recovery of damages for an injury resulting in death, it becomes very material whether death was or was not instantaneous. Thus, under the Massachusetts statute, which provides "that the action for trespass on the case, for damages to the person, shall hereafter survive, so that, in the event of the death of the person entitled to bring such action, or liable thereto, the same may be prosecuted or defended by or against the executor or administrator, in the

[33] Tiff. Death Wrongf. Act, § 71.

§ 167. [1] Brown v. Railroad Co., 22 N. Y. 191; International & G. N. R. Co. v. Kindred, 57 Tex. 491; Roach v. Mining Co., 7 Sawy. 224, 7 Fed. 698; Reed v. Railroad Co., 37 S. C. 42, 16 S. E. 289; Belding v. Railroad Co., 3 S. D. 369, 53 N. W. 750.

[2] Brown v. Railroad Co., 22 N. Y. 191.

[3] The remedy by indictment under the MAINE statute cannot be maintained for death resulting from negligence of a railroad corporation, if death was not instantaneous. State v. Maine Cent. R. Co., 60 Me. 490; State v. Grand Trunk Ry. Co., 61 Me. 114. The opposite ruling is made under the MASSACHUSETTS statute. Com. v. Metropolitan R. Co., 107 Mass. 236.

same manner as if he were living," it has been repeatedly held that, if death was instantaneous, no action could be maintained.[4] And under similar statutes in Maine and Kentucky the courts have held that no right of action survives when death was instantaneous.[5] In Connecticut,[6] Iowa,[7] and Tennessee,[8] although the statutes provide for a survival of the action, the language of the enactments is such that, under the construction placed upon it by the courts, the action may be maintained notwithstanding the fact that death was instantaneous.

SAME—PROXIMATE CAUSE OF DEATH.

168. To maintain the action, it must appear that death was the natural, proximate result of the wrongful act, neglect, or default of the defendant.

To support this general proposition, no citations are necessary. It is not sufficient, however, that death is merely hastened by the injury.[1] But that other causes acted in conjunction with the injury complained of will not necessarily defeat the action.[2] So, also, a recovery may be had for death caused by the concurrent negli-

[4] Kearney v. Railroad Corp., 9 Cush. 108; Moran v. Hollings, 125 Mass. 93. On failure of positive proof to the contrary, the presumption would seem to be in favor of instantaneous death. Riley v. Railroad Co., 135 Mass. 292; Corcoran v. Railroad Co., 133 Mass. 507. Death by suffocation not instantaneous. Npurse v. Packard, 138 Mass. 307; Pierce v. Steamship Co., 153 Mass. 87, 26 N. E. 415. And see Bancroft v. Railroad Corp., 11 Allen, 34.

[5] State v. Railroad Co., 60 Me. 490; Hansford's Adm'x v. Payne, 11 Bush (Ky.) 380; Newport News & M. V. R. Co. v. Dentzel's Adm'r, 91 Ky. 42, 14 S. W. 958.

[6] Murphy v. Railroad Co., 30 Conn. 184.

[7] Conners v. Railway Co., 71 Iowa, 490, 32 N. W. 465, followed in Worden v. Railroad Co., 72 Iowa, 201, 33 N. W. 629.

[8] Nashville & C. R. Co. v. Prince, 2 Heisk. 580, overruling Louisville & N. R. Co. v. Burke, 6 Cold. 45, and followed in Fowlkes v. Railroad Co., 5 Baxt. 663; Haley v. Railroad Co., 7 Baxt. 239; Kansas City, Ft. S. & M. R. Co. v. Daughtry, 88 Tenn. 721, 13 S. W. 698. See, also, Matz v. Railroad Co., 85 Fed. 180; Perham v. Electric Co. (Or.) 53 Pac. 14.

§ 168. [1] Jackson v. Railway Co., 87 Mo. 422.

[2] Louisville & N. R. Co. v. Jones, 83 Ala. 376, 3 South. 902.

gence of several parties.[3] In general, the determination of the cause of death is analogous to the determination of the proximate cause in any action to recover for the negligence of the defendant. Thus, if an independent cause intervene, sufficient to break the causal connection, no recovery can be had for the death, just as no recovery could be had for the injury, had death not resulted, and the direct relation of cause and effect had not been established between the alleged negligent act and the injury.[4] If, however, the injury was in itself sufficient to cause death, it will be received as the proximate cause, unless it is made to appear that death must have ensued independently of the injury.[5]

Where death results from neglect by the defendant of a statutory duty, the action can still be maintained, provided the injured person could have maintained an action, had he survived;[6] and in such case the action can be maintained even if the statute giving redress for the personal injury was enacted after the act creating a right of action for wrongful death.[7]

Apart from any right of action conferred by the so-called "civil damage acts," there are well-considered cases which hold that an action is maintainable when death results from liquor supplied by defendant after decedent was in an advanced stage of intoxication.[8] These cases, however, proceed on the theory that in an advanced stage of intoxication the decedent was incapable of exercising volition, and hence could not be guilty of contributory negligence. It is difficult to understand, however, why contributory negligence should not be predicated on the act of the decedent in

[3] Consolidated Ice-Mach. Co. v. Keifer, 134 Ill. 481, 25 N. E. 799; Cline v. Railroad Co., 43 La. Ann. 327, 9 South. 122.

[4] Scheffer v. Railroad Co., 105 U. S. 249; Schoen v. Railroad Co. (Super. N. Y.) 9 N. Y. Supp. 709. And see ante, pp. 9–33.

[5] Beauchamp v. Mining Co., 50 Mich. 163, 15 N. W. 65; Jucker v. Railway Co., 52 Wis. 150, 8 N. W. 862.

[6] Osborne v. McMasters, 40 Minn. 103, 41 N. W. 543; Nugent v. Vanderveer, 39 Hun (N. Y.) 323; Becke v. Railway Co., 102 Mo. 544, 13 S. W. 1053. And see Palmer v. Railroad Co., 112 N. Y. 234, 19 N. E. 678; Rodrian v. Railroad Co., 125 N. Y. 526, 26 N. E. 741.

[7] Merkle v. Bennington Tp., 58 Mich. 156, 24 N. W. 776. And see Racho v. City of Detroit, 90 Mich. 92, 51 N. W. 360. Per contra, All v. Barnwell Co., 29 N. C. 161, 7 S. E. 58.

[8] Fink v. Garman, 40 Pa. St. 95; McCue v. Klein, 60 Tex. 168.

becoming intoxicated in the first instance, thus making the negligent or wrongful act of the defendant possible. When the action is brought under the "civil damage acts," the weight of authority favors its maintenance,[9] although the contrary doctrine is also maintained.[10]

The Action—By Whom Brought.

It is not within the scope of the present discussion to consider in detail the provisions of the statutes conferring this right of action in the various states, nor to examine their peculiarities in reference to the circumstances in which the action can be maintained.[11]

By the terms of Lord Campbell's act it is provided that the action shall be brought by and in the name of the executor or administrator, and most of the statutes modeled thereon contain the same provision, or its equivalent, requiring the action to be brought by the "personal representatives"; while a number of the statutes provide that the action may be prosecuted by the parties for whose benefit it is given. But, whatever may be the particular provision, the action is maintainable only by the persons to that end expressly authorized by the statute. If the statute authorizes the action to be brought by the executor or administrator, it cannot be brought by the beneficiaries;[12] and, conversely, if the persons authorized to sue are the beneficiaries of the action, it cannot be

[9] Emory v. Addis, 71 Ill. 273; Hackett v. Smelsley, 77 Ill. 109; Flynn v. Fogarty, 106 Ill. 263; Rafferty v. Buckman, 46 Iowa, 195; Brockway v. Patterson, 72 Mich. 122, 40 N. W. 192; Roose v. Perkins, 9 Neb. 304, 2 N. W. 715; Mead v. Stratton, 87 N. Y. 493; Davis v. Standish, 26 Hun (N. Y.) 608; McCarty v. Wells, 51 Hun, 171, 4 N. Y. Supp. 672.

[10] Barrett v. Dolan, 130 Mass. 366; Harrington v. McKillop, 132 Mass. 567; Davis v. Justice, 31 Ohio St. 359; Kirchner v. Myers, 35 Ohio St. 85; Pegram v. Stortz, 31 W. Va. 220, 6 S. E. 485.

[11] For a full discussion of this branch of the subject, see Tiff. Death Wrongf. Act, c. 3.

[12] Davis v. Railway Co., 53 Ark. 117, 13 S. W. 801; Kramer v. Railroad Co., 25 Cal. 434; Covington St. R. Co. v. Packer, 9 Bush (Ky.) 455; City of Chicago v. Major, 18 Ill. 349; Hagen v. Kean, 3 Dill. 124, Fed. Cas. No. 5,899; Peru & I. R. Co. v. Bradshaw, 6 Ind. 146; Nash v. Tousley, 28 Minn. 5, 8 N. W. 875; Scheffler v. Railway Co., 32 Minn. 125, 19 N. W. 656; Wilson v. Bumstead, 12 Neb. 1, 10 N. W. 411; Worley v. Railroad Co., 1 Handy (Ohio) 481; Weidner v. Rankin, 26 Ohio St. 522; Goodwin v. Nickerson, 17 R. I. 478, 23 Atl. 12;

maintained by the executor or administrator.[13] It follows as a corollary that, where the right to sue is conferred on the personal representatives, the executor or administrator alone can sue.[14] And where the sole right to maintain the action is conferred on the personal representatives, it is immaterial that the deceased was a married woman, and that, had the action been brought in her lifetime, the husband must have been joined, for the reason that the condition of the statute that the act or neglect must be such that the party injured might have maintained an action is merely descriptive of the act or neglect, and not of the person by whom the action could be maintained.[15] In those states where the jurisdiction of the probate court to appoint an administrator depends upon the existence of assets of the deceased to be administered, the question arises whether a claim for damages for his death constitutes such assets. As such a claim, although enforceable by the administrator, does not belong to the creditors of the estate, a strict construction of the statutes conferring jurisdiction on the probate court on this ground would deprive it of jurisdiction. And it is so held in Indiana,[16] Kansas,[17] and Illinois.[18] In Iowa,[19] Minnesota,[20] and Nebraska [21] it has been held that the fact that this right of action is given to the personal representatives implies the right to appoint, if necessary, an administrator to enforce it.

Edgar v. Castello, 14 S. C. 20. Statutory provision not exclusive. Brown v. Railway Co. (Wis.) 77 N. W. 748; Ferguson v. Railroad Co., 6 App. D. C. 525.

[13] Miller v. Railroad Co., 55 Ga. 143; Gibbs v. City of Hannibal, 82 Mo. 143; Hennessy v. Brewing Co., 145 Mo. 104, 46 S. W. 966.

[14] Dennick v. Railroad Co., 103 U. S. 11; Howell v. Commissioners, 121 N. C. 362, 28 S. E. 362; Fitzhenry v. Traction Co. (N. J. Sup.) 42 Atl. 416.

[15] Green v. Railroad Co., 31 Barb. (N. Y.) 260, affirming 16 How. Prac. (N. Y.) 263; Lynch v. Davis, 12 How. Prac. (N. Y.) 323, overruled; Whiton v. Railroad Co., 21 Wis. 310; Dimmey v. Railway Co., 27 W. Va. 32; South & N. A. R. Co. v. Sullivan, 59 Ala. 272. See Long v. Morrison, 14 Ind. 595.

[16] Jeffersonville R. Co. v. Swayne's Adm'r, 26 Ind. 477.

[17] Perry v. Railroad Co., 29 Kan. 420.

[18] Illinois Cent. R. Co. v. Cragin, 71 Ill. 177; Marvin v. Transfer Co., 49 Fed. 436.

[19] Morris v. Railroad Co., 65 Iowa, 727, 23 N. W. 143.

[20] Hutchins v. Railway Co., 44 Minn. 5, 46 N. W. 79.

[21] Missouri Pac. Ry. Co. v. Lewis, 24 Neb. 848, 40 N. W. 401. And see Hartford & N. H. R. Co. v. Andrews, 36 Conn. 213.

Whether the authority of the administrator to bring the action can be questioned in such collateral proceeding on the ground that by reason of the nonexistence of assets the probate court has no jurisdiction to make the appointment, is a matter which has not been clearly decided by the courts.[22] When the statute, on the nonexistence of personal representatives, gives the right of action to the "heirs at law," the term includes all persons entitled to share in the proceeds; and, if the action is brought by one of the heirs at law, all must be joined.[23] In general, under statutes providing that the action shall be brought by the persons in interest, it depends upon the requirements of the particular enactment whether it is necessary to join all such persons. Where the statute creating this cause of action does not expressly change the common-law rule, the right of action abates upon the death of the offending party.[24]

SAME—BENEFICIARIES.

169. The action cannot be maintained unless it is alleged and proved that one or more of the persons entitled to the benefit of the action survives.

The statutes requiring the action to be brought by the executor or administrator in almost every instance provide that it shall be prosecuted for the benefit of certain specified members of the deceased's family, and that the proceeds shall be enjoyed by them to the exclusion of creditors of the estate. As the executor or ad-

[22] Jeffersonville R. Co. v. Swayne's Adm'r, 26 Ind. 477; Illinois Cent. R. Co. v. Cragin, 71 Ill. 177; Missouri Pac. Ry. Co. v. Lewis, 24 Neb. 848, 40 N. W. 401; Louisville & N. R. Co. v. Chaffin, 84 Ga. 519, 11 S. E. 891. See In re Hardy, 35 Minn. 193, 28 N. W. 219; Denver, S. P. & P. Ry. Co. v. Woodward, 4 Colo. 1. In KANSAS the point has been decided in the affirmative. Perry v. Railroad Co., 29 Kan. 420. But see, per contra, Holmes v. Railway Co., 5 Fed. 523.

[23] St: Louis, I. M. & S. Ry. Co. v. Needham, 3 C. C. A. 129, 52 Fed. 371.

[24] Green v. Thompson, 26 Minn. 500, 5 N. W. 376; Hamilton v. Jones, 125 Ind. 176, 25 N. E. 192; Davis v. Nichols, 54 Ark. 358, 15 S. W. 880; Russell v. Sunbury, 37 Ohio St. 372; Moe v. Smiley, 125 Pa. St. 136, 17 Atl. 228. And cf. Pennsylvania Co. v. Davis, 4 Ind. App. 51, 29 N. E. 425; Hegerich v. Keddie, 99 N. Y. 258, 1 N. E. 787, overruling Yertore v. Wiswall, 16 How. Prac. (N. Y.) 8.

ministrator, in his executive capacity, has no interest in the recovery,[1] it follows that the action cannot be maintained unless it is alleged and proved that one or more of the persons entitled to the benefit of the action survives.[2] The fact that under a particular statute the remedy is by indictment does not affect the rule.[3] Under the peculiar provisions of the statutes of Virginia,[4] West Virginia,[5] and North Carolina,[6] where the statute gives the benefit of the action to the widow and next of kin, the provision is construed in the alternative, and it is sufficient if either survives.[7] In those

§ 169. [1] Leggott v. Railway Co., 1 Q. B. Div. 599, 45 Law J. Q. B. 557, 35 Law T. (N. S.) 334; Kramer v. Railroad Co., 25 Cal. 434; Lamphear v. Buckingham, 33 Conn. 237; City of Chicago v. Major, 18 Ill. 349; Jeffersonville, M. & I. R. Co. v. Hendricks, 41 Ind. 49; Stewart v. Railroad Co., 103 Ind. 44, 2 N. E. 208; Kansas Pac. Ry. Co. v. Cutter, 16 Kan. 568; Perry v. Railroad Co., 29 Kan. 420; Dickins v. Railroad Co., 23 N. Y. 158; Yertore v. Wiswall, 16 How. Prac. (N. Y.) 28; Hegerich v. Keddie, 99 N. Y. 258, 1 N. E. 787; Bradshaw v. Railway Co., L. R. 10 C. P. 189, 44 Law J. C. P. 148, 31 Law T. (N. S.) 847.

[2] Lamphear v. Buckingham, 33 Conn. 237; Chicago & R. I. R. Co. v. Morris, 26 Ill. 400; Quincy Coal Co. v. Hood, 77 Ill. 68; Indianapolis, P. & C. R. Co. v. Keely's Adm'r, 23 Ind. 133; Stewart v. Railroad Co., 103 Ind. 44, 2 N. E. 208; Clore v. McIntire, 120 Ind. 262, 22 N. E. 128; Missouri Pac. Ry. Co. v. Barber, 44 Kan. 612, 24 Pac. 969; Schwarz v. Judd, 28 Minn. 371, 10 N. W. 208; Barnum v. Railway Co., 30 Minn. 461, 16 N. W. 364; Serensen v. Railroad Co., 45 Fed. 407; Warren v. Englehart, 13 Neb. 283, 13 N. W. 401; Dunhene's Adm'x v. Trust Co., 1 Disn. (Ohio) 257; Lilly v. Railroad Co., 32 S. C. 142, 10 S. E. 932; Louisville & N. R. Co. v. Pitt, 91 Tenn. 86, 18 S. W. 118; Westcott v. Railroad Co., 61 Vt. 438, 17 Atl. 745; Geroux's Adm'r v. Graves, 62 Vt. 280, 19 Atl. 987; Woodward v. Railway Co., 23 Wis. 400; Wiltse v. Town of Tilden, 77 Wis. 152, 46 N. W. 234; Lucas v. Railroad Co., 21 Barb. (N. Y.) 245; Chicago, R. I. & P. Ry. Co. v. Young (Neb.) 79 N. W. 556.

[3] Com. v. Eastern R. Co., 5 Gray (Mass.) 473; Com. v. Boston & A. R. Co., 121 Mass. 36; State v. Grand Trunk Ry. Co., 60 Me. 145; State v. Gilmore, 24 N. H. 461; State v. Manchester & L. R. Co., 52 N. H. 528. And it is also immaterial that the action is brought in the name of the state. State v. Baltimore & O. R. Co., 70 Md. 319, 17 Atl. 88.

[4] Baltimore & O. R. Co. v. Wightman's Adm'r, 29 Grat. 431, followed in Matthews v. Warner's Adm'r, 29 Grat. 570; Baltimore & O. R. Co. v. Noell's Adm'r, 32 Grat. 394; Harper v. Railroad Co., 36 Fed. 102.

[5] Madden v. Railway Co., 28 W. Va. 610.

[6] Warner v. Railroad Co., 94 N. C. 250.

[7] City of Chicago v. Major, 18 Ill. 349; Oldfield v. Railroad Co., 14 N. Y. 310; Quin v. Moore, 15 N. Y. 432; Tilley v. Railroad Co., 24 N. Y. 471; Mc-

states where the husband does not inherit under the statute of descent and distribution, it is held that he cannot claim the benefit of the action, as being among "the next of kin." [8] The action may be maintained for the benefit of a posthumous child of the deceased.[9] Where the common-law rule that an action of tort does not survive the death of the party in whose favor it existed prevails, the action for death does not survive the beneficiary,[10] unless it is preserved by special enactment.

Distribution.

Under the provision of a majority of the statutes in the United States, the proceeds of the action are distributable in the proportions provided by law for the distribution of the personal property of an intestate, and, in the absence of any express provision by statute, it is believed that this method of distribution would be followed. Creditors of the estate of the deceased are very generally excluded, by the terms of the acts, from the distribution.

DAMAGES.

170. The damages recoverable are, in general, measured by the pecuniary loss resulting to the beneficiaries of the action from the death.

Although the phraseology employed by the various statutes, descriptive of the damages which may be recovered, is marked by differences and peculiarities, it is believed that the fundamental principle is substantially the same in each instance; that the damages

Mahon v. City of New York, 33 N. Y. 642; Haggerty v. Railroad Co., 31 N. J. Law, 349.

[8] Dickins v. Railroad Co., 23 N. Y. 158; Warren v. Englehart, 13 Neb. 283, 13 N. W. 401. But where he inherits under the statute, he is, for that reason, held to be included. Steel v. Kurtz, 28 Ohio St. 191; Bream v. Brown, 5 Cold. (Tenn.) 168; Trafford v. Express Co., 8 Lea (Tenn.) 96.

[9] The George & Richard, L. R. 3 Adm. & Ecc. 466, 24 Law T. (N. S.) 717, 20 Wkly. Rep. 245; Nelson v. Railway Co., 78 Tex. 621, 14 S. W. 1021.

[10] Woodward v. Railway Co., 23 Wis. 400; State v. Railroad Co. (Md.) 17 Atl. 88; Frazier v. Railroad Co., 101 Ga. 77, 28 S. E. 662; Chivers v. Rogers, 50 La. Ann. 57, 23 South. 100; Huberwald v. Railroad Co., 50 La. Ann. 477, 23 South. 474; Schmidt v. Woodenware Co., 99 Wis. 300, 74 N. W. 797; Texas Loan Agency v. Fleming (Tex. Civ. App.) 46 S. W. 63.

are measured by the pecuniary loss resulting to the beneficiaries of the action from the death.[1]

It may be safely stated as the almost universal rule that the recovery must be confined to the pecuniary loss of the beneficiaries, to the exclusion of any compensation for the loss of society by way of solatium for their grief and wounded feelings;[2] and this rule is followed irrespective of the occurrence of the word "pecuniary" in the enactment. Almost equally general is the rule that punitive or exemplary damages cannot be recovered,[3] although in a few states such damages are recoverable under express provisions of the enactments, notably in cases of "willful act or omission or gross negligence of the defendant."[4]

§ 170. [1] Tiff. Death Wrongf. Act, § 153; Louisville & N. R. Co. v. Brown (Ala.) 25 South. 609; Louisville & N. R. Co. v. Taafe's Adm'r (Ky.) 50 S. W. 850; Louisville & N. R. Co. v. Eakin's Adm'r (Ky.) 45 S. W. 529.

[2] Illinois Cent. R. Co. v. Barron, 5 Wall. 95; City of Chicago v. Major, 18 Ill. 349; Chicago City Ry. Co. v. Gillam, 27 Ill. App. 386; Barley v. Railroad Co., 4 Biss. 430, Fed. Cas. No. 997; Kansas Pac. Ry. Co. v. Cutter, 19 Kan. 83; State v. Baltimore & O. R. Co., 24 Md. 84; Mynning v. Railroad Co., 59 Mich. 257, 26 N. W. 514; Hutchins v. Railway Co., 44 Minn. 5, 46 N. W. 79; Collins v. Davidson, 19 Fed. 83; Schaub v. Railroad Co., 106 Mo. 74, 16 S. W. 924; Besenecker v. Sale, 8 Mo. App. 211; Anderson v. Railroad Co., 35 Neb. 95, 52 N. W. 840; Oldfield v. Railroad Co., 14 N. Y. 310; Tilley v. Railroad Co., 29 N. Y. 252; Steel v. Kurtz, 28 Ohio St. 191; Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318; Cleveland & P. R. Co. v. Rowan, 66 Pa. St. 393; March v. Walker, 48 Tex. 375; Galveston, H. & S. A. Ry. Co. v. Matula, 79 Tex. 577, 15 S. W. 573; Wells v. Railway Co., 7 Utah, 482, 27 Pac. 688; Needham v. Railway Co., 38 Vt. 294; Potter v. Railway Co., 21 Wis. 372; Cerrillos Coal R. Co. v. Deserant (N. M.) 49 Pac. 807; Coley v. City of Statesville, 121 N. C. 301, 28 S. E. 482; Walker v. McNeill, 17 Wash. 582, 50 Pac. 518; Barth v. Railway Co., 142 Mo. 535, 44 S. W. 778; Knoxville, C. G. & L. R. Co. v. Wyrick, 99 Tenn. 500, 42 S. W. 434; Green v. Southern Pac. Co. (Cal.) 55 Pac. 577.

[3] See cases cited in section 170, note 1. Also Chicago & N. W. Ry. Co. v. Whitton's Adm'r, 13 Wall. 270; Donaldson v. Railroad Co., 18 Iowa, 280; Dwyer v. Railway Co., 84 Iowa, 479, 51 N. W. 244; Kelley v. Railroad Co., 48 Fed. 663; Whitford v. Railroad Co., 23 N. Y. 465, 469; Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315; Southern Cotton Press & Mfg. Co. v. Bradley, 52 Tex. 587; Garrick v. Railroad Co., 53 S. C. 448, 31 S. E. 334.

[4] Sayles' Civ. St. Tex. art. 2901. See, also, Alabama G. S. R. Co. v. Burgess, 116 Ala. 509, 22 South. 913; Cerrillos Coal R. Co. v. Deserant (N. M.) 49 Pac. 807.

Since the action for death does not survive, but is created by the statute, no recovery can be had for the mental or physical suffering of the deceased.[5] By the same course of reasoning it would seem that no recovery could be had for expenses attending the injury, and incurred prior to the death,—as nursing and medical attendance,—but they have been frequently allowed in actions by the parents for the death of minor children.[6] Funeral expenses are generally held to be a legitimate element of damages, at least where the obligation to pay them rests on the beneficiary.[7] The word "pecuniary," however, must not be taken to designate those losses only which can be computed on a money basis. As was observed in an early New York case: "The word 'pecuniary' was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though painful and grievous to be borne, cannot be measured or recompensed in money. It excludes, also, those losses which result from the deprivation of the society and companionship, which are equally incapable of being defined by any recognized measure of value." [8]

[5] See cases cited in section 170, note 3; Florida Cent. & P. R. Co. v. Foxworth (Fla.) 25 South. 338.

[6] Little Rock & Ft. S. Ry. Co. v. Barker, 33 Ark. 350; Pennsylvania Co. v. Lilly, 73 Ind. 252; Rains v. Railway Co., 71 Mo. 164; Roeder v. Ormsby, 13 Abb. Prac. (N. Y.) 334, 22 How. Prac. (N. Y.) 270; Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318; Pennsylvania R. Co. v. Bantom, 54 Pa. St. 495; Cleveland & P. R. Co. v. Rowan, 66 Pa. St. 393; Lehigh Iron Co. v. Rupp, 100 Pa. St. 95; City of Galveston v. Barbour, 62 Tex. 172; Sieber v. Railway Co. (Minn.) 79 N. W. 95.

[7] Owen v. Brockschmidt, 54 Mo. 285; Murphy v. Railroad Co., 88 N. Y. 445, affirmed in 25 Hun (N. Y.) 311; Petrie v. Railroad Co., 29 S. C. 303, 7 S. E. 515; Southern Ry. Co. v. Covenia, 100 Ga. 46, 29 S. E. 219, 40 Lawy. Rep. Ann. 253. Contra, Consolidated Traction Co. v. Hone, 60 N. J. Law, 444, 38 Atl. 759; Trow v. Thomas, 70 Vt. 580, 41 Atl. 652. The MINNESOTA statute provides that out of the proceeds of the action "any demand for the support of the deceased and funeral expenses duly allowed by the probate court, shall be first deducted and paid." But the fund is subject only to expenses consequential on the injury. State v. Probate Court of Dakota Co., 51 Minn. 241, 53 N. W. 463.

[8] Denio, J., in Tilley v. Railroad Co., 24 N. Y. 471, 29 N. Y. 252.

Death of Husband or Father.

The widow and minor orphan may recover for the loss of support which the deceased owed them respectively,[9] and the measure of the damages is the amount which deceased would probably have earned for their benefit during his life,[10] and the accumulations from his earnings which they might reasonably expect to inherit.[11] The damages suffered by the child for loss of support must be confined to his minority.[12] In addition to the wages or money income earned by the deceased, it is proper to consider the daily attention, service, and care bestowed on the family.[13] If the proof of damage in the foregoing particulars is fairly substantial, the court will rarely disturb a verdict for failure of detailed evidence.[14] Evidence regarding the number and ages of the minor children is,

[9] Illinois Cent. R. Co. v. Weldon, 52 Ill. 290; Chicago, R. I. & P. R. Co. v. Austin, 69 Ill. 426; Chicago & A. R. Co. v. May, 108 Ill. 288.

[10] Pennsylvania R. Co. v. Butler, 57 Pa. St. 335; Pennsylvania Tel. Co. v. Varnau (Pa. Sup.) 15 Atl. 624; Hudson v. Houser, 123 Ind. 309, 24 N. E. 243; Baltimore & O. R. Co. v. State, 24 Md. 271; Schaub v. Railroad Co., 106 Mo. 74, 16 S. W. 924; Hogue v. Railroad Co., 32 Fed. 365; Shaber v. Railway Co., 28 Minn. 103, 9 N. W. 575; Bolinger v. Railroad Co., 36 Minn. 418, 31 N. W. 856; Burton v. Railroad Co., 82 N. C. 504; Pool v. Railroad Co., 7 Utah, 303, 26 Pac. 654; Baltimore & O. R. Co. v. Wightman's Adm'r, 29 Grat. (Va.) 431; Louisville & N. R. Co. v. Ward's Adm'r (Ky.) 44 S. W. 1112; Maxwell v. Railway Co., 1 Marv. 199, 40 Atl. 945.

[11] Lake Erie & W. R. Co. v. Mugg, 132 Ind. 168, 31 N. E. 564; Catawissa R. Co. v. Armstrong, 52 Pa. St. 282; Castello v. Landwehr, 28 Wis. 522; Lawson v. Railway Co., 64 Wis. 447, 24 N. W. 618.

[12] Baltimore & R. Turnpike Road v. State, 71 Md. 573, 18 Atl. 884; Baltimore & O. R. Co. v. State, 33 Md. 542; Baltimore & O. R. Co. v. State, 41 Md. 268.

[13] Bolinger v. Railroad Co., 36 Minn. 418, 31 N. W. 856; Florida Cent. & P. R. Co. v. Foxworth (Fla.) 25 South. 338.

[14] Bolinger v. Railroad Co., 36 Minn. 418, 31 N. W. 856; Board Com'rs of Howard Co. v. Legg, 110 Ind. 479, 11 N. E. 612; Smith v. Railway Co., 92 Mo. 359, 4 S. W. 129; Baltimore & O. R. Co. v. State, 24 Md. 271; Kelley v. Railway Co., 50 Wis. 381, 7 N. W. 291; Dallas & W. Ry. Co. v. Spicker, 61 Tex. 427; Missouri Pac. Ry. Co. v. Lehmberg, 75 Tex. 61, 12 S. W. 838; St. Louis, A. & T. Ry. Co. v. Johnston, 78 Tex. 536, 15 S. W. 104; Secord v. Railway Co., 15 U. C. Q. B. 631. In the following cases the verdict, on the evidence, was held excessive: Illinois Cent. R. Co. v. Weldon, 52 Ill. 290; Louisville & N. R. Co. v. Trammell, 93 Ala. 350, 9 South. 870; Hutton v. Windsor, 34 U. C. Q. B. 487; Morley v. Railway Co., 16 U. C. Q. B. 504.

of course, essential when they are beneficiaries;[15] and even when the action is for the sole benefit of the widow such evidence has been properly admitted, for the reason that she must be burdened with their support.[16]

Damages may be recovered in behalf of a minor child for loss of support, and also for loss of education and such other conveniences and comforts as he might have reasonably expected to enjoy if his parent had survived.[17] Moreover, it is quite generally held that loss of the personal care, instruction, and discipline of the parent is a proper element of damage.[18]

Death of Wife.

For the death of his wife the husband is entitled to recover for the loss of her services, and the measure of the damages is their reasonable value.[19] And although the loss must be estimated, as nearly as possible, on a pecuniary basis, the jury may consider not only the ability of the deceased for usefulness and capacity to earn money,[20] but the frugality, industry, attention, and tender solicitude of a wife and the mother of children;[21] and, in the absence of direct proof of the foregoing facts, it is within the province of

[15] Breckenfelder v. Railway Co., 79 Mich. 560, 44 N. W. 957.

[16] Tetherow v. Railroad Co., 98 Mo. 74, 11 S. W. 310; Soeder v. Railway Co., 100 Mo. 673, 13 S. W. 714; Atchison, T. & S. F. R. Co. v. Wilson, 1 C. C. A. 25, 48 Fed. 57; Mulcairns v. City of Janesville, 67 Wis. 24, 29 N. W. 565; Abbot v. McCadden, 81 Wis. 563, 51 N. W. 1079.

[17] Pym v. Railway Co., 2 Best & S. 759, 10 Wkly. Rep. 737, 31 Law J. Q. B. 249, affirmed in 4 Best & S. 396, 11 Wkly. Rep. 922, 32 Law J. Q. B. 377; Bradley v. Railroad Co., 122 N. C. 972, 30 S. E. 8.

[18] Tilley v. Railroad Co., 24 N. Y. 471, 29 N. Y. 252; Board Com'rs of Howard Co. v. Legg, 93 Ind. 523; Stoher v. Railway Co., 91 Mo. 509, 4 S. W. 389; Dimmey v. Railroad Co., 27 W. Va. 32; Searle's Adm'r v. Railway Co., 32 W. Va. 370, 9 S. E. 248; Baltimore & O. R. Co. v. Wightman's Adm'r, 29 Grat. (Va.) 431; St. Louis, I. M. & S. Ry. Co. v. Maddry, 57 Ark. 306, 21 S. W. 472; May v. Railroad Co. (N. J. Sup.) 42 Atl. 163.

[19] Chicago & N. W. Ry. Co. v. Whitton's Adm'r, 13 Wall. 270; Chant v. Railway Co., Wkly. Notes (Eng.) 1866, p. 134; Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329; Delaware, L. & W. R. Co. v. Jones, 128 Pa. St. 308, 18 Atl. 330.

[20] Chicago & N. W. Ry. Co. v. Whitton's Adm'r, 13 Wall. 270.

[21] Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329.

the jury to make reasonable assumptions in the circumstances shown.[22]

Death of Minor Child.

For the death of his minor child a parent is entitled to recover for loss of services during minority,[23] the measure of damages being the value of the services less the probable cost of support.[24] To justify such recovery, it is not essential that the child should have been a wage earner,[25] or, in the United States, at least, capable of performing any services;[26] and proof of services is, therefore, unnecessary,[27] although proof of personal characteristics may be shown to enhance damages;[28] and the jury may consider the services of the child in the family, such as acts of kindness and attention, increasing the comfort of his parents.[29] The right of the court to reduce or set aside excessive verdicts is reserved in these as in other cases.[30]

[22] Chant v. Railway Co., Wkly. Notes (Eng.) 1866, p. 134; Delaware, L. & W. R. Co. v. Jones, 128 Pa. St. 308, 18 Atl. 330.

[23] Little Rock & Ft. S. Ry. Co. v. Barker, 33 Ark. 350; Chicago v. Keefe, 114 Ill. 222, 2 N. E. 267; Illinois Cent. R. Co. v. Slater, 129 Ill. 91, 21 N. E. 575; McGovern v. Railroad Co., 67 N. Y. 417; City of Galveston v. Barbour, 62 Tex. 172; Rains v. Railway Co., 71 Mo. 164; Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318; Caldwell v. Brown, 53 Pa. St. 453.

[24] Rockford, R. I. & St. L. R. Co. v. Delaney, 82 Ill. 198; Rajnowski v. Railroad Co., 74 Mich. 20, 41 N. W. 847; Pennsylvania R. Co. v. Lilly, 73 Ind. 252; Brunswig v. White, 70 Tex. 504, 8 S. W. 85.

[25] Oldfield v. Railroad Co., 14 N. Y. 310; Bramall v. Lees, 29 Law T. 111; Condon v. Railway Co., 16 Ir. C. L. 415; Ihl v. Railway Co., 47 N. Y. 317; O'Mara v. Railroad Co., 38 N. Y. 445; Houghkirk v. Canal Co., 92 N. Y. 219, 28 Hun (N. Y.) 407.

[26] Ihl v. Railroad Co., 47 N. Y. 317; Oldfield v. Railroad Co., 14 N. Y. 310; O'Mara v. Railroad Co., 38 N. Y. 445; Houghkirk v. Canal Co., 92 N. Y. 219; Ahern v. Steele, 48 Hun, 517, 1 N. Y. Supp. 259; Gorham v. Railroad Co., 23 Hun (N. Y.) 449.

[27] Little Rock & Ft. S. Ry. Co. v. Barker, 39 Ark. 491; City of Chicago v. Major, 18 Ill. 349; City of Chicago v. Scholten, 75 Ill. 468; City of Chicago v. Hesing, 83 Ill. 204; Union Pac. Ry. Co. v. Dunden, 37 Kan. 1, 14 Pac. 501; Nagel v. Railway Co., 75 Mo. 653; Grogan v. Foundry Co., 87 Mo. 321; Brunswig v. White, 70 Tex. 504, 8 S. W. 85.

[28] City of Chicago v. Scholten, 75 Ill. 468.

[29] Louisville, N. A. & C. Ry. Co. v. Rush, 127 Ind. 545, 26 N. E. 1010.

[30] Little Rock & Ft. S. Ry. Co. v. Barker, 33 Ark. 350; Chicago & A. R. Co. v. Becker, 84 Ill. 483; Lake Shore & M. S. Ry. Co. v. Sunderland, 2 Ill.

As the parent has no legal claim upon the services of the child after his majority, the expectancy of such a benefit is not generally admitted as an element of damage for the death of a minor child.[31] In some states, however, the damages are not limited to the value of services during minority.[32]

Loss of Prospective Gifts and Inheritances.

In addition to damages for loss of services and support, it is within the scope of the act to recover for the loss of pecuniary benefits of which a reasonable expectation existed. To entitle the plaintiff to a recovery for the loss of prospective gifts, it must, in general, appear that, during his lifetime, the deceased conferred material benefits, such as services, money, or other gifts, upon the beneficiary, and that their continuance was a reasonable probability at the time of his death.[33] The measure of damages in such

App. 307; Union Pac. Ry. Co. v. Dunden, 37 Kan. 1, 14 Pac. 501; Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205; Cooper v. Railway Co., 66 Mich. 261, 33 N. W. 306; Gunderson v. Elevator Co., 47 Minn. 161, 49 N. W. 694; Strutzel v. Railway Co., 47 Minn. 543, 50 N. W. 690; City of Vicksburg v. McLain, 67 Miss. 4, 6 South. 774; Parsons v. Railway Co., 94 Mo. 286, 6 S. W. 464; Hickman v. Railway Co., 22 Mo. App. 344; Telfer v. Railroad Co., 30 N. J. Law, 188; Pennsylvania Coal Co. v. Nee (Pa. Sup.) 13 Atl. 841; Ross v. Railway Co., 44 Fed. 44; Ewen v. Railway Co., 38 Wis. 613; Hoppe v. Railway Co., 61 Wis. 359, 21 N. W. 227; Schrier v. Railway Co., 65 Wis. 457, 27 N. W. 167.

[31] Little Rock & Ft. S. Ry. Co. v. Barker, 33 Ark. 350; St. Louis, I. M. & S. Ry. Co. v. Freeman, 36 Ark. 41; State v. Railroad Co., 24 Md. 84; Cooper v. Railway Co., 66 Mich. 261, 33 N. W. 306; Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318; Caldwell v. Brown, 53 Pa. St. 453; Lehigh Iron Co. v. Rupp, 100 Pa. St. 95; Agricultural & Mechanical Ass'n v. State, 71 Md. 86, 18 Atl. 37.

[32] Missouri Pac. Ry. Co. v. Peregoy, 36 Kan. 424, 14 Pac. 7; Gulf, C. & S. F. Ry. Co. v. Compton, 75 Tex. 667, 13 S. W. 667; Scheffler v. Railway Co., 32 Minn. 518, 21 N. W. 711; Birkett v. Ice Co., 110 N. Y. 504, 18 N. E. 108; Potter v. Railway Co., 22 Wis. 615.

[33] Dalton v. Railway Co., 4 C. B. (N. S.) 296, 4 Jur. (N. S.) 711, 27 Law J. C. P. 227; Fordyce v. McCants, 51 Ark. 509, 11 S. W. 694; Atchison, T. & S. F. R. Co. v. Brown, 26 Kan. 443; Cherokee & P. Coal & Mining Co. v. Limb, 47 Kan. 469, 28 Pac. 181; Richmond v. Railway Co., 87 Mich. 374, 49 N. W. 621; Houston & T. C. Ry. Co. v. Cowser, 57 Tex. 293; Winnt v. Railway Co., 74 Tex. 32, 11 S. W. 907; Pennsylvania R. Co. v. Adams, 55 Pa. St. 499; Pennsylvania R. Co. v. Keller, 67 Pa. St. 300; North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15; Lehigh Iron Co. v. Rupp, 100 Pa. St. 95; Hall v.

cases is the amount which deceased might reasonably have been expected to contribute to the support of the parent during the latter's expectancy of life, not exceeding the expectancy of life of deceased at the time of his death.[34] In a Minnesota case[35] the rule is thus stated by the court: "The proper estimate can usually be arrived at with approximate accuracy by taking into account the calling of the deceased, and the income derived therefrom; his health, age, talents, habits of industry; his success in life in the past, as well as the amount of aid in money or services which he was accustomed to furnish the next of kin; and, if the verdict is greatly in excess of the sum thus arrived at, the court will set it aside or cut it down."

Theoretically, an adult child may recover damages for the loss of pecuniary benefits resulting from the wrongful death of the parent.

Railway Co., 39 Fed. 18; Missouri Pac. Ry. Co. v. Lee, 70 Tex. 496, 7 S. W. 857; Texas & P. Ry. Co. v. Wilder, 35 C. C. A. 105, 92 Fed. 953; Franklin v. Railway Co., 3 Hurl. & N. 211, 4 Jur. (N. S.) 565; Hetherington v. Railway Co., 9 Q. B. Div. 160.

[34] West Chicago St. R. Co. v. Dooley, 76 Ill. App. 424. Recovery not permitted. Sykes v. Railway Co., 44 Law J. C. P. 191, 32 Law T. (N. S.) 199, 23 Wkly. Rep. 473; Demarest v. Little, 47 N. J. Law, 28; Atchison, T. & S. F. Ry. Co. v. Brown, 26 Kan. 443; Houston & T. C. Ry. Co. v. Cowser, 57 Tex. 293; Winnt v. Railway Co., 74 Tex. 32, 11 S. W. 907. Application of rule, see Richmond v. Railway Co., 87 Mich. 374, 49 N. W. 621; Baltimore & O. R. Co. v. Noell's Adm'r, 32 Grat. (Va.) 394; Little Rock & Ft. S. Ry. Co. v. Voss (Ark.) 18 S. W. 172; Fordyce v. McCants, 55 Ark. 384, 18 S. W. 371; O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269; Chicago & A. R. Co. v. Shannon, 43 Ill. 388; Illinois & St. L. R. Co. v. Whalen, 19 Ill. App. 116; Chicago & A. R. Co. v. Adler, 28 Ill. App. 102; City of Salem v. Harvey, 29 Ill. App. 483, affirmed in 129 Ill. 344, 21 N. E. 1076; Texas & P. Ry. Co. v. Lester, 75 Tex. 56, 12 S. W. 955; Missouri Pac. Ry. Co. v. Henry, 75 Tex. 220, 12 S. W. 828; Webb v. Railway Co., 7 Utah, 363, 26 Pac. 981. In NEW YORK it is sufficient to show the age, sex, condition, and circumstances of deceased and of the next of kin, leaving the jury to fix the pecuniary damage on this evidence. Oldfield v. Railroad Co., 14 N. Y. 310; O'Mara v. Railroad Co., 38 N. Y. 445; Houghkirk v. Canal Co., 92 N. Y. 219; Ahern v. Steele, 48 Hun, 517, 1 N. Y. Supp. 259; and the same rule applies where the basis of damage is the loss of prospective gifts and inheritances, Tilley v. Railroad Co., 29 N. Y. 252; Dickens v. Railroad Co., 1 Abb. Dec. 504; Lockwood v. Railroad Co., 98 N. Y. 523; Lustig v. Railroad Co., 65 Hun, 547, 20 N. Y. Supp. 477; Bierbauer v. Railroad Co., 15 Hun (N. Y.) 559, affirmed in 77 N. Y. 588.

[35] Hutchins v. Railway Co., 44 Minn. 5, 46 N. W. 79.

Cases, however, in which the facts warrant such recovery, are comparatively rare.[36] The principle and application of the rule remain unchanged where the decedent is a collateral relative of the plaintiff.[37] In these cases the proof of the probability of future benefits, had deceased lived, and the measure of damages in assessing the loss caused by his death, do not vary from those already stated. In Illinois Cent. R. Co. v. Barron,[38] Nelson, J., said: "The damages in these cases, whether the suit is in the name of the injured party, or, in case of his death, under the statute, by his legal representative, must depend very much on the good sense and sound judgment of the jury, upon all the facts and circumstances of the particular case. * * * So, where the suit is brought by the representative, the pecuniary injury resulting from the death to the next of kin is equally uncertain and indefinite." Evidence of the poverty,[39] bad health,[40] or other circumstance of the beneficiary, is, in general, inadmissible upon the question of pecuniary loss. One exception to this rule is sometimes recognized in actions by parents for the death of minor children, when such evidence is held material as bearing upon the probability of the bestowal of gifts had deceased survived.[41]

[36] Baltimore &. O. R. Co. v. State, 60 Md. 449; Id., 63 Md. 135; Petrie v. Columbus & G. R. Co., 29 S. C. 303, 7 S. E. 515.

[37] Anderson v. Railroad Co., 35 Neb. 95, 52 N. W. 840; Serensen v. Railroad Co., 45 Fed. 407.

[38] 5 Wall. 90. If the evidence does not show a probability that injured, had he lived, would have accumulated anything, nominal damages only can be awarded, Howard v. Canal Co., 40 Fed. 195; and, if the verdict is grossly out of proportion to the probability, the verdict will be set aside, Demarest v. Little, 47 N. J. Law, 28.

[39] Illinois Cent. R. Co. v. Baches, 55 Ill. 379; Chicago & N. W. Ry. Co. v. Moranda, 93 Ill. 302; Chicago & N. W. Ry. Co. v. Howard, 6 Ill. App. 569; Heyer v. Salsbury, 7 Ill. App. 93; Illinois Cent. R. Co. v. Slater, 28 Ill. App. 73, affirmed in 129 Ill. 91, 21 N. E. 575; City of Delphi v. Lowery, 74 Ind. 520; Overholt v. Vieths, 93 Mo. 422, 6 S. W. 74; Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205; Hunn v. Railroad Co., 78 Mich. 513, 44 N. W. 502; Central R. R. v. Rouse, 77 Ga. 393, 3 S. E. 307. But see, on the ILLINOIS rule, Pennsylvania Co. v. Keane, 143 Ill. 172, 32 N. E. 260.

[40] Illinois Cent. R. Co. v. Baches, 55 Ill. 379; Benton v. Railroad Co., 55 Iowa, 496, 8 N. W. 330.

[41] Potter v. Railway Co., 21 Wis. 372; Johnson v. Railway Co., 64 Wis. 425, 25 N. W. 223; Wiltse v. Town of Tilden, 77 Wis. 152, 46 N. W. 234; Staal

Evidence.

Standard life tables, as the Northampton, Carlisle, etc., are always admissible for the purpose of showing the expectation of life of deceased.[42] Interest cannot be computed by the jury upon the assessed damages,[43] unless this right is expressly conferred by statute, as in New York.[44]

In assessing the damages of the beneficiary it is not proper for the jury to consider the fact that he has, by the death of deceased, become possessed of other property, for it is a fair assumption that, in any event, such property would have ultimately belonged to the beneficiary.[45] So, also, when the beneficiary receives money from an insurance policy on the life of deceased, the fact cannot be con-

v. Railroad Co., 57 Mich. 239, 23 N. W. 795; Cooper v. Railway Co., 66 Mich. 261, 33 N. W. 306; Missouri Pac. R. Co. v. Peregoy, 36 Kan. 424, 14 Pac. 7; International & G. N. R. Co. v. Kindred, 57 Tex. 491; City of Chicago v. McCulloch, 10 Ill. App. 459; Illinois Cent. R. Co. v. Slater, 28 Ill. App. 73, contra; Annas v. Railroad Co., 67 Wis. 46, 30 N. W. 282; McKeigue v. Janesville, 68 Wis. 50, 31 N. W. 298.

[42] Donaldson v. Railroad Co., 18 Iowa, 280; Coates v. Railway Co., 62 Iowa, 486, 17 N. W. 760; Worden v. Railway Co., 76 Iowa, 310, 41 N. W. 26; Louisville, C. & L. R. Co. v. Mahony's Adm'x, 7 Bush (Tenn.) 235; Cooper v. Railway Co., 66 Mich. 261, 33 N. W. 306; Hunn v. Railroad Co., 78 Mich. 513, 44 N. W. 502; Sellars v. Foster, 27 Neb. 118, 42 N. W. 907; Sauter v. Railroad Co., 66 N. Y. 50; Mississippi & T. R. Co. v. Ayres, 16 Lea (Tenn.) 725; San Antonio & A. P. Ry. Co. v. Bennett, 76 Tex. 151, 13 S. W. 319. But they are not conclusive; they are to be considered with other evidence in the case. Scheffler v. Railway Co., 32 Minn. 518, 21 N. W. 711; McKeigue v. City of Janesville, 68 Wis. 50, 31 N. W. 298; Georgia Railroad & Banking Co. v. Oaks, 52 Ga. 410; Georgia R. Co. v. Pittman, 73 Ga. 325; Beems v. Railway Co., 67 Iowa, 435, 25 N. W. 693; Deisen v. Railway Co., 43 Minn. 454, 45 N. W. 864; Gulf, C. & S. F. Ry. Co. v. Compton, 75 Tex. 667, 13 S. W. 667; Sweet v. Railroad Co. (R. I.) 40 Atl. 237; Galveston, H. & S. A. Ry. Co. v. Burnett (Tex. Civ. App.) 42 S. W. 314.

[43] Central R. Co. v. Sears, 66 Ga. 499; Cook v. Railroad Co., 10 Hun, 426 (before act of 1870).

[44] Cornwall v. Mills, 44 N. Y. Super. Ct. 45.

[45] Terry v. Jewett, 78 N. Y. 338, 17 Hun, 395. It is error to permit plaintiff to show that intestate left no property, Koosorowska v. Glasser (Super. Buff.) 8 N. Y. Supp. 197; although cases are conceivable where this rule is equitable, Grand Trunk Ry. Co. of Canada v. Jennings, 13 App. Cas. 800, 58 Law J. P. C. 1, 59 Law T. (N. S.) 679.

sidered in reduction of damages.[46] And it is, of course, immaterial that benefits from independent sources had subsequently accrued to the beneficiary.[47]

Instructions to Jury, and Verdict.

Within broad limitations, the amount of the pecuniary loss is within the discretion of the jury, and instructions to that effect are proper.[48] The instruction, however, should include a definite charge upon the measure of damages proper in the particular case,[49] conforming to the evidence[50] and the pecuniary injury to the beneficiaries.[51]

If the amount of the verdict is evidently excessive, the court may make an alternative order that the plaintiff remit a part of the sum awarded, or that a new trial be had.[52] It follows, as a corollary, that the court may, in its discretion, set aside an inadequate verdict, and grant a new trial.[53]

[46] Althorf v. Wolfe, 22 N. Y. 355; Kellogg v. Railroad Co., 79 N. Y. 72; Sherlock v. Alling, 44 Ind. 184; Carroll v. Railway Co., 88 Mo. 239; North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15; Baltimore & O. R. Co. v. Wightman, 29 Grat. (Va.) 431; Western & A. R. Co. v. Melgs, 74 Ga. 857; Galveston, H. & S. A. Ry. Co. v. Cody (Tex. Civ. App.) 50 S. W. 135.

[47] Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350; Georgia Railroad & Banking Co. v. Garr, 57 Ga. 277.

[48] Illinois Cent. R. Co. v. Barron, 5 Wall. 90; Chicago & N. W. Ry. Co. v. Whitton's Adm'r, 13 Wall. 270; Pennsylvania R. Co. v. Ogier, 35 Pa. St. 60; City of Vicksburg v. McLain, 67 Miss. 4, 6 South. 774; Kansas Pac. Ry. Co. v. Cutter, 19 Kan. 83.

[49] Pennsylvania R. Co. v. Ogler, 35 Pa. St. 60; Pennsylvania R. Co. v. Vandever, 36 Pa. St. 298; Catawissa R. Co. v. Armstrong, 52 Pa. St. 282.

[50] Chicago & N. W. R. Co. v. Swett, 45 Ill. 197; Chicago & A. R. Co. v. Shannon, 43 Ill. 338; North Chicago Rolling-Mill Co. v. Morrissey, 111 Ill. 646; Chicago, M. & St. P. Ry. Co. v. Dowd, 115 Ill. 659, 4 N. W. 368.

[51] Chicago & A. R. Co. v. Becker, 76 Ill. 25; Chicago, B. & Q. R. Co. v. Harwood, 80 Ill. 88.

[52] Little Rock & Ft. S. Ry. Co. v. Barker, 39 Ark. 491; Central R. Co. v. Crosby, 74 Ga. 737; Rose v. Railroad Co., 39 Iowa, 246; Hutchins v. Railway Co., 44 Minn. 5, 46 N. W. 79; Smith v. Railway Co., 92 Mo. 360, 4 S. W. 129; Demarest v. Little, 47 N. J. Law, 28; McIntyre v. Railroad Co., 37 N. Y. 287; McKay v. Dredging Co., 92 Me. 454, 43 Atl. 29. This rule is followed in WISCONSIN only when the illegal portion of the verdict is readily severable, and hence cannot apply in actions for death. Potter v. Railway Co., 22 Wis. 615.

[53] Mariani v. Dougherty, 46 Cal. 26; Wolford v. Mining Co., 63 Cal. 483;

It would seem to be a logical conclusion that there could be no recovery unless there was pecuniary loss, and this view is sustained by some courts.[54] In other states it is held that a negligent killing necessarily implies damage, and hence the next of kin may always maintain an action for at least nominal damages.[55]

PLEADING.

171. In general it is sufficient if the complaint alleges facts which bring the case fairly within the statute,[1] without stating that the negligence of the defendant was such that, had death not ensued, the person injured might have maintained the action.[2]

Negligence and Resultant Injury.

The allegations of negligence and the resultant injury to the deceased are, subject to the ordinary rules of pleading, applicable to all cases of personal injury.

Existence of Beneficiaries.

As the action must be maintained for the benefit of some person entitled thereto under the provisions of the act, the existence

James v. Railroad Co., 92 Ala. 231, 9 South. 335; Meyer v. Hart, 23 App. Div. 131, 48 N. Y. Supp. 904; Connor v. City of New York, 28 App. Div. 186, 50 N. Y. Supp. 972.

[54] Hurst v. Railway Co., 84 Mich. 539, 48 N. W. 44; Van Brunt v. Railroad Co., 78 Mich. 530, 44 N. W. 321; Charlebois v. Railroad Co., 91 Mich. 59, 51 N. W. 812; McGown v. Railroad Co., 85 Tex. 289, 20 S. W. 80; Regan v. Railway Co., 51 Wis. 599, 8 N. W. 292.

[55] Chicago & A. R. Co. v. Shannon, 43 Ill. 338; Chicago & N. W. Ry. Co. v. Swett, 45 Ill. 197; Quincy Coal Co. v. Hood, 77 Ill. 68; Quin v. Moore, 15 N. Y. 432; Ihl v. Railroad Co., 47 N. Y. 317; Lehman v. City of Brooklyn, 29 Barb. (N. Y.) 234; Atchison, T. & S. F. R. Co. v. Weber, 33 Kan. 543, 6 Pac. 877; Johnston v. Railroad Co., 7 Ohio St. 336; Kenney v. Railroad Co., 49 Hun, 535, 2 N. Y. Supp. 512; Korrady v. Railway Co., 131 Ind. 261, 29 N. E. 1069.

§ 171. [1] Brown v. Harmon, 21 Barb. (N. Y.) 508; Kennayde v. Railroad Co., 45 Mo. 255; White v. Maxcy, 64 Mo. 552; Westcott v. Railroad Co., 61 Vt. 438, 17 Atl. 745. If the action is based on foreign statute, the statute must be pleaded. Vanderwerken v. Railroad Co., 6 Abb. Prac. (N. Y.) 239; Chicago & W. I. R. Co. v. Schroeder, 18 Ill. App. 328.

[2] Philadelphia, W. & B. R. Co. v. State, 58 Md. 372.

of such person or persons must be alleged in the complaint,[3] although it is not necessary to give their names,[4] unless this is specifically required by the statute.[5]

Action by Personal Representatives.

The complaint must allege the appointment of plaintiff as executor or administrator, when the statute requires the action to be brought by the personal representatives of the deceased.[6] And a general denial does not put in issue such appointment; such issue must be raised by special plea.[7]

Allegation of Damages.

In those jurisdictions which hold that the action is not maintainable unless the beneficiaries have suffered pecuniary loss,[8] the complaint must contain allegations to that effect.[9] But in those jurisdictions where nominal damages are allowed in the absence of proof of actual loss, such allegations are unnecessary, and their

[3] Lamphear v. Buckingham, 33 Conn. 237; Chicago & R. I. R. Co. v. Morris, 26 Ill. 400; Quincy Coal Co. v. Hood, 77 Ill. 68; Indianapolis, P. & C. R. Co. v. Keely's Adm'r, 23 Ind. 133; Stewart v. Railroad Co., 103 Ind. 44, 2 N. E. 208; Schwarz v. Judd, 28 Minn. 371, 10 N. W. 208; Serensen v. Railroad Co., 45 Fed. 407; Louisville & N. R. Co. v. Pitt, 91 Tenn. 86, 18 S. W. 118; Westcott v. Railroad Co., 61 Vt. 438, 17 Atl. 745; Woodward v. Railway Co., 23 Wis. 400; Wiltse v. Town of Tilden, 77 Wis. 152, 46 N. W. 234; Chicago, B. & Q. R. Co. v. Bond (Neb.) 78 N. W. 710; Nohrden v. Railroad Co. (S. C.) 32 S. E. 524; West Chicago St. R. Co. v. Mabie, 77 Ill. App. 176; Chicago, B. & Q. R. Co. v. Oyster (Neb.) 78 N. W. 359.

[4] Conant v. Griffin, 48 Ill. 410. See Quincy Coal Co. v. Hood, 77 Ill. 68; Jeffersonville, M. & I. R. Co. v. Hendricks, 41 Ind. 48; Budd v. Railroad Co., 69 Conn. 272, 37 Atl. 683.

[5] MARYLAND and NEW JERSEY require this particularity.

[6] City of Atchison v. Twine, 9 Kan. 350; Hagerty v. Hughes, 4 Baxt. (Tenn.) 222; Chicago & A. R. Co. v. Smith, 77 Ill. App. 492.

[7] Ewen v. Railway Co., 38 Wis. 613; Union Ry. & Transp. Co. v. Shacklet, 119 Ill. 232, 10 N. E. 896. And see Burlington & M. R. Co. v. Crockett, 17 Neb. 570, 24 N. W. 219.

[8] See ante, p. 404; Chicago, B. & Q. R. Co. v. Van Buskirk (Neb.) 78 N. W. 514; Erb v. Morasch (Kan. App.) 54 Pac. 323.

[9] Hurst v. Railway Co., 84 Mich. 539, 48 N. W. 44; Regan v. Railway Co., 51 Wis. 599, 8 N. W. 292. Although it would seem that, if the loss is clearly deducible from the facts pleaded, it need not be specifically alleged. Kelley v. Railway Co., 50 Wis. 381, 7 N. W. 291; Gulf, C. & S. F. Ry. Co. v. Younger (Tex. Civ. App.) 40 S. W. 423.

absence does not render the complaint demurrable. Thus, in an Indiana case, a complaint which showed that the deceased left a widow and infant children surviving was held good on demurrer, although it did not directly allege that the beneficiaries sustained actual damages, the court saying that, in legal presumption, the infant children and wife are entitled to the services of a father and husband, and that such services are valuable to them.[10]

Amendments.

Provided the amendment is not so material as to state a new cause of action, the declaration may be amended as in other actions, and, although made after the action is barred by the statute of limitations, will relate back to the commencement of the suit;[11] as an amendment changing the relation of the injured party from that of employé to that of passenger,[12] or adding the allegation that deceased left wife and children,[13] or alleging the provisions of a foreign statute,[14] or adding new[15] or more particular[16] allegations regarding the negligence of defendant. But when the amendment contains a substantially new or different cause of action, it will not be allowed. Thus, where a widow began the action for the use of herself and children, and, after the expiration of the period of limitation, sought to substitute the administrator as plaintiff for the use of the widow, the court said that the fiction of relation could not be applied to defeat the defense of the statute of limitations.[17]

[10] Korrady v. Railway Co., 29 N. E. 1069. But see, also, Haug v. Railway Co. (N. D.) 77 N. W. 97, 42 Lawy. Rep. Ann. 664; District of Columbia v. Wilcox, 4 App. D. C. 90. In Pennsylvania Co. v. Lilly, 73 Ind. 252, it was held that in an action by a father for the death of a minor child, in order to recover for loss of services beyond the date of the beginning of the suit, such damage must be specifically pleaded.

[11] Tiff. Death Wrongf. Act, § 187.

[12] Kansas Pac. Ry. Co. v. Salmon, 14 Kan. 512.

[13] South Carolina R. Co. v. Nix, 68 Ga. 572; Haynie v. Railroad Co., 9 Ill. App. 105.

[14] Lustig v. Railroad Co., 65 Hun, 547, 20 N. Y. Supp. 477; South Carolina R. Co. v. Nix, 68 Ga. 572.

[15] Harris v. Railroad Co., 78 Ga. 525, 3 S. E. 355.

[16] Jeffersonville, M. & I. R. Co. v. Hendricks, 41 Ind. 48; Kuhns v. Railway Co., 76 Iowa, 67, 40 N. E. 92; Moody v. Railroad Co., 68 Mo. 470.

[17] Flatley v. Railroad Co., 9 Heisk. (Tenn.) 230. See, also, Lilly v. Railroad

EVIDENCE.

172. In actions for death the proof of the case must, in general, be made in the same manner as in any other action the gist of which is the negligence of the defendant.

Character of Evidence.

Owing, however, to the fact that in many cases there were no witnesses to the accident, and that the proof must be, in a large measure, circumstantial, less fullness and precision is required than where the injured person is alive, and able to testify.[1]

Defendant as Witness.

It is a very general rule that in actions by or against executors and administrators neither party can testify against the other; and this rule prevails in many of the states in actions for death, even where the common law, disqualifying the testimony of interested parties, has been abrogated. This exclusion, however, is commonly limited to testimony relative to transactions with or statements by the testator or intestate. Where the action is brought directly in the name of the beneficiary, the reason for the rule does not exist, and the rule itself is held not to apply.[2] Thus, in Missouri, in an action by the widow, it was held that the defendant was a competent witness, although the statute provided that in actions where one of the original parties to the contract or cause of action was dead the other should not be allowed to testify in his own favor, the reason being that the plaintiff was not suing on a cause of ac-

Co., 32 S. C. 142, 10 S. E. 932; Smith v. Railroad Co., 84 Ga. 183, 10 S. E. 602; Bell v. Railroad Co., 73 Ga. 520.

§ 172. [1] Central R. Co. v. Rouse, 77 Ga. 393, 3 S. E. 307; Chicago, B. & Q. R. Co. v. Gregory, 58 Ill. 272; Missouri Furnace Co. v. Abend, 107 Ill. 44; Chicago & A. Ry. Co. v. Carey, 115 Ill. 115, 3 N. E. 519; McDermott v. Railway Co. (Iowa) 47 N. W. 1037; Louisville & N. R. Co. v. Brooks' Adm'x, 83 Ky. 129; Maguire v. Railroad Co., 146 Mass. 379, 15 N. E. 904; Buesching v. Gaslight Co., 73 Mo. 219; Galvin v. City of New York, 112 N. Y. 223, 19 N. E. 675; Phillips v. Railroad Co., 77 Wis. 349, 46 N. W. 543.

[2] Mann v. Weiand, *81 Pa. St. 243; Wallace v. Stevens, 74 Tex. 559, 12 S. W. 283; McEwen v. Springfield, 64 Ga. 159. And see Hale v. Kearly, 8 Baxt. (Tenn.) 50.

tion to which the deceased was a party.[3] In Indiana [4] and Illinois,[5] where the action is brought in the name of the executor or administrator, it is held that the defendant is disqualified as a witness: in the former state, under a statute providing that in suits in which an executor or administrator is a party, involving matters which occurred during the lifetime of the deceased, where a judgment may be rendered for or against the estate, any person who is a necessary party to the issue or record, whose interest is adverse to the estate, shall not be a competent witness against the estate; and in the latter, under a statute excluding parties and persons interested from testifying in suits by executors and administrators.

LIMITATION OF COMMENCEMENT OF ACTION.

173. The time within which an action may be brought for wrongful death is governed by the provisions of the various statutes, perhaps a majority adopting in this respect the substance of Lord Campbell's act that "every such action must be commenced within twelve calendar months after the death of such deceased person." In some states the time is limited from the date of the wrongful act or injury, while in a few instances no special limitation is contained in the statute, the period being determined by the general statute on the limitation of actions.[1]

The Limitation Absolute.

As the right of action is given subject to the limitation, the limitation is an inseparable part of the right itself. "This is not strictly a statute of limitation. It gives a right of action that would not otherwise exist. It must be accepted in all respects as the statute

[3] Entwhistle v. Feighner, 60 Mo. 214.

[4] Hudson v. Houser, 123 Ind. 309, 24 N. E. 243; Sherlock v. Alling, 44 Ind. 184.

[5] Forbes v. Snyder, 94 Ill. 374; Consolidated Ice-Mach. Co. v. Keifer, 134 Ill. 481, 25 N. E. 799.

§ 173. [1] DELAWARE, GEORGIA, IOWA, KENTUCKY, MICHIGAN, NEVADA, NORTH DAKOTA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, and WASHINGTON.

gives it." [2] A subsequent change in the period of limitation will not work an extension of the time within which an existing right of action may be enforced.[3] Since the time within which the suit may be brought operates as a limitation of the created liability, the limitation need not be pleaded, and, if it appears from the complaint that the action was not brought within the time limited, it is demurrable.[4]

It would seem to follow that no allegation would be sufficient to excuse delay in the commencement of the action, unless the language of the particular statute contained special provisions for exceptions and disabilities. This occurs in the statutes of Texas and Kentucky, where the ordinary disabilities are made available in this class of actions.[5] What constitutes a commencement of the suit must be determined by the statutes regulating practice in different states.[6] Where the limitation is to a certain period "after the death" or "after the act or omissions," there is no difficulty in deciding when the statute begins to run. But certain of the limitations are susceptible of different meanings, and must then be construed with the other provisions of the particular statute. Thus, under a statute limiting the time "within one year after the cause of action shall have arisen," it was held that the administrator must be appointed before

[2] Taylor v. Coal Co., 94 N. C. 525, approved in Best v. Town of Kinston, 106 N. C. 205, 10 S. E. 997. And in The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140, Waite, C. J., observed: "The statute creates a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone." And see Hill v. Town of New Haven, 37 Vt. 501.

[3] Pittsburgh, C. & St. L. R. Co. v. Hine, 25 Ohio St. 629; Benjamin v. Eldridge, 50 Cal. 612. See Commonwealth v. Boston & W. R. Corp., 11 Cush. (Mass.) 512; Commonwealth v. East Boston Ferry, 13 Allen (Mass.) 589.

[4] Hanna v. Railroad Co., 32 Ind. 113, approved in Jeffersonville, M. & I. R. Co. v. Hendricks, 41 Ind. 48. And see George v. Railway Co., 51 Wis. 603, 8 N. W. 374.

[5] Nelson v. Railway Co., 78 Tex. 621, 14 S. W. 1021. But where the children are adults the statute begins to run against them at once. Paschal v. Owen, 77 Tex. 583, 14 S. W. 203. And see Louisville & N. R. Co. v. Sanders, 86 Ky. 259, 5 S. W. 563.

[6] Under the IOWA Code the delivery of the notice to the sheriff, and not the filing of the petition, is the commencement of the action. Ewell v. Railroad Co., 29 Fed. 57. And see Parish v. Town of Eden, 62 Wis. 272, 22 N. W. 399.

the cause of action arose and the limitation began to run.[7] But, when the time was limited to a year "after the cause of action shall accrue," it was held that the time began to run at the death, because the right of action was given by the statute directly to the beneficiaries, without the intervention of an administrator.[8] And a proviso that the action must be begun "within two years" has been held to mean within two years from the death.[9] Where the limitation of this class of actions is left to be determined by the general statute on limitations, no general rule can be laid down; reference must be had to the decisions under the particular statute. Thus, in Iowa, the general statute places a limitation of two years "after their causes accrue" on "actions founded on injuries to the person," and the statute giving the action in case of death provides that "such action shall be deemed a continuing one, and to have accrued to such representative or successor at the same time it did to the deceased if he had survived," and it is held that the time begins to run with the injury.[10] But under a similar limitation in Kentucky it would appear that the time does not begin to run until the qualification of the administrator.[11]

Where, by express provision of statute, a notice is required before an action can be commenced against a municipality to recover for personal injuries, it is at least questionable if the giving of the notice is a condition precedent to the commencement of an action to recover for death resulting from such injuries. In New Hampshire it has been held that such notice is not necessary in case of death.[12]

[7] Andrews v. Railroad Co., 34 Conn. 57; Sherman v. Stage Co., 24 Iowa, 515. The latter decision was made under the provision of the Code that such actions should be barred two years "after their causes accrued," which has now been changed.

[8] Kennedy v. Burrier, 36 Mo. 128.

[9] Hanna v. Railroad Co., 32 Ind. 113.

[10] Ewell v. Railway Co., 29 Fed. 57. See, also, Sherman v. Stage Co., 22 Iowa, 556. So, also, in TENNESSEE. Fowlkes v. Railroad Co., 5 Baxt. (Tenn.) 663.

[11] Louisville & N. R. Co. v. Sanders, 86 Ky. 259, 5 S. W. 563. In the original act the action was to be commenced within one year from the death, and it was held that, unless the petition showed that the action was barred, the statute must be pleaded. Chiles v. Drake, 2 Metc. (Ky.) 146.

[12] Clark v. City of Manchester, 62 N. H. 577; Jewett v. Keene, 62 N. H. 701.

And in Wisconsin it has been held that a failure to give a notice within 90 days after the happening of the injury would not defeat an action by the administrator for the death, where the death occurred within 90 days after the happening of the injury.[13]

[13] McKeigue v. City of Janesville, 68 Wis. 50, 31 N. W. 298. See Parish v. Town of Eden, 62 Wis. 272, 22 N. W. 399.

CHAPTER XI.

NEGLIGENCE OF MUNICIPAL CORPORATIONS.

PUBLIC AND PRIVATE CORPORATIONS.

174. Public corporations are created and exist solely in the public interest, as fractional parts of the general government.

175. Private corporations owe their existence, at least in part, to the expectation of personal emolument.

Although the torts of private corporations form no part of the present discussion, it is essential that the distinction between public and private corporations be clearly drawn. Each is the creature of the legislature, but their powers, duties, and liabilities are entirely dissimilar. The essential distinction between the two classes is this: The private corporation possesses, at least partially, as the object of its existence, the advancement of private or personal interests, while the public corporation can, by the very conditions of its existence, entertain and foster no purpose which is not purely public in its character. Moreover, the private corporation is called into existence by the volition of the interested parties, assisted by the legislature, or in pursuance of its acts passed in that behalf. Public corporations are the passive offspring of the state, called into being at its pleasure, and holding their entire interests and franchises as the exclusive property and domain of the government itself.

In the case of the former the state enters into a contract, and, when its terms have been assented to by the incorporators, their rights are fixed and irrevocable, and cannot be impaired or abrogated by subsequent legislation.[1] But the relation existing between the state and a municipal or other purely public corporation is by no means that of contract, and, if certain constitutional limitations are excepted, the power of control which the legislature may exercise over it is practically unlimited.[2] In U. S. v. Baltimore & O. R. Co.[3] the court says: "A municipal corporation, like the city of Baltimore, is a representative not only of the state, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the state. The state may withdraw these local powers of government at pleasure, and may, through its legislature, or other appointed channels, govern the local territory as it governs the state at large. It may enlarge or contract its powers, or destroy its existence." [4]

PUBLIC CORPORATIONS—DEFINITION.

176. For the purposes of this chapter, public corporations are either

(a) Municipal corporations proper, voluntarily assuming the responsibilities incident to the association, or

(b) Quasi municipal corporations, consisting of political divisions, created for convenience, without the actual consent of their constituents.

Municipal corporations, properly speaking, are voluntary associations to which an actual, expressed consent has been given by the

§§ 174–175. [1] Dartmouth College v. Woodward, 4 Wheat. 518; 1 Dill. Mun. Corp. (3d Ed.) § 52.

[2] Dartmouth College v. Woodward, 4 Wheat. 518; Cheaney v. Hooser, 9 B. Mon. (Ky.) 330; People v. Morris, 13 Wend. (N. Y.) 325; Inhabitants of Yarmouth v. Inhabitants of North Yarmouth, 34 Me. 411; Girard v. City of Philadelphia, 7 Wall. 1; Tinsman v. Railroad Co., 26 N. J. Law, 148; City of Paterson v. Society for Establishing Useful Manufactures, 24 N. J. Law, 385; City of Clinton v. Cedar Rapids & M. R. R. Co., 24 Iowa, 455; Sloan v. State, 8 Blackf. (Ind.) 361.

[3] 17 Wall. 322.

[4] See, also, cases collected in 1 Dill. Mun. Corp. (3d Ed.) § 54, note.

people affected. The charters or enabling acts of corporations of this class confer upon them extended benefits and enlarged liabilities. Quasi municipal corporations are merely political divisions of the state, created for purposes of convenience in administering the general government. They are created without the volition or consent of the inhabitants of the territory involved, and are, therefore, more restricted in their powers, rights, and responsibilities. Counties, townships, school districts, and the New England towns belong to this class of corporations.

RIGHT OF ACTION.

177. A private action may be maintained against a municipal corporation for injury resulting from negligence in the performance of duties not essentially public in character, and intended for the special benefit of the locality and its inhabitants.[1]

§ 177. [1] City of Galveston v. Posnainsky, 62 Tex. 118. In this case Stayton, J., says: "Persons or corporations that voluntarily assume and undertake the performance of a work, even though it be quasi public in its character, ought to be held to impliedly contract that they will exercise due care in its performance, and for a neglect in this respect should be liable for the resulting damage. We do not wish, however, to be understood to assert that there is a contract between the state and a municipal corporation accepting a charter, but simply to assert that, when such a corporation accepts a charter, giving defined powers, the law imposes the duty of faithfully exercising them, and gives an action for misfeasance or neglect in this respect to any person who may be injured by such failure of duty." Curran v. City of Boston, 151 Mass. 505, 24 N. E. 781; Thayer v. City of Boston, 19 Pick. (Mass.) 511; Conway v. City of Beaumont, 61 Tex. 10; Barnes v. District of Columbia, 91 U. S. 541; Weightman v. Corporation of Washington, 1 Black, 39; Supervisors Rock Island Co. v. U. S., 4 Wall. 435; Chicago City v. Robbins, 2 Black, 418; Western College of Homeopathic Medicine v. City of Cleveland, 12 Ohio St. 375; Simmer v. City of St. Paul, 23 Minn. 408; Kobs v. City of Minneapolis, 22 Minn. 160; Reed v. City of Belfast, 20 Me. 246; City of Logansport v. Wright, 25 Ind. 513; Hannon v. St. Louis Co., 62 Mo. 313; Kiley v. City of Kansas, 87 Mo. 103; Noble v. City of Richmond, 31 Grat. (Va.) 271; Gilman v. Town of Laconia, 55 N. H. 130; Rowe v. City of Portsmouth, 56 N. H. 291; Meares v. Commissioners, 31 N. C. 73; Smoot v. Mayor, etc., 24 Ala. 112; Jones v. City of New Haven, 34 Conn. 1; O'Neill v. City of New Orleans, 30 La. Ann. 220; Wallace v. City of Muscatine, 4 G. Greene (Iowa) 373; Kenworthy v. Town of Ironton, 41 Wis.

It is a general principle that municipal corporations are not liable in private actions for omissions or neglect in the performance of a corporate or governmental duty imposed on them by law, when such city or other corporation derives no benefit therefrom in its corporate capacity, unless, of course, such action is given by statute.[2] And it should be here observed that, to determine the question of liability in any case, a true interpretation of the statutes under which the corporation is created is absolutely essential,[3] and in many instances the liability of a municipality depends exclusively upon the statute.[4]

As to what duties are public and governmental and what are private or corporate duties, there is a great lack of harmony in the courts, and the decisions do not furnish any clear basis of distinction. Judge Dillon says:[5] "This liability on the part of municipal corporations springs, as we think, from the particular nature of the duty enjoined, which must relate to the local or special interests

647; City of Helena v. Thompson, 29 Ark. 569; Western Saving Fund Soc. of Philadelphia v. City of Philadelphia, 31 Pa. St. 175; Erie City v. Schwingle, 22 Pa. St. 384; Anne Arundel County Com'rs v. Duckett, 20 Md. 469; Hewison v. City of New Haven, 37 Conn. 475; Town of Waltham v. Kemper, 55 Ill. 346; City of Springfield v. Le Claire, 49 Ill. 476; White v. Bond Co., 58 Ill. 298; City of Dayton v. Pease, 4 Ohio St. 80; Requa v. City of Rochester, 45 N. Y. 129; Conrad v. Village of Ithaca, 16 N. Y. 158; Rochester White Lead Co. v. City of Rochester, 3 N. Y. 463; Morey v. Town of Newfane, 8 Barb. (N. Y.) 645; Frederick v. City of Columbus, 58 Ohio St. 538, 51 N. E. 35; City of Belleville v. Hoffman, 74 Ill. App. 503; Vaughtman v. Town of Waterloo, 14 Ind. App. 649, 43 N. E. 476; Brink v. Borough of Dunmore, 174 Pa. St. 395, 34 Atl. 598; Mersey Docks & Harbour Board v. Penhallow, L. R. 1 H. L. 93; Scott v. Manchester, 37 Eng. Law & Eq. 495.

[2] Curran v. City of Boston, 151 Mass. 505, 24 N. E. 781; Oliver v. City of Worcester, 102 Mass. 489. And see cases cited in note 1, supra.

[3] Snider v. City of St. Paul, 51 Minn. 466, 53 N. W. 763; Gibbs v. Docks, 3 Hurl. & N. 164; City of Detroit v. Putnam, 45 Mich. 263, 7 N. W. 815.

[4] Reed v. City of Madison, 83 Wis. 171, 53 N. W. 547; Kollock v. City of Madison, 84 Wis. 458, 54 N. W. 725; Stilling v. Town of Thorp, 54 Wis. 528, 11 N. W. 906; Roberts v. City of Detroit, 102 Mich. 64, 60 N. W. 450. And the right to sue is subject to limitation in municipal charter requiring notice of injury, and limiting time within which action may be brought. Nichols v. City of Minneapolis, 30 Minn. 545, 16 N. W. 410; Morgan v. City of Des Moines, 54 Fed. 456; Berry v. Town of Wauwatosa, 87 Wis. 401, 58 N. W. 751. And, generally, see Bacon v. City of Boston, 154 Mass. 100, 28 N. E. 9.

[5] Dill. Mun. Corp. (4th Ed.) § 967.

of the municipality, and be imperative, and not discretionary, legislative, or judicial; and from the means given for its performance, which must be ample, or such as were considered so by the legislators, and not from the supposed circumstance that they received and accepted their charters or grants of powers and franchises upon an implied contract with the state that they would discharge their corporate duties, and that this contract inures to the benefit of every individual interested in its performance." Referring, however, to the distinction attempted to be drawn between negligence of the servants of a town or city in the performance of a duty imperatively required and one voluntarily assumed by authority of the statute, Mr. Justice Allen observes:[6] "In our opinion, this distinction does not affect the resulting liability. There are many provisions of statute by which all municipal corporations must do certain things and may do certain other things, in each instance with a view solely to the general good. In looking at these provisions in detail, it is impossible to suppose that the legislature have intended to make this distinction a material one in determining the question of corporate liability to private actions. For example, towns must maintain pounds, guide posts, and burial grounds, and may establish and maintain hospitals, workhouses, or almshouses. * * * In all these cases the duty is imposed or the authority conferred for the general benefit. The motive and the object are the same, though in some instances the legislature determines finally the necessity or expediency, and in others it leaves the necessity or expediency to be determined by the towns themselves. But when determined, and when the service has been entered upon, there is no good reason why a liability to a private action should be imposed when a town voluntarily enters upon such a beneficial work, and withheld when it performs the service under the requirement of an imperative law." Although, as already stated, it is not possible to reconcile all the decisions in actions where it has been sought to hold municipalities responsible for injuries to persons or property sustained through negligence or wrongdoing of the cities or their agents, it is believed that most of the cases can be distributed into general classes, which have come to be quite generally recognized.

[6] Tindley v. City of Salem, 137 Mass. 171.

LIABILITY FOR INJURIES.

178. A municipal corporation is liable

(a) When the act itself has a direct tendency, regardless of the manner of performance, to injure property, or is of such a nature that unskillful performance will surely result in such injury; or

(b) When the act is undertaken voluntarily in anticipation of a direct profit to the corporation, including those cases where the pecuniary interest to the corporation consists in avoiding liability and expense, and in economical construction and maintenance.

When the Act Inevitably Results in Injury.

The municipality is liable to respond in damages to the person whose property is injured when such injury is the direct and natural result of the act complained of, and the act is not performed under special legislative sanction.[1] Where the city of Milwaukee, under special authority of the legislature, made certain harbor improvements in a sufficiently skillful manner, but the natural tendency of which was to injure plaintiff's property, no recovery was allowed.[2] A common instance of this class of cases is that of trespass committed by the city in entering, before condemnation, on private property, for municipal purposes,—as constructing a sewer.[3] This proposition is elementary in character, and does not properly fall within the subject under consideration, as it does not involve any question of negligence. The performance of the act itself, however it is done, must necessarily cause damage to the owner of the property.

§ 178. [1] Proprietors of Locks & Canals on Merrimack River v. City of Lowell, 7 Gray (Mass.) 223 (discharging sewer and drains into plaintiff's canals); Haskell v. New Bedford, 108 Mass. 208 (discharging filth by sewer into plaintiff's docks).

[2] Alexander v. City of Milwaukee, 16 Wis. 247. In this case it would, at least, seem debatable that the plaintiff was entitled to compensation under the constitutional prohibition against the "taking" of property. See Pumpelly v. Canal Co., 13 Wall. 166.

[3] Hildreth v. City of Lowell, 11 Gray (Mass.) 345; Ashley v. City of Port Huron, 35 Mich. 296. Cf. Montgomery v. Gilmer, 33 Ala. 116, with Wilson v. Mayor, etc., 1 Denio (N. Y.) 595.

Negligent Performance of Act Naturally Inducing Injury.

Closely bordering on acts of the foregoing class are those of such a nature that their unskillful or negligent performance would naturally result in injury to private property. Thus, in the construction of bridges over natural streams, it is evident that the failure to make due provision for the passage of the water will inevitably result in damage to those whose property shall be inundated in consequence. The general law in such cases is thus stated by Shaw, C. J., in a Massachusetts case:[4] "We take it to be well settled in this commonwealth that in all cases where a highway, turnpike, bridge, town way, or other way is laid across a natural stream and water course it is the duty of those who use this franchise or privilege to make provision by open bridges, culverts, or other means for the free current of the water, so that it shall not be obstructed and pent up to flow back on private lands or public ways." It is held in many cases, and is sometimes stated to be the general law, that municipalities are not liable for damage resulting from defective plans of their agents or officers, but are liable only for damages resulting from the negligent execution thereof.[5] The argument is something as follows: The city must act through the agency

[4] Lawrence v. Inhabitants of Fairhaven, 5 Gray (Mass.) 110. Insufficient and obstructed culvert, Parker v. City of Lowell, 11 Gray (Mass.) 353; Rochester White Lead Co. v. City of Rochester, 3 N. Y. 463; Weightman v. Washington Corp., 1 Black. 39.

[5] Van Pelt v. City of Davenport, 42 Iowa, 308; Mills v. City of Brooklyn, 32 N. Y. 489; Lynch v. Mayor, etc., 76 N. Y. 61; Smith v. New York, 66 N. Y. 295; Carr v. Northern Liberties, 35 Pa. St. 324; Child v. City of Boston, 4 Allen (Mass.) 41; Allen v. City of Boston, 159 Mass. 324, 34 N. E. 519; Darling v. Bangor, 68 Me. 108; City of Kansas City v. Brady, 52 Kan. 297, 34 Pac. 884; Rozell v. City of Anderson, 91 Ind. 591; Johnston v. District of Columbia, 1 Mackey (D. C.) 427; City of Denver v. Capelli, 4 Colo. 25; Hardy v. City of Brooklyn, 7 Abb. (N. C.) 403; Collins v. City of Philadelphia, 93 Pa. St. 272; Mayor, etc., of Americus v. Eldridge, 64 Ga. 524; Springfield v. Spence, 39 Ohio St. 665; City of Aurora v. Love, 93 Ill. 521; Ford v. Town of Braintree, 64 Vt. 144, 33 Atl. 633; Los Angeles Cemetery Ass'n v. City of Los Angeles, 103 Cal. 461, 37 Pac. 375. But cf. City of Evansville v. Decker, 84 Ind. 325; Aicher v. City of Denver, 10 Colo. App. 413, 52 Pac. 86; Knostman & Peterson Furniture Co. v. City of Davenport, 99 Iowa, 589, 68 N. W. 887; Bealafeld v. Borough of Verona, 188 Pa. St. 627, 41 Atl. 651. Liability for failure to anticipate excessive rainfall, Hession v. City of Wilmington, 1 Marv. 122, 40 Atl. 749; City of Peoria v. Adams, 72 Ill. App. 662.

of others. If it uses due care in the selection of its officers, it has discharged its duty, and is not chargeable for their negligent acts or omissions;[6] the adoption of the plans of such officers being a legislative or discretionary function. It is believed that this principle is not supported by the weight of authority or by sound reason. It must be remembered that, coupled with the powers delegated to municipalities, there exist, in many instances, duties to achieve certain tangible results. Where the power and the duty are thus combined, the exercise of the function ceases to be legislative or judicial, and becomes essentially ministerial in its character; and a failure to achieve the prescribed result may entail upon the city a liability for consequent injury.[7] In many of the states, where the rule exempting the city from liability resulting from the adoption of defective plans is considered well established, the decisions are at variance, or the earlier decisions approving the rule have been modified or overruled.[8] Judge Dillon thus states the law on this point:[9] "* * * The later cases tend strongly to establish, and may, we think, be said to establish, and, in our judgment, rightly to establish, that a city may be liable on the ground of negligence in respect of public sewers solely constructed and controlled by it, where, by reason of their insufficient size, clearly demonstrated by experience, they result, under ordinary conditions, in overflowing the private property of adjoining or connecting owners

[6] Van Pelt v. City of Davenport, 42 Iowa, 308.

[7] Blyhl v. Village of Waterville, 57 Minn. 115, 58 N. W. 817; City of Lansing v. Toolan, 37 Mich. 152; Conlon v. City of St. Paul, 70 Minn. 216, 72 N. W. 1073; City of Chicago v. Seben, 165 Ill. 371, 46 N. E. 244; Oliver v. City of Worcester, 102 Mass. 489; Emery v. City of Lowell, 104 Mass. 13; Merrifield v. City of Worcester, 110 Mass. 216; City Council of Augusta v. Lombard, 99 Ga. 282, 25 S. E. 772; Boyd v. Town of Derry (N. H.) 38 Atl. 1005; Seaman v. City of Marshall (Mich.) 74 N. W. 484; Peck v. City of Michigan City, 149 Ind. 670, 49 N. E. 800; City of Litchfield v. Southworth, 67 Ill. App. 398; King v. City of Kansas City, 58 Kan. 334, 48 Pac. 88; Ostrander v. City of Lansing, 111 Mich. 693, 70 N. W. 332; Donahoe v. City of Kansas City, 136 Mo. 657, 38 S. W. 571.

[8] Cf. Gould v. City of Topeka, 32 Kan. 485, 4 Pac. 822, with City of Kansas City v. Brady, 52 Kan. 297, 34 Pac. 884. Cf. Van Pelt v. City of Davenport, 42 Iowa, 308, with Knostman & Peterson Furniture Co. v. City of Davenport, 99 Iowa, 589, 68 N. W. 887.

[9] 2 Dill. Mun. Corp. (5th Ed.) p. 1328.

with sewage; and that the principle of exemption from liability for defect or want of efficiency of plan does not, as more fully stated below, extend to such a case." And it is believed that the true rule may safely be made even stronger than this, and require of the municipality the exercise of reasonable care in the achievement of a result of this character.

Ministerial Acts Anticipating Pecuniary Profit.

In the discharge of those duties and powers which are distinctly public, appertaining to the municipality as a division of the general government of the state, no liability attaches,[10] but municipalities are not exempt from the liability to which other corporations are subject for negligence in managing or dealing with property or rights held by them for their own advantage or emolument.[11] This principle is commonly illustrated in municipal construction and control of water works [12] and gas works.[13] And where the city rented a public building, and a person was injured by falling into an excavation negligently left open on the premises, it was liable.[14] So, also, where the city owned and operated a toll bridge over the Savannah river, it was responsible for injuries received through its defective condition.[15] Under the foregoing head will also fall that numerous class of cases involving municipal liability where the pecuniary gain reverting to the corporation is indirect; that is, where it consists in avoiding liability and expense, and in economical construction and maintenance. Even in the absence of special statute creating liability, it is now generally held that a municipal corpora-

[10] See "Legislative Duties," post, pp. 448–451.

[11] Oliver v. City of Worcester, 102 Mass. 489; Child v. City of Boston, 4 Allen (Mass.) 41; Emery v. City of Lowell, 104 Mass. 13; Merrifield v. City of Worcester, 110 Mass. 216; City Council of Augusta v. Lombard, 99 Ga. 282, 25 S. E. 772; Hill v. City of Boston, 122 Mass. 344; Mayor, etc., of New York v. Bailey, 2 Denio (N. Y.) 433; Collins v. Inhabitants of Greenfield, 172 Mass. 78, 51 N. E. 454.

[12] City of Philadelphia v. Gilmartin, 71 Pa. St. 140; Smith v. City of Philadelphia, 81 Pa. St. 38.

[13] Scott v. Mayor, etc., 37 Eng. Law & Eq. 495.

[14] Oliver v. City of Worcester, 102 Mass. 489. And see Neff v. Inhabitants of Wellesley, 148 Mass. 487, 20 N. E. 111.

[15] City Council of Augusta v. Hudson, 88 Ga. 599, 15 S. E. 678; Doherty v. Inhabitants of Braintree, 148 Mass. 495, 20 N. E. 106.

tion having the exclusive control of the streets,[16] sidewalks,[17] bridges, and sewers[18] within its limits, or, at least, if the means for performing the duty are placed at its disposal,[19] is obliged to construct and use ordinary diligence to keep them in a reasonably safe condition;[20] and if it unnecessarily neglects the duty, and injuries result to any person by this neglect, the corporation is liable for the damages sustained.[21] The true conception of the basis of this responsibility would seem to lie in considering duties of this

[16] Waggener v. Town of Point Pleasant, 42 W. Va. 798, 26 S. E. 352; City of Jacksonville v. Smith, 24 C. C. A. 97, 78 Fed. 292; Town of Worthington v. Morgan, 17 Ind. App. 603, 47 N. E. 235; City of Dallas v. McAllister (Tex. Civ. App.) 39 S. W. 173.

[17] Village of Sciota v. Norton, 63 Ill. App. 530; Hutchings v. Inhabitants of Sullivan, 90 Me. 131, 37 Atl. 883; Town of Kentland v. Hagen (Ind. App.) 46 N. E. 43; City of Ord v. Nash, 50 Neb. 335, 69 N. W. 964. Ice on sidewalks. City of Virginia v. Plummer, 65 Ill. App. 419; Huston v. City of Council Bluffs, 101 Iowa, 33, 69 N. W. 1130; Ellis v. City of Lewiston, 89 Me. 60, 35 Atl. 1016; Stapleton v. City of Newburgh, 9 App. Div. 39, 41 N. Y. Supp. 96; Conklin v. City of Elmira, 11 App. Div. 402, 42 N. Y. Supp. 518; Town of Boswell v. Wakley, 149 Ind. 64, 48 N. E. 637; Town of Williamsport v. Lisk (Ind. App.) 52 N. E. 628.

[18] City of Chicago v. Seben, 165 Ill. 371, 46 N. E. 244; Donahoe v. City of Kansas City, 136 Mo. 657, 38 S. W. 571.

[19] Shartle v. City of Minneapolis, 17 Minn. 308 (Gil. 284). In action to recover damage caused by defective sewer, the financial inability of the city to repair must be pleaded. Netzer v. City of Crookston, 59 Minn. 244, 61 N. W. 21. But see Hoyt v. City of Danbury, 69 Conn. 341, 37 Atl. 1051 (under statute); Lord v. City of Mobile, 113 Ala. 360, 21 S. E. 366.

[20] Byerly v. City of Anamosa, 79 Iowa, 204, 44 N. W. 359; Kellogg v. Village of Janesville, 34 Minn. 132, 24 N. W. 359; Delger v. City of St. Paul, 14 Fed. 567; Clarke v. City of Richmond, 83 Va. 355, 5 S. E. 369; Albrittin v. Mayor, etc., 60 Ala. 486; City of Denver v. Dunsmore, 7 Colo. 328, 3 Pac. 705; Grove v. City of Ft. Wayne, 45 Ind. 429; Saulsbury v. Village of Ithaca, 94 N. Y. 27; Hiner v. City of Fond du Lac, 71 Wis. 74, 36 N. W. 632; Cleveland v. King, 132 U. S. 295, 10 Sup. Ct. 90; Browning v. City of Springfield, 17 Ill. 143; Goldschmid v. City of New York, 14 App. Div. 135, 43 N. Y. Supp. 447; City of South Omaha v. Powell, 50 Neb. 798, 70 N. W. 391; Scanlan v. City of Watertown, 14 App. Div. 1, 43 N. Y. Supp. 618; City of Decatur v. Besten, 169 Ill. 340, 48 N. E. 186; Graham v. Town of Oxford, 105 Iowa, 705, 75 N. W. 473; Hall v. City of Austin (Minn.) 75 N. W. 1121; City of Guthrie v. Swan, 5 Okl. 779, 51 Pac. 562.

[21] Shartle v. City of Minneapolis, 17 Minn. 308 (Gil. 284); Mooney v. Borough of Luzerne, 186 Pa. St. 161, 40 Atl. 311, 42 Wkly. Notes Cas. 279.

class to be ministerial in their nature, and assumed by the corporation in consideration of the privileges conferred by its charter.[22] But negligence in the manner of construction and maintenance must not be confused with an entire neglect or omission to construct; for, when the power to make improvements of this nature is discretionary with the corporation, the failure to exercise the power cannot be made the basis of liability.[23] Neither can an action of this class be sustained against so-called "quasi municipal corporations," whose liability is considered in another place.[24]

If the financial inability of the city to construct and keep in repair its various equipment is relied upon as a defense, it must be pleaded.[25] There is no implied warranty as to the safe condition of either the streets, sidewalks, bridges, or other works and ways of a municipal corporation; nor is the latter liable to respond in damages for every injury that is sustained by reason of defects existing therein.[26] The extent of the requirement is that the city use reasonable care to secure the safety of persons who are in the exercise of ordinary care and prudence. Thus, regarding the accumulations of ice and snow upon sidewalks, although a few of the cases are arbitrary and extreme, the consensus of the decisions does not impose liability for a mere slippery condition, occasioned by ice or snow,[27] but the accumulation must be of such quantity and nature as to cause a virtual obstruction or impediment.[28]

[22] Hill v. City of Boston, 122 Mass. 344; Sawyer v. Corse, 17 Grat. (Va.) 230; City of Richmond v. Long's Adm'rs, 17 Grat. (Va.) 375, 379.

[23] Wilson v. Mayor, etc., 1 Denio (N. Y.) 595; Lacour v. Mayor, etc., 3 Duer (N. Y.) 406.

[24] See post, pp. 454–457.

[25] Netzer v. City of Crookston, 59 Minn. 244, 61 N. W. 21. And see Hoyt v. City of Danbury, 69 Conn. 341, 37 Atl. 1051. And it is no defense that funds are lacking through failure to impose the legitimate tax for that purpose. It must appear that it has exhausted its powers to raise revenue. Lord v. City of Mobile, 113 Ala. 360, 21 South. 366.

[26] Miller v. City of St. Paul, 38 Minn. 134, 36 N. W. 271.

[27] Nason v. City of Boston, 14 Allen (Mass.) 508; Cook v. City of Milwaukee, 24 Wis. 270; City of Chicago v. McGiven, 78 Ill. 347; Stone v. Inhabitants of Hubbardston, 100 Mass. 50; Broburg v. City of Des Moines, 63 Iowa, 523, 19 N. W. 340; Kinney v. City of Troy, 108 N. Y. 567, 15 N. E. 728; Smyth v. City of Bangor, 72 Me. 249; Henkes v. City of Minneapolis, 42

[28] See note 28 on following page.

Contributory negligence of the injured party is, of course, a good defense, and although, ordinarily, a person who deliberately attempts to pass over a place which he knows to be dangerous cannot recover for injuries incurred thereby,[29] the rule is not absolute. Thus, one may know of the defective condition of a sidewalk, and yet not be guilty of negligence in attempting to pass over it, provided he exercised care commensurate with the circumstances.[30] The weather records of the United States signal service are competent evidence

Minn. 530, 44 N. W. 1026; Seeley v. Town of Litchfield, 49 Conn. 134; Grossenbach v. City of Milwaukee, 65 Wis. 31, 26 N. W. 182; Borough of Mauch Chunk v. Kline, 100 Pa. St. 119; Chase v. City of Cleveland, 44 Ohio St. 505, 9 N. E. 225; City of Chicago v. Richardson, 75 Ill. App. 198; Kleng v. City of Buffalo, 156 N. Y. 700, 51 N. E. 1091; Peard v. City of Mt. Vernon, 158 N. Y. 681, 52 N. E. 1125; Hyer v. City of Janesville, 101 Wis. 371, 77 N. W. 729; Newton v. City of Worcester, 169 Mass. 516, 48 N. E. 274; Wesley v. City of Detroit (Mich.) 76 N. W. 104; City of Lynchburg v. Wallace, 95 Va. 640, 29 S. E. 675.

[28] McLaughlin v. City of Corry, 77 Pa. St. 109; Savage v. City of Bangor, 40 Me. 176; Adams v. Town of Chicopee, 147 Mass. 440, 18 N. E. 231; Gillrie v. City of Lockport, 122 N. Y. 403, 25 N. E. 357; Huston v. City of Council Bluffs, 101 Iowa, 33, 69 N. W. 1130; Ellis v. City of Lewiston, 89 Me. 60, 35 Atl. 1016; Walsh v. City of Buffalo, 17 App. Div. 112, 44 N. Y. Supp. 942; McGowan v. City of Boston, 170 Mass. 384, 49 N. E. 633; Waltemeyer v. Kansas City, 71 Mo. App. 354; Thompson v. Village of Saratoga Springs, 22 App. Div. 186, 47 N. Y. Supp. 1032; Miller v. City of Bradford, 186 Pa. St. 164, 40 Atl. 409; Salzer v. City of Milwaukee, 97 Wis. 471, 73 N. W. 20.

[29] Hudon v. City of Little Falls, 68 Minn. 463, 71 N. W. 678; Town of Salem v. Walker, 16 Ind. App. 687, 46 N. E. 90; Lane v. City of Lewiston, 91 Me. 292, 39 Atl. 999; Rogers v. City of Bloomington (Ind. App.) 52 N. E. 242; Barce v. City of Shenandoah, 106 Iowa, 426, 76 N. W. 747; Boyle v. Borough of Mahanoy City, 187 Pa. St. 1, 40 Atl. 1093, 42 Wkly. Notes Cas. 423.

[30] Schwingschlegl v. City of Monroe, 113 Mich. 683, 72 N. W. 7; Culverson v. City of Maryville, 67 Mo. App. 343; McPherson v. City of Buffalo, 13 App. Div. 502, 43 N. Y. Supp. 658; Manross v. City of Oil City, 178 Pa. St. 276, 35 Atl. 959; City of Highlands v. Raine, 23 Colo. 295, 47 Pac. 283; Lichtenberger v. Incorporated Town of Meriden, 100 Iowa, 221, 69 N. W. 424; Fox v. City of Chelsea, 171 Mass. 297, 50 N. E. 622; Gutkind v. City of Elroy, 97 Wis. 649, 73 N. W. 325; Village of Coffeen v. Lang, 67 Ill. App. 359; Village of Noble v. Hanna, 74 Ill. App. 564; Graham v. Town of Oxford, 105 Iowa, 705, 75 N. W. 473; Chilton v. City of St. Joseph, 143 Mo. 192, 44 S. W. 766; City of Hillsboro v. Jackson (Tex. Civ. App.) 44 S. W. 1010; Giffen v. City of Lewiston (Idaho) 55 Pac. 545.

on the question of the amount of precipitation of rain or snow,[31] as well as on questions of temperature and mean or normal conditions. A city is under no obligation to light its streets unless its charter expressly imposes the duty, although the fact as to whether it is lighted or not may, in certain cases, have a material bearing upon the question of negligence, for the manifest reason that a street in a given condition may be reasonably safe if lighted, but dangerous if unlighted.[32]

As a general proposition, the duty is not incumbent upon a city to place fences, rails, or barriers on the margins of its streets,[33] unless special circumstances make such action a reasonable precaution.[34]

Improper Occupation and Use of Streets.

As it is the general duty of the city to keep its streets and sidewalks in a reasonably safe condition, it follows that any obstruction, structure, or appurtenance placed or allowed to remain on or near them by permission of the city, actual or implied, and which renders their use dangerous, may impose liability on the municipality, if injury results therefrom.[35] It is not necessary that an obstruction in a highway should endanger any particular mode of

[31] Evanston v. Gunn, 99 U. S. 660.

[32] Randall v. Railroad Co., 106 Mass. 276; Miller v. City of St. Paul, 38 Minn. 134, 36 N. W. 271; McHugh v. City of St. Paul, 67 Minn. 441, 70 N. W. 5; City of Chicago v. McDonald, 57 Ill. App. 250; City of Freeport v. Isbell, 83 Ill. 440; Oliver v. City of Denver (Colo. App.) 57 Pac. 729.

[33] Murphy v. Gloucester, 105 Mass. 470; Puffer v. Orange, 122 Mass. 389; McHugh v. City of St. Paul, 67 Minn. 441, 70 N. W. 5; O'Malley v. Borough of Parsons (Pa. Sup.) 43 Atl. 384; Crafter v. Railway Co., L. R. 1 C. P. 300. But as to passages by excavations, etc., see City of Chicago v. Gallagher, 44 Ill. 295.

[34] Burnham v. City of Boston, 10 Allen (Mass.) 290; Blaisdell v. City of Portland, 39 Me. 113; Drury v. Inhabitants of Worcester, 21 Pick. (Mass.) 44; City of Freeport v. Isbell, 83 Ill. 440; Hey v. City of Philadelphia, 81 Pa. St. 44; O'Leary v. City of Mankato, 21 Minn. 65; City of Chicago v. Gallagher, 44 Ill. 295; Ray v. City of Poplar Bluff, 70 Mo. App. 252.

[35] Callanan v. Gilman, 107 N. Y. 360, 14 N. E. 264; Yates v. Town of Warrenton, 84 Va. 337, 4 S. E. 818; State v. Merritt, 35 Conn. 314; Cohen v. Mayor, etc., 113 N. Y. 532, 21 N. E. 700; State v. Berdetta, 73 Ind. 185; Com. v. Blaisdell, 107 Mass. 234; State v. Woodward, 23 Vt. 92; City of Henderson v. Burke (Ky.) 44 S. W. 422.

public travel in order to be a defect subjecting a municipality to responsibility to one injured thereby. It is sufficient that the obstruction makes dangerous any mode of travel which the public has a right to use.[36] But this responsibility does not attach when the user is an improper one.[37] Thus, liability may rest on the city for injuries caused by signs, awnings, sheds, or cornices,[38] and it is no defense that the obstruction was placed there by a third person.[39] If, however, the obstruction has been authorized by act of the legislature, it cannot constitute a nuisance.[40]

A similar duty is imposed upon cities in regard to objects which, in their nature, are calculated to frighten horses. If such an object is allowed to remain upon or near the street after its presence has become known, or, in the exercise of reasonable diligence, should have become known, to the authorities, the city will be liable for injuries resulting from fright thereby caused to horses ordinarily tractable.[41] In the various cases of liability before mentioned it is immaterial that the street where the injury occurred had not been legally laid out or dedicated. If the city has treated the thorough-

[36] Powers v. City of Boston, 154 Mass. 60, 27 N. E. 995. Bicycles, Wheeler v. City of Boone (Iowa) 78 N. W. 909.

[37] Racing, McCarthy v. Portland, 67 Me. 167; Sindlinger v. City of Kansas City, 126 Mo. 315, 28 S. W. 857; playing, Blodgett v. City of Boston, 8 Allen (Mass.) 237; Jackson v. City of Greenville, 72 Miss. 220, 16 S. W. 382.

[38] Drake v. City of Lowell, 13 Metc. (Mass.) 292 (awning); Grove v. City of Ft. Wayne, 45 Ind. 429 (cornice); Wells v. City of Brooklyn, 9 App. Div. 61, 41 N. Y. Supp. 143 (show case); Chase v. City of Lowell, 151 Mass. 422, 24 N. E. 212; Bieling v. City of Brooklyn, 120 N. Y. 98, 24 N. E. 389; Bohen v. City of Waseca, 32 Minn. 176, 19 N. W. 730 (awning); Jones v. City of New Haven, 34 Conn. 1 (dead limb of tree).

[39] Caton v. City of Sedalia, 62 Mo. App. 227.

[40] Cushing v. City of Boston, 128 Mass. 330; Com. v. Capp, 48 Pa. St. 53; City of North Vernon v. Voegler, 103 Ind. 327, 2 N. E. 821.

[41] McKee v. Bidwell, 74 Pa. St. 218; City of Chicago v. Hoy, 75 Ill. 530 (dead animal); Cushing v. Bedford, 125 Mass. 526 (red drinking trough); Smith v. Inhabitants of Wendell, 7 Cush. (Mass.) 498 (stones); Ouverson v. City of Grafton, 5 N. D. 281, 65 N. W. 676 (a threshing machine); City of Mt. Vernon v. Hoehn (Ind. App.) 53 N. E. 654 (mowing machine in street). But cf. Sparr v. City of St. Louis, 4 Mo. App. 573, where plaintiff was not allowed to recover for injuries caused by his horse taking fright at a steam street-mending machine. Lane v. City of Lewiston, 91 Me. 292, 39 Atl. 999.

fare as a public street, the duty to keep it in reasonably safe condition is imposed.[42]

Giving Notice of Injury.

The provision, either by statute or charter, is now very general throughout the United States that, prior to the commencement of an action against the city to recover for personal injuries, a formal notice, of varying requirements, shall be served upon the city. Such provisions are constitutional, and compliance with their provisions is a condition precedent to the right of action.[43] Nor can the municipality waive this compliance.[44] But a substantial compliance with the requirements of the provision is sufficient.[45] It would seem that such compliance—the giving of the notice—should be pleaded,[46] although in some states the failure to do so does not render the complaint demurrable.[47]

It must be borne in mind, as modifying and applying to all that has been said respecting the duties of municipalities regarding the construction and care of their streets and sidewalks, that the city

[42] Phelps v. City of Mankato, 23 Minn. 277; Manderschid v. City of Dubuque, 25 Iowa, 108; Todd v. City of Troy, 61 N. Y. 506; Coates v. Town of Canaan, 51 Vt. 131; Johnson v. City of Milwaukee, 46 Wis. 568, 1 N. W. 187; Steel v. Borough of Huntingdon (Pa. Sup.) 43 Atl. 398.

[43] Kellogg v. City of New York, 15 App. Div. 326, 44 N. Y. Supp. 39; City of Ft. Worth v. Shero (Tex. Civ. App.) 41 S. W. 704.

[44] Starling v. Incorporated Town of Bedford, 94 Iowa, 194, 62 N. W. 674.

[45] Stedman v. City of Rome, 88 Hun, 279, 34 N. Y. Supp. 737; Coffin v. Inhabitants of Palmer, 162 Mass. 192, 38 N. E. 509; Hughes v. City of Lawrence, 160 Mass. 474, 36 N. E. 485. Cf. last case with Gardner v. City of New London, 63 Conn. 267, 28 Atl. 42; Laue v. City of Madison, 86 Wis. 453, 57 N. W. 93; Carstesen v. Town of Stratford, 67 Conn. 428, 35 Atl. 276; Hutchings v. Inhabitants of Sullivan, 90 Me. 131, 37 Atl. 883. Insufficient notice, see Driscoll v. City of Fall River, 163 Mass. 105, 39 N. E. 1003; Dolan v. City of Milwaukee, 89 Wis. 497, 61 N. W. 564; Van Loan v. Village of Lake Mills, 88 Wis. 430, 60 N. W. 710; Kennedy v. City of New York, 18 Misc. Rep. 303, 41 N. Y. Supp. 1077; Kelley v. City of Minneapolis (Minn.) 79 N. W. 653; Lyons v. City of Red Wing (Minn.) 78 N. W. 868. Failure to give notice excused. Barclay v. City of Boston, 167 Mass. 596, 46 N. E. 113; but see Saunders v. City of Boston, 167 Mass. 595, 46 N. E. 98.

[46] Pardey v. Incorporated Town of Mechanicsville, 101 Iowa, 266, 70 N. W. 189.

[47] Frisby v. Town of Marshall, 119 N. C. 570, 26 S. E. 251; Hawley v. City of Johnstown, 40 App. Div. 568, 58 N. Y. Supp. 49.

is liable only for negligence, and is held only to the exercise of reasonable care in their construction and maintenance, and to reasonable diligence in the discovery and remedy of defects.[48]

ALTERATION OF GRADES.

179. In the absence of any express legislative provision, a municipality is not liable for injuries to abutting property, resulting from change of grade, repairs, or improvement of streets, provided that the city uses reasonable care and skill in the performance of the work, and that it is authorized by statute.[1]

In Reining v. New York, L. & W. Ry. Co.,[2] Andrews, J., says: "The cases of change of grade furnish apposite illustrations. They proceed on the ground that individual interests in streets are subordinate to public interests, and that a lot owner, although he may have built upon and improved his property with a view to the existing and established grade of the street, and relying upon its continuance, has no legal redress for any injury to his property, however serious, caused by a change of grade, provided only that the change is made under lawful authority. This, it is held, is not a taking of the abutting owner's property, and the injury requires

[48] Rapho Tp. v. Moore, 68 Pa. St. 404; Todd v. City of Troy, 61 N. Y. 506; Hume v. City of New York, 47 N. Y. 639; Dewey v. City of Detroit, 15 Mich. 307; Doulon v. City of Clinton, 33 Iowa, 397; Mayor, etc., of New York v. Sheffield, 4 Wall. 189; City of Centralia v. Krouse, 64 Ill. 19.

§ 179. [1] Callender v. Marsh, 1 Pick. (Mass.) 418; Fellowes v. City of New Haven, 44 Conn. 240; Brown v. City of Lowell, 8 Metc. (Mass.) 172; City of Reading v. Keppleman, 61 Pa. St. 233; City of Lafayette v. Spencer, 14 Ind. 399; Radcliff's Ex'rs v. Brooklyn, 4 N. Y. 195; St. Peter v. Denison, 58 N. Y. 416; Talbot v. Railroad Co., 151 N. Y. 155, 45 N. E. 382; City of Quincy v. Jones, 76 Ill. 231; Wakefield v. Newell, 12 R. I. 75; Mitchell v. City of Rome, 49 Ga. 29; Hovey v. Mayo, 43 Me. 322; Alden v. City of Minneapolis, 24 Minn. 254; Skinner v. Bridge Co., 29 Conn. 523; In re Ehrsam, 37 App. Div. 272, 55 N. Y. Supp. 942; McCray v. Town of Fairmont (W. Va.) 33 S. E. 245. Per contra, City of Cincinnati v. Penny, 21 Ohio St. 499. And the doctrine has been qualified in Kentucky. City of Louisville v. Mill Co., 3 Bush (Ky.) 416; Kemper v. City of Louisville, 14 Bush (Ky.) 87; City of Louisville v. Hegan (Ky.) 49 S. W. 532.

[2] 128 N. Y. 157, at page 165, 28 N. E. 642.

no compensation." A more simple explanation of the foundation of this doctrine is thus given by Parker, C. J., in Callender v. Marsh: [3] "Those who purchase house lots bordering upon streets are supposed to calculate the chance of such elevations and reductions as the increasing population of a city may require in order to render the passage to and from the several parts of it safe and convenient; and, as their purchase is always voluntary, they may indemnify themselves in the price of the lot which they buy, or take the chance of future improvements, as they see fit. * * * Every one who purchases a lot upon the summit or on the decline of a hill is presumed to foresee the changes which public necessity or convenience may require, and may avoid or provide against a loss. Neither does the property right of the adjacent owner give him any right of lateral support in the material of the street, even by prescription.[4] The suitableness of the adopted grade is immaterial, and will not be inquired into by the court.[5] When the charter of the city provides for assessment of damage and condemnation before the proposed change is undertaken, this constitutes a condition precedent, and must be observed.[6]

Public Buildings.

The principles governing the liability of cities for injuries occurring by reason of defects in the construction and operation of public buildings are in no way different from those which determine the corporate liability in the performance of other public functions, the proposition being that no private action, unless authorized by express statute, can be maintained against a city for the neglect of a public duty imposed upon it by law for the benefit of the public, and from the performance of which the corporation receives no

[3] 1 Pick. (Mass.) 418, at page 431.

[4] City of Quincy v. Jones, 76 Ill. 231. In Transportation Co. v. City of Chicago, 99 U. S. 635, the court points out that this doctrine in no way departs from the common law as to the right of lateral support, viz. that the right of lateral support extends only to the soil in its natural condition, and does not protect whatever is placed upon the soil, increasing the downward and lateral pressure.

[5] Snyder v. President, etc., of Rockport, 6 Ind. 237; Roberts v. City of Chicago, 26 Ill. 249.

[6] Hurford v. City of Omaha, 4 Neb. 336; Garraux v. City Council of Greenville, 53 S. C. 575, 31 S. E. 597.

profit or advantage. In Hill v. City of Boston [7] it was held that a child attending the public school, in a school house provided by the city, could not recover for injuries sustained by reason of the unsafe condition of a staircase therein. Gray, C. J., delivering the opinion of the court, concludes as follows: "But, however it may be where the duty in question is imposed by the charter itself, the examination of the authorities confirms us in the conclusion that a duty which is imposed upon an incorporated city, not by the terms of its charter, nor for the profit of the corporation, pecuniarily or otherwise, but upon the city as the representative and agent of the public, and for the public benefit, and by a general law applicable to all cities and towns in the commonwealth, and a breach of which in the case of a town would give no right of private action, is a duty owing to the public alone; and a breach thereof by a city, as by a town, is to be redressed by prosecution in behalf of the public, and will not support an action by an individual, even if he sustained special damage thereby."

ACTS OF OFFICERS OR AGENTS.

180. A municipality is liable for the conduct of its corporate agents or officers, acting within their authority, when the act complained of is one of misfeasance, or consists in neglect of an absolute corporate duty.

The affairs of municipal corporations must necessarily be conducted through the intervention of agents who are more or less representative of the corporate government, according to the nature of the duty they are required to perform. To render the munici-

[7] 122 Mass. 344. See, also, Bigelow v. Inhabitants of Randolph, 14 Gray (Mass.) 541; Howard v. City of Worcester, 153 Mass. 426, 27 N. E. 11; Snider v. City of St. Paul, 51 Minn. 466, 53 N. W. 763; Schauf's Adm'r v. City of Paducah (Ky.) 50 S. W. 42. City hall, Gullikson v. McDonald, 62 Minn. 278, 64 N. W. 812. City parks and squares, Sheehan v. City of Boston, 171 Mass. 296, 50 N. E. 543. In the following cases, arising out of injuries suffered in the use of public buildings, recovery was allowed, the duty involved not being a purely public one: Barron v. City of Detroit, 94 Mich. 601, 54 N. W. 273; Briegel v. City of Philadelphia, 135 Pa. St. 451, 19 Atl. 1038; Kies v. City of Erie, 169 Pa. St. 598, 32 Atl. 621.

pality liable for the act of its agent, it is essential, in the first instance, that the latter should be an officer of the corporation, duly authorized to perform the duty whose breach caused the injury; and the breach must occur in the performance of a corporate duty, or a power constitutionally conferred. Thus, if the act complained of be ultra vires, no action will lie against the city, for municipal corporations can be held liable for such tortious conduct only as occurs in the exercise of some power or duty conferred or imposed by law.[1] And not only must the act be within the power conferred on the municipality, and duly authorized or ratified by it, but it must be done in good faith, in pursuance of the general authority with which the officer is clothed to act for the city.[2] Thus, a city is not liable for the act of a tax collector in bringing a malicious suit against a person, unless it has authorized or ratified such suit.[3]

§ 180. [1] Loyd v. City of Columbus, 90 Ga. 20, 15 S. E. 818; City of Orlando v. Pragg, 31 Fla. 111, 12 South. 368; City of Albany v. Cunliff, 2 N. Y. 165, reversing 2 Barb. (N. Y.) 190; Browning v. Board, 44 Ind. 11; Haag v. Board, 60 Ind. 511; City of Pekin v. Newell, 26 Ill. 320; Stoddard v. Village of Saratoga Springs, 127 N. Y. 261, 27 N. E. 1030; Smith v. City of Rochester, 76 N. Y. 506; Morrison v. City of Lawrence, 98 Mass. 219; Schumacher v. City of St. Louis, 3 Mo. App. 297; City of New Orleans v. Kerr, 50 La. Ann. 413, 23 South. 384; Reynolds v. Board, 33 App. Div. 88, 53 N. Y. Supp. 75; Smith v. Major, 16 Ohio Cir. Ct. R. 362, 8 Ohio Dec. 649.

[2] Noble Tp. v. Aasen (N. D.) 76 N. W. 990; Reynolds v. Board, 33 App. Div. 88, 53 N. Y. Supp. 75; Davidson v. City of New York, 24 Misc. Rep. 560, 54 N. Y. Supp. 51. Thus, a town is not liable for the unauthorized acts of its officers, although done colore officii. In an action against a town for damages caused by the acts of its officers, the complaint must allege that such acts were within the scope of their authority. Kreger v. Bismarck Tp., 59 Minn. 3, 60 N. W. 675.

[3] Horton v. Newell, 17 R. I. 571, 23 Atl. 910; Donnelly v. Tripp, 12 R. I. 97; New York & Brooklyn Sawmill & Lumber Co. v. City of Brooklyn, 71 N. Y. 580; Ham v. Mayor, etc., 70 N. Y. 459; Goddard v. Inhabitants of Harpswell, 84 Me. 499, 24 Atl. 958; Fisher v. City of Boston, 104 Mass. 87; Alcorn v. City of Philadelphia, 44 Pa. St. 348; Reilly v. City of Philadelphia, 60 Pa. St. 467; Sewall v. City of St. Paul, 20 Minn. 511 (Gil. 459); City of Chicago v. Joney, 60 Ill. 383; City of Kansas City v. Brady, 52 Kan. 297, 34 Pac. 884. Liability for wrongful acts authorized by municipality, Commercial Electric Light & Power Co. v. City of Tacoma (Wash.) 55 Pac. 219; Hollman v. City of Platteville, 101 Wis. 94, 76 N. W. 1119; City of Oklahoma City v. Hill, 6 Okl. 114, 50 Pac. 242.

Nor are police officers of a city its agents in such a sense as to render it liable for their wrongful acts.[4]

No liability attaches to the corporation for the acts of its officers or agents performed under direct authority conferred by a valid act of the legislature.[5] But, though the legislature has authorized the execution of the work, it does not thereby exempt those authorized to perform it from the obligation to use reasonable care that no unnecessary damage shall be done in the execution.[6]

In determining whether the officer whose conduct is complained of is a servant or agent of the corporation, or a public or state officer, regard must be had to the character of the duty with the performance of which he is charged. To constitute an officer a corporate agent, so that the maxim respondeat superior may apply to his acts, it is not sufficient that he holds his position through the act of the corporation, or is retained and controlled at its pleasure; it is still further essential to the relation that the duties with which he is officially charged should relate peculiarly and solely to the interest and benefit of the municipality in its segregated character. Unless these tests apply, the town or city is exonerated from liability for his acts on the ground that the wrongful act complained of is not its act, but that of a person who is deemed to be a public officer, existing under independent provision of law; as an officer who, though appointed and paid by the city or town, and though, perhaps, its agent or servant for other purposes, is yet held not to sustain this relation in respect to the particular act in question.[7] Thus, a municipal board of police is distinctly an agency of

[4] Woodhull v. City of New York, 76 Hun, 390, 28 N. Y. Supp. 120; Coley v. City of Statesville, 121 N. C. 301, 28 S. E. 482; Stinnett v. City of Sherman (Tex. Civ. App.) 43 S. W. 847; Craig v. City of Charleston, 78 Ill. App. 312.

[5] Callender v. Marsh, 1 Pick. (Mass.) 418; Bellinger v. Railroad Co., 23 N. Y. 42; Sprague v. City of Worcester, 13 Gray (Mass.) 193; Pontiac v. Carter, 32 Mich. 164; Snyder v. Town of Rockport, 6 Ind. 237; Bartlett v. Town of Clarksburg (W. Va.) 31 S. E. 918; Doty v. Village of Port Jervis, 23 Misc. Rep. 313, 52 N. Y. Supp. 57.

[6] Mersey Docks & Harbour Board v. Gibbs, L. R. 1 H. L. 93, 11 H. L. Cas. 686.

[7] City of Chicago v. McGraw, 75 Ill. 566; Backer v. Commissioners, 66 Ill. App. 507; Kelly v. Cook (R. I.) 41 Atl. 571.

the state government, and not of the municipality,[8] and the chief of a city police force is the officer of the state, and not of the municipality where he is employed.[9]

It was held that no liability attached to a municipal corporation for negligence or misconduct of its officers in the following cases: Members of the fire department,[10] board of health,[11] pound keeper,[12] city engineer,[13] board of public works,[14] superintendent of streets,[15] board of water commissioners,[16] road commissioners,[17] highway sur-

[8] People v. Mahaney, 13 Mich. 481; People v. Hurlbut, 24 Mich. 44; Com. v. Plaisted, 148 Mass. 375, 19 N. E. 224; People v. McDonald, 69 N. Y. 362; City of Chicago v. Wright, 69 Ill. 318; State v. Covington, 29 Ohio St. 102; Elliott v. City of Philadelphia, 75 Pa. St. 347; Calwell v. City of Boone, 51 Iowa, 687, 2 N. W. 614; Bowditch v. City of Boston, 101 U. S. 16; Jolly's Adm'x v. City of Hawesville, 89 Ky. 279, 12 S. W. 313; Woodhull v. City of New York, 150 N. Y. 450, 44 N. E. 1038; Gullikson v. McDonald, 62 Minn. 278, 64 N. W. 812.

[9] Burch v. Hardwicke, 30 Grat. (Va.) 24. Nor is a city liable for the act of police officer in killing a dog running at large contrary to ordinance. Moss v. City Council of Augusta, 93 Ga. 797, 20 S. E. 653; Van Hoosear v. Town of Wilton, 62 Conn. 106, 25 Atl. 457.

[10] Hafford v. City of New Bedford, 16 Gray (Mass.) 297; Fisher v. City of Boston, 104 Mass. 87; Lawson v. City of Seattle, 6 Wash. 184, 33 Pac. 347; Wild v. City of Paterson, 47 N. J. Law, 406, 1 Atl. 490; Alexander v. City of Vicksburg, 68 Miss. 564, 10 South. 62; Gillespie v. City of Lincoln, 35 Neb. 34, 52 N. W. 811; Dodge v. Granger, 17 R. I. 664, 24 Atl. 100; Frederick v. City of Columbus, 58 Ohio St. 538, 51 N. E. 35.

[11] Forbes v. Board, 28 Fla. 26, 9 South. 862; Bates v. City of Houston, 14 Tex. Civ. App. 287, 37 S. W. 383; Love v. City of Atlanta, 95 Ga. 129, 22 S. E. 29; Clayton v. City of Henderson (Ky.) 44 S. W. 667; Webb v. Board (Mich.) 74 N. W. 734.

[12] Rounds v. City of Bangor, 46 Me. 541. And see Summers v. Daviess Co., 103 Ind. 262, 2 N. E. 725.

[13] Sievers v. City & County of San Francisco, 115 Cal. 648, 47 Pac. 687.

[14] Kuehn v. City of Milwaukee, 92 Wis. 263, 65 N. W. 1030; Norton v. City of New Bedford, 166 Mass. 48, 43 N. E. 1034.

[15] Jensen v. City of Waltham, 166 Mass. 344, 44 N. E. 339; McCann v. City of Waltham, 163 Mass. 344, 40 N. E. 20; Barney v. City of Lowell, 98 Mass. 570.

[16] Gross v. City of Portsmouth (N. H.) 33 Atl. 256. But see Bailey v. Mayor, etc., 3 Hill (N. Y.) 531; Miller v. City of Minneapolis (Minn.) 77 N. W. 788.

[17] Bryant v. Inhabitants of Westbrook, 86 Me. 450, 29 Atl. 1109; nor bridge

veyors,[18] police officers,[19] overseers of the poor,[20] assessors and collectors,[21] selectmen,[22] board of aldermen,[23] and the city government itself.[24] And it is, of course, immaterial whether the person committing the act was or was not a corporate agent, if the act itself was unauthorized.[25]

ACTS ULTRA VIRES.

181. Municipal corporations can be held liable for such tortious conduct only as occurs in the exercise of some power or duty conferred or imposed by law. If the conduct be unauthorized by either charter or statute, it cannot be the basis of a suit for damages against the city.[1]

Thus, cutting a ditch outside of the city limits is an act ultra vires, for which the city is not liable to the owner of the premises damaged.[2] Neither can a municipality commit libel.[3] Nor can the

tenders, Daly v. City & Town of New Haven, 69 Conn. 644, 38 Atl. 397. But see Inman v. Tripp, 11 R. I. 520.

[18] Walcott v. Inhabitants of Swampscott, 1 Allen (Mass.) 101.

[19] Buttrick v. City of Lowell, 1 Allen (Mass.) 172.

[20] City of New Bedford v. Inhabitants of Taunton, 9 Allen (Mass.) 207.

[21] Rossire v. City of Boston, 4 Allen (Mass.) 57.

[22] Cushing v. Inhabitants of Bedford, 125 Mass. 526.

[23] Child v. City of Boston, 4 Allen (Mass.) 41.

[24] Griggs v. Foote, 4 Allen (Mass.) 195.

[25] Easterly v. Incorporated Town of Irwin, 99 Iowa, 694, 68 N. W. 919; City of Caldwell v. Prunelle, 57 Kan. 511, 46 Pac. 949; Fox v. City of Richmond (Ky.) 40 S. W. 251; Gray v. City of Detroit, 112 Mich. 657, 71 N. W. 1107; Royce v. City of Salt Lake City, 15 Utah, 401, 49 Pac. 290.

§ 181. [1] Stetson v. Kempton, 13 Mass. 272; Inhabitants of Norton v. Inhabitants of Mansfield, 16 Mass. 48; Cavanagh v. City of Boston, 139 Mass. 426, 1 N. E. 834; Mayor, etc., of City of Albany v. Cunliff, 2 N. Y. 165; Barbour v. City of Ellsworth, 67 Me. 294; Smith v. City of Rochester, 76 N. Y. 506; City of Peru v. Gleason, 91 Ind. 566; Donnelly v. Tripp, 12 R. I. 97; City of Chicago v. Turner, 80 Ill. 419; Cheeney v. Town of Brookfield, 60 Mo. 53; Boze v. City of Albert Lea (Minn.) 76 N. W. 1131; Hoggard v. City of Monroe (La.) 25 South. 349; Brunswick Gaslight Co. v. Brunswick Village Corp., 92 Me. 493, 43 Atl. 104.

[2] Loyd v. City of Columbus, 90 Ga. 20, 15 S. E. 818; City of Orlando v.

[3] Howland v. Inhabitants of Maynard, 159 Mass. 434, 34 N. E. 515.

wrongful act of a municipality be characterized as gross and willful, so as to render it liable for vindictive damages; compensatory damages alone can be recovered.[4] A fortiori, a municipal corporation cannot be legally negligent in the doing of an act which it was unlawful for it to do; as, in placing or failing to place a railing upon a bridge which was the property of the state.[5] The tendency of recent decisions, however, is to impose liability upon the corporation whenever the negligent act, although in excess of the power actually vested, falls within its general scope. Thus, where the city attempted to avoid liability for negligence in the construction of a certain sewer by claiming that its construction was an unlawful act, upon which negligence could not be predicated, the court, in overruling the point, said: "If it were ultra vires in such sense as not to be within the scope of the corporate powers of the defendant, the latter would not be answerable for the consequences resulting from it, although the persons causing the work to be done were its officers or agents, and assumed to act as such in doing it. But that is not the situation presented here. It was legitimately within the corporate power of the defendant to construct sewers, and it may be that in attempting to execute it the constituted authorities went to some extent beyond the authority conferred upon the corporation and them as its officers, * * * and, thus acting, the defendant may be chargeable with the injury to others resulting from their failure to properly perform the duty which they had assumed to discharge, although it may have been occasioned by irregularity, or acts on their part in excess of authority."[6] And

Pragg, 31 Fla. 111, 12 South. 368; Mayor, etc., of City of Albany v. Cunliff, 2 N. Y. 165, reversing 2 Barb. (N. Y.) 190; Browning v. Board, 44 Ind. 11, 13; Haag v. Board, 60 Ind. 511; City of Pekin v. Newell, 26 Ill. 320; Stoddard v. Village of Saratoga Springs, 127 N. Y. 261, 27 N. E. 1030; Smith v. City of Rochester, 76 N. Y. 506; Morrison v. City of Lawrence, 98 Mass. 219; Schumacher v. City of St. Louis, 3 Mo. App. 297. Location of pest house within prohibited territory not ultra vires. Clayton v. City of Henderson (Ky.) 44 S. W. 667.

[4] City of Chicago v. Kelly, 69 Ill. 475; City of Chicago v. Langlass, 52 Ill. 256, 66 Ill. 361; Hunt v. City of Boonville, 65 Mo. 620. But see McGary v. City of Lafayette, 12 Rob. (La.) 668, 4 La. Ann. 440.

[5] Carpenter v. City of Cohoes, 81 N. Y. 21; Sewell v. City of Cohoes, 75 N. Y. 45.

[6] Stoddard v. Village of Saratoga Springs, 127 N. Y. 261, 27 N. E. 1030.

the fact that licenses have been illegally granted has not, in several instances, been held sufficient to defeat an action for damages arising from negligence.[7] The principle upon which the immediately foregoing decisions rest is agreeable to reason and equity. "It is not just to confer upon corporate bodies the ability to manage property and to engage in business enterprises, and then to restrict the remedies of individuals, who are in no way put upon inquiry as to the extent of these powers, to cases where the corporation has kept strictly within its charter rights." [8]

Respondeat Superior.

The general principles of this subject, as already considered,[9] apply equally when the municipality is one of the contracting parties. It is therefore not intended to review the subject in this connection, but merely to restate a few of the more important principles as directly applied to municipal corporations.

The general rule is that the principle of respondeat superior does not extend to cases of independent contracts, where the party for whom the work is to be done is not the immediate superior of those guilty of the wrongful act, and has no choice in the selection of workmen, and no control over the manner of doing the work under the contract.[10] There are, however, modifications of this general rule; as when the character of the work to be done is intrinsically dangerous, and the injury complained of is the direct and natural result of its unskillful performance.[11] Thus, where the obstruction or defect caused or erected in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but, when the obstruction or defect which occasioned the injury results directly from the acts which the con-

See, also, Stanley v. City of Davenport, 54 Iowa, 463, 2 N. W. 1064, and 6 N. W. 706; Gordon v. City of Taunton, 126 Mass. 349. And cf. Bogie v. Town of Waupun, 75 Wis. 1, 43 N. W. 667, with Houfe v. Town of Fulton, 34 Wis. 608.

[7] Cohen v. Mayor, etc., 113 N. Y. 532, 21 N. E. 700.

[8] Jones, Neg. Mun. Corp. § 175.

[9] See ante, c. 4.

[10] Village of Jefferson v. Chapman, 127 Ill. 438, 20 N. E. 33.

[11] City of Circleville v. Neuding, 41 Ohio St. 465; Carman v. Railroad Co., 4 Ohio St. 399; Prentiss v. City of Boston, 112 Mass. 43; Boze v. City of Albert Lea (Minn.) 76 N. W. 1131.

tractor agrees and is authorized to do, the person who employs the contractor, and authorizes him to do these acts, is equally liable to the injured party.[12] The primary duty rests upon the city to keep its thoroughfares in a reasonably safe condition for public travel; and when a projected improvement, repair, or alteration necessitates the tearing up or excavation of a street it cannot relieve itself of this duty by placing the work in the hands of other parties.[13] When the negligence of the contractor is collateral, and does not involve the breach of a primary duty owed by the city, the former alone is responsible. And it was so held in a case where the work undertaken for the city involved the placing of a hydrant in college grounds. The contractors dug a ditch for this purpose, and negligently left it unguarded, and it was held that no liability thereby attached to the city.[14] Where the city retains any material part in the management or control of the work, or directs the manner of its performance, it will not be relieved from liability for injuries resulting from its negligent performance.[15] Of course, if the re-

[12] Robbins v. City of Chicago, 4 Wall. 657; Prentiss v. City of Boston, 112 Mass. 43; City of Circleville v. Neuding, 41 Ohio St. 465; City of Logansport v. Dick, 70 Ind. 65. A town that contracts with an individual for the repair of a highway, including the destruction by fire of brush which has theretofore been cut and piled, is not liable for damages to a third person, caused by negligence of such contractor in burning the brush. Shute v. Princeton Tp., 58 Minn. 337, 59 N. W. 1050.

[13] Turner v. City of Newburgh, 109 N. Y. 301, 16 N. E. 344; City of Circleville v. Neuding, 41 Ohio St. 465; Hincks v. City of Milwaukee, 46 Wis. 559, 1 N. W. 230; Brooks v. Inhabitants of Somerville, 106 Mass. 271; City of Harrisburg v. Saylor, 87 Pa. St. 216; Southwell v. City of Detroit, 74 Mich. 438, 42 N. W. 118; Vogel v. City of New York, 92 N. Y. 10; Fowler v. Town of Strawberry Hill, 74 Iowa, 644, 38 N. W. 521; Mayor, etc., of City of Baltimore v. O'Donnell, 53 Md. 110; Mayor, etc., of City of Savannah v. Waldner, 49 Ga. 316; Todd v. City of Chicago, 18 Ill. App. 565; Grant v. City of Stillwater, 35 Minn. 242, 28 N. W. 660.

[14] Harvey v. City of Hillsdale, 86 Mich. 330, 49 N. W. 141. See, also, Erie School Dist. v. Fuess, 98 Pa. St. 600; Van Winter v. Henry Co., 61 Iowa, 684, 17 N. W. 94; City of Chicago v. Robbins, 4 Wall. 657, 2 Black, 418. But when plaintiff, when using the highway, was injured through the negligence of a contractor in firing a blast, it was held he could not recover. Heerington v. Village of Lansingburgh, 110 N. Y. 145, 17 N. E. 728. Although this case comes close to the dividing line, it does not conflict with the principle as stated. Cf. Carman v. Railroad Co., 4 Ohio St. 399.

[15] Kelly v. Mayor, etc., 11 N. Y. 432; City of Cincinnati v. Stone, 5 Ohio

served control or direction is unimportant, or foreign to the causes leading up to the injury complained of, the question of liability will not be thereby affected.[16] In line, also, with the general rule of respondeat superior, it must appear that the tortious act committed by the municipal employé, and sought to be charged to the corporation, was committed within the scope of the authority conferred by the city.[17]

There seems to be no valid reason why a municipal corporation may not avail itself of the defense of fellow servant, under the same rules and limitations which apply in the case of the individual employer.[18]

JUDICIAL OR LEGISLATIVE DUTIES.

182. No implied liability rests upon a municipal corporation for the misfeasance or nonfeasance of discretionary powers which are legislative or governmental in character.

As already observed, governmental duties are those which are assumed by the state for the general benefit and protection of all its citizens. Their performance involves the exercise of a sovereign power, and the manner of the performance cannot be measured by the ordinary standard of reasonable care, which is the criterion of individual conduct. If, therefore, in the exercise of these governmental functions, which necessarily devolve upon every community and municipality, a miscarriage occurs, whether through omission or careless performance, the individual injured thereby cannot maintain an action for damages against the derelict agency.[1] On this point Judge Dillon says:[2] "But the discretion, whatever

St. 38; City of St. Paul v. Seitz, 3 Minn. 297 (Gil. 205); Schumacher v. City of New York (Sup.) 57 N. Y. Supp. 968.

[16] Jones v. City of Liverpool, 14 Q. B. Div. 890.

[17] Alcorn v. City of Philadelphia, 44 Pa. St. 348; Sherman v. City of Grenada, 51 Miss. 186; Waller v. City of Dubuque, 69 Iowa, 541, 29 N. W. 456.

[18] Conley v. City of Portland, 78 Me. 217, 3 Atl. 658; but a laborer placing pipes in a trench dug by another set of employés is not a fellow servant of the latter, Wanamaker v. City of Rochester, 63 Hun, 625, 17 N. Y. Supp. 321.

§ 182. [1] 2 Dill. Mun. Corp. (4th Ed.) § 949; Jones, Neg. Mun. Corp. § 27.

[2] 2 Dill. Mun. Corp. (4th Ed.) § 966.

its grounds, or precise boundaries or difficulties in its application, is well established; and the latter class of corporations [municipal] is considered to be impliedly liable (unless the legislation negatives such liability) for wrongful acts done in what is termed their private or corporate character, and from which they derive some special or immediate advantage or emolument, but not as to such acts done in their public capacity, as governing agencies, in the discharge of duties imposed for the public or general (not corporate) benefit." [3]

Discretionary Powers.

Where the exercise of public or legislative power conferred by statute is discretionary, and not absolute, in character, no liability can be based upon the failure or omission to exercise it.[4] Thus,

[3] See Western Saving Fund Soc. of Philadelphia v. City of Philadelphia, 31 Pa. St. 175, 189; Oliver v. City of Worcester, 102 Mass. 489; City of Petersburg v. Applegarth's Adm'r, 28 Grat. (Va.) 321. For discussion of distinction between public and private functions of municipal corporations, see opinion of Folger, J., in Maxmilian v. Mayor, etc., 62 N. Y. 160. See, also, City of Galveston v. Posnainsky, 62 Tex. 118; Aldrich v. Tripp, 11 R. I. 141; Crossett v. City of Janesville, 28 Wis. 420; Hannon v. St. Louis Co., 62 Mo. 313. And where an injury was received by reason of a defectively constructed highway it was held a good defense that the manner of its construction was authorized by legislature. Redford v. Coggeshall, 19 R. I. 313, 36 Atl. 89.

[4] Fair v. City of Philadelphia, 88 Pa. St. 309; Borough of Norristown v. Fitzpatrick, 94 Pa. St. 121; McDade v. City of Chester, 117 Pa. St. 414, 12 Atl. 421; Lehigh Co. v. Hoffort, 116 Pa. St. 119, 9 Atl. 177; Cole v. Trustees, 27 Barb. (N. Y.) 218; Clemence v. City of Auburn, 66 N. Y. 334; Hyatt v. Trustees, 44 Barb. (N. Y.) 385; Seaman v. Mayor, etc., 80 N. Y. 239; Duke v. Mayor, etc., 20 Ga. 635; Rivers v. Council, 65 Ga. 376; City of Aurora v. Pulfer, 56 Ill. 270; Goodrich v. City of Chicago, 20 Ill. 445; City of Freeport v. Isbell, 83 Ill. 440; Western College of Homeopathic Medicine v. City of Cleveland, 12 Ohio St. 375; City of Dayton v. Pease, 4 Ohio St. 80; City of Peru v. Gleason, 91 Ind. 566; City of Anderson v. East, 117 Ind. 126, 19 N. E. 726; Robinson v. City of Evansville, 87 Ind. 334; White v. Yazoo City, 27 Miss. 357; Kelley v. City of Milwaukee, 18 Wis. 83; Hewison v. City of New Haven, 37 Conn. 475; City of Detroit v. Beckman, 34 Mich. 125; Schattner v. City of Kansas, 53 Mo. 162; Kiley v. City of Kansas, 87 Mo. 103; Armstrong v. City of Brunswick, 79 Mo. 319; Reock v. Mayor, etc., 33 N. J. Law, 129; Cole v. City of Nashville, 4 Sneed (Tenn.) 162; Lindholm v. City of St. Paul, 19 Minn. 245 (Gil. 204); Ball v. Town of Woodbine, 61 Iowa, 83, 15 N. W. 846; Van Horn v. City of Des Moines, 63 Iowa, 447, 19

the power is generally conveyed by its charter to the municipality to make such improvements in opening and grading streets as it may deem expedient, and as the interest of the public may require; but if the corporation omit or neglect to take such action as opening a street, no matter how urgent the circumstances may be, it cannot be made liable therefor by reason of injuries resulting to an individual.[5] So, also, no liability rests upon a municipal corporation for failure to abate a nuisance,[6] or to provide a proper supply of water and apparatus for extinguishing fires.[7] And where the municipality either fails to adopt by-laws and ordinances for proper government and the protection of its citizens, or, having adopted such by-laws, fails to enforce them, no liability arises from resulting injury.[8] Thus, although the city of Milwaukee had power, by

N. W. 293; Randall v. Railroad Co., 106 Mass. 276; McDonough v. Mayor, etc., 6 Nev. 90; Fowle v. Council, 3 Pet. 398.

[5] Collins v. Mayor, etc., 77 Ga. 745. See, also, Bauman v. City of Detroit, 58 Mich. 444, 25 N. W. 391; Wilson v. Mayor, etc., 1 Denio (N. Y.) 595; City of Anderson v. East, 117 Ind. 126, 19 N. E. 726; Keating v. City of Kansas City, 84 Mo. 415; Horton v. Mayor, etc., 4 Lea (Tenn.) 39; McDade v. City of Chester, 117 Pa. St. 414, 12 Atl. 421; Daly v. City & Town of New Haven, 69 Conn. 644, 38 Atl. 397.

[6] McCutcheon v. Homer, 43 Mich. 483, 5 N. W. 668; Armstrong v. City of Brunswick, 79 Mo. 319; City of Ft. Worth v. Crawford, 64 Tex. 202; Tainter v. City of Worcester, 123 Mass. 311; Ball v. Town of Woodbine, 61 Iowa, 83, 15 N. W. 846; Smoot v. Mayor, etc., 24 Ala. 112; Walker v. Hallock, 32 Ind. 239; Borough of Norristown v. Fitzpatrick, 94 Pa. St. 121; McDade v. City of Chester, 117 Pa. St. 414, 12 Atl. 421; Kistner v. City of Indianapolis, 100 Ind. 210; Hill v. City of Boston, 122 Mass. 344; People v. City of Albany, 11 Wend. (N. Y.) 539; Fowle v. Council, 3 Pet. 398; Leonard v. City of Hornellsville (Sup.) 58 N. Y. Supp. 266.

[7] Tainter v. City of Worcester, 123 Mass. 311; Patch v. City of Covington, 17 B. Mon. (Ky.) 722; Vanhorn v. City of Des Moines, 63 Iowa, 447, 19 N. W. 293; Brinkmeyer v. City of Evansville, 29 Ind. 187; Wright v. Council, 78 Ga. 241; Eastman v. Meredith, 36 N. H. 284; Hafford v. City of New Bedford, 16 Gray (Mass.) 297; Torbush v. City of Norwich, 38 Conn. 225; Ogg v. City of Lansing, 35 Iowa, 495; Elliott v. City of Philadelphia, 75 Pa. St. 347; Frederick v. City of Columbus, 58 Ohio St. 538, 51 N. E. 35; Irvine v. Mayor, etc. (Tenn. Sup.) 47 S. W. 419. Nor does any liability exist for the negligence of a fire insurance patrol, Boyd v. Insurance Patrol, 113 Pa. St. 269, 6 Atl. 536; or of the board of fire commissioners, O'Leary v. Board, 79 Mich. 281, 44 N. W. 608.

[8] Fowle v. Council, 3 Pet. 398, 409; McCrowell v. Mayor, etc., 5 Lea (Tenn.)

its charter, to restrain the running at large of swine, yet a complaint alleging special damages by reason of the council neglecting to pass any ordinance upon that subject was held not to state a cause of action.[9] Nor is a city liable for the failure of its officers to suppress coasting;[10] nor for an improper or mistaken exercise of discretion in the matter of legislative functions. And where injury occurred by reason of a horse becoming frightened while being driven along an adjoining street, by the firing of a cannon on the common, under a license granted in pursuance of an ordinance, the city was held not liable; the court saying: "The ordinance set out in the declaration is not the exercise of an owner's authority over his property, but is a police regulation of the use of a public place by the public, made by the city under its power to make needful and salutary by-laws, without regard to the accidental ownership of the fee."[11] Under the same principle, a municipality is not liable for the suspension of an ordinance forbidding fireworks during the time plaintiff's house was destroyed by fireworks negligently used by boys.[12]

CONFLAGRATIONS AND DESTRUCTION BY MOBS.

183. Although existing independently of any granted power, cities, and even individuals, may, in cases of urgent public necessity, assume the exercise of certain discretions, and, if justified by the circumstances, no liability will be incurred for resultant injury to private property.

685; Griffin v. Mayor, etc., 9 N. Y. 456; Lorillard v. Town of Munroe, 11 N. Y. 392, 396; Kiley v. City of Kansas, 87 Mo. 103; Chandler v. City of Bay St. Louis, 57 Miss. 327; City of Anderson v. East, 117 Ind. 126, 19 N. E. 726.

[9] Kelley v. City of Milwaukee, 18 Wis. 83. And see, on same point, Levy v. Mayor, etc., 1 Sandf. (N. Y.) 465, approved in Lorillard v. Town of Munroe, 11 N. Y. 392.

[10] City of Wilmington v. Vandegrift, 1 Marv. 5, 29 Atl. 1047.

[11] Lincoln v. City of Boston, 148 Mass. 578, 580, 20 N. E. 329.

[12] Hill v. Board, 72 N. C. 55. And generally, see City of Pontiac v. Carter, 32 Mich. 164; Griffin v. Mayor, etc., 9 N. Y. 456; Dewey v. City of Detroit, 15 Mich. 307; Grant v. City of Erie, 69 Pa. St. 420.

Thus, in case of conflagrations, when the necessity is urgent, buildings may be destroyed to prevent the spread of the fire. The maxim, "Salus populi suprema est lex," has thus been exemplified from ancient times; Lord Coke saying in an early case:[1] "For the commonwealth a man shall suffer damage; as, for the saving of a city or town, a house shall be plucked down if the next be on fire. This every man may do without being liable to an action." In such cases no recovery can be had against the municipality in the absence of statute or provision in the charter expressly creating such liability, it being held that such a destruction is not a taking of private property for public uses.[2] And when such provision is made for compensation, to support a claim for property thus destroyed it must appear that the circumstances clearly coincide with the provisions of the enactment.[3]

When private property is destroyed by mobs, no liability for compensation rests upon the municipality, even if it has failed to take ordinary measures for its protection under authority expressly conferred for the purpose,[4] unless such remedy has been expressly provided either by charter or by act of legislature.[5]

§ 183. [1] Mouse's Case, 12 Coke, 63; see, also, Maleverer v. Spinke, 1 Dyer, 35; Respublica v. Sparhawk, 1 Dall. (Pa.) 357; Taylor v. Inhabitants of Plymouth, 8 Metc. (Mass.) 462; Neuert v. City of Boston, 120 Mass. 338; Smith v. City of Rochester, 76 N. Y. 506; Bowditch v. City of Boston, 101 U. S. 16.

[2] Field v. City of Des Moines, 39 Iowa, 575.

[3] Coffin v. Town of Nantucket, 5 Cush. (Mass.) 269; Ruggles v. Inhabitants of Nantucket, 11 Cush. (Mass.) 433; Hafford v. City of New Bedford, 16 Gray (Mass.) 297; Neuert v. City of Boston, 120 Mass. 338; Howard v. City and County of San Francisco, 51 Cal. 52; McDonald v. City of Red Wing, 13 Minn. 38 (Gil. 25); Western College of Homeopathic Medicine v. City of Cleveland, 12 Ohio St. 375; Hayes v. City of Oshkosh, 33 Wis. 314. The right of recovery by the property owner is not affected by the fact that the property was insured, the insurance company becoming subrogated to the rights of the assured. Mayor of City of New York v. Pentz, 24 Wend. (N. Y.) 668.

[4] Hart v. Bridgeport, 13 Blatchf. 289, Fed. Cas. No. 6,149; Western College of Homeopathic Medicine v. City of Cleveland, 12 Ohio St. 375; Prather v. City of Lexington, 13 B. Mon. (Ky.) 559; Chicago League Ball Club v. City of Chicago, 77 Ill. App. 124.

[5] Underhill v. City of Manchester, 45 N. H. 214; Russell v. Mayor, etc., 2 Denio (N. Y.) 461; Campbell's Adm'x v. Council, 53 Ala. 527; Allegheny Co. v. Gibson's Sons & Co., 90 Pa. St. 297; City of Chicago v. Manhattan

PUBLIC HEALTH AND SANITATION.

184. The preservation of the health of the public by means of proper measures for sanitation is likewise a governmental duty, resting upon the state, and not upon the municipality; and, in the absence of special provision by statute, no obligation to this end rests upon any locality or municipality; and, even if such obligation is assumed, and negligently carried out, no liability will result.

This is exemplified in the negligence of the properly constituted board of health to perform its special duties, no responsibility for such negligent conduct resting upon the city.[1]

Cement Co., 178 Ill. 372, 53 N. E. 68; Salisbury v. Washington Co., 22 Misc. Rep. 41, 48 N. Y. Supp. 122.

§ 184. [1] Bryant v. City of St. Paul, 33 Minn. 289, 23 N. W. 220. In this case the plaintiff sought to charge the defendant for the misfeasance or negligence of the board of health or its agents in leaving a vault upon private premises exposed and open after removing its contents, in consequence of which plaintiff, without fault on her part, fell into the vault, and was injured. In deciding the case the court says (page 293, 33 Minn., and page 221, 23 N. W.: "The question, then, presented for our consideration, is whether the alleged negligence of the board created a corporate liability as against the city. The duty is imposed by the legislature upon the board of health, under the police power, to be exercised for the benefit of the public generally. It is one in which the city corporation has no particular interest, and from which it derives no special benefit in its corporate capacity. And we think it clear that, as respects an agency thus created for the public service, the city should not be held liable for the manner in which such service is performed by the board. 2 Dill. Mun. Corp. (4th Ed.) § 976, etc. It is bound to discharge its official duty, not by virtue of its responsibility to the municipality, but for the general welfare of the community, and no action will lie against the city for the acts of the board, unless given by statute." City of Richmond v. Long's Adm'rs, 17 Grat. (Va.) 375. And see Fisher v. City of Boston, 104 Mass. 87; Hayes v. City of Oshkosh, 33 Wis. 314; Maxmilian v. City of New York, 62 N. Y. 160; Ogg v. City of Lansing, 35 Iowa, 495; Welsh v. Village of Rutland, 56 Vt. 228; Tindley v. City of Salem, 137 Mass. 171; Condict v. Jersey City, 46 N. J. Law, 157; Smith v. City of Rochester, 76 N. Y. 506; Webb v. Board (Mich.) 74 N. W. 734.

QUASI MUNICIPAL CORPORATIONS.

185. In a majority of states quasi municipal corporations are not liable for failure to maintain highways and bridges in a reasonably safe condition. But the decisions are largely dictated by statutes, and do not establish the foregoing rule on principle.

As already stated,[1] quasi municipal corporations are merely political divisions of the state, created for purposes of convenience in administering the general government. They are generally created without the volition or consent of the inhabitants of the territory involved, and are, therefore, more restricted in their powers, rights, and responsibilities. Counties, townships, school districts, and the New England towns belong to this class of corporations.

It is generally supposed and asserted to be the well-settled law of this country that a clearly-drawn distinction exists between the liability of chartered municipal corporations proper and that of quasi municipal corporations, for negligence regarding the construction and maintenance of highways and bridges,[2] but a careful examination of the adjudicated cases discloses that they are by no means entirely harmonious, and that the foregoing principle cannot be thus broadly asserted.[3] If a defined locality is endowed by the

§ 185. [1] See ante, p. 425.

[2] 2 Dill. Mun. Corp. (4th Ed.) § 997. And see, also, Id. § 1023b; Shear. & R. Neg. (4th Ed.) §§ 256, 289, citing Russell v. Men of Devon, 2 Term R. 667; Weightman v. Washington, 1 Black, 39; Riddle v. Proprietors of Locks, 7 Mass. 169; Mower v. Inhabitants of Leicester, 9 Mass. 247; Beardsley v. Smith, 16 Conn. 375; Jones v. City of New Haven, 34 Conn. 1; Baxter v. Turnpike Co., 22 Vt. 123; Ball v. Town of Winchester, 32 N. H. 443, as explained and limited by Gilman v. Laconia, 55 N. H. 130; Eastman v. Meredith, 36 N. H. 284; Hill v. City of Boston, 122 Mass. 344; Board of Chosen Freeholders of Sussex Co. v. Strader, 18 N. J. Law, 108; Cooley v. Chosen Freeholders of Essex Co., 27 N. J. Law, 415; King v. St. Landry, 12 La. Ann. 858; Tritz v. Kansas City, 84 Mo. 632; Pettit v. Board, 87 Fed. 768; Board Com'rs Johnson Co. v. Reinier, 18 Ind. App. 119, 47 N. E. 642; Markey v. Queens Co., 154 N. Y. 675, 49 N. E. 71, 39 Lawy. Rep. Ann. 46. And see, also, Elliott, Roads & S. 42.

[3] Jones, Neg. Mun. Corp. § 59. "Every independent corporate body upon which is put the duty of repairing the highways within its limits should be-

state with the power to hold property, and exercise ministerial functions thereover, the essential elements of a corporation exist, even if the investment of authority is not made in express words of incorporation.[4] When to these corporate powers is coupled by statute the duty to keep in repair the highways within its districts, the obligation and responsibility would seem to be complete; and the English authorities are quite uniform to this effect.[5] Many of the English cases further hold that an action to recover for injuries sustained by reason of negligence in the maintenance of a highway can be maintained against a public corporation having control thereof, although no such action is given by statute,[6] it being sufficient if the negligence emanates from a corporation capable of being sued as such.[7] And the more recent English decisions hold incorporated public trustees liable for negligence in the line of their imposed duties.[8]

Rule in the United States.

Although it may, perhaps, be fairly said that in the United States the general rule exempts counties from a liability of the kind under discussion, unless the liability is expressly imposed by statute,[9] yet the weight of authority is by no means overwhelming, and, it is be-

answerable for any neglect to exercise reasonable care to keep them safe. And it is ordinarily admitted that every such body is answerable to the public for a neglect of this kind, and may be indicted therefor." Id. § 60, citing Com. Dig. tit. "Chimin," 6, 3; Rex v. Inhabitants of West Riding, 2 W. Bl. 685; Russell v. Men of Devon, 2 Term R. 667; Hill v. City of Boston, 122 Mass. 344.

[4] See Adams v. Wiscasset Bank, 1 Greenl. (Me.) 361; Finch v. Board, 30 Ohio St. 37; Riddle v. Proprietors of Locks, 7 Mass. 169.

[5] Russell v. Men of Devon, 2 Term R. 667; Kent v. Board, 10 Q. B. Div. 118, commenting on Russell v. Men of Devon; Hartnall v. Commissioners, 4 Best & S. 361, 33 Law J. Q. B. 39; Borough of Bathurst v. Macpherson, 4 App. Cas. 256. For early English rule to same effect, see Jones, Neg. Mun. Corp. § 16, citing Payne v. Partridge, 1 Show. 231; Steinson v. Heath, 3 Lev. 400; Churchman v. Tunstal, Hardr. 162; Yielding v. Fay, Cro. Eliz. 569.

[6] Hartnall v. Commissioners, 4 Best & S. 361, 33 Law J. Q. B. 39.

[7] Borough of Bathurst v. Macpherson, 4 App. Cas. 256.

[8] Mersey Docks v. Gibbs, 11 H. L. Cas. 686; Winch v. Conservators, L. R. 7 C. P. 458; Gilbert v. Trinity House, 17 Q. B. Div. 795; Smith v. Board, 3 C. P. Div. 423.

[9] Hill v. Boston, 122 Mass. 344; Dunn v. Society, 46 Ohio St. 93, 18 N. E. 496; Weightman v. Washington, 1 Black, 39; Greene Co. v. Eubanks, 80 Ala.

lieved, is constantly becoming less.[10] But when the duty to repair highways admittedly rests upon a municipal corporation, even if it be a so-called "quasi municipal corporation," no sound reason appears why it should not be liable for injuries resulting from a neglect of this duty, and in many carefully considered cases it has been so held.[11] In many of the states usually cited as sustaining the so-called "general rule" denying the liability of quasi municipal corporations the duty of repairing highways does not rest upon the corporation at all,[12] and in some instances, by statute, is placed upon commissioners or other corporate officials.[13] In such cases it is evidently impossible that liability, in the absence of an express provision of statute, should attach to the corporations themselves.

It is therefore evident that, in order to determine the liability of a quasi municipal corporation in a given case, the local statutes

204; Covington Co. v. Kinney, 45 Ala. 176; Scales v. Chattahoochee Co., 41 Ga. 225; Arnold v. Henry Co., 81 Ga. 730, S S. E. 606; Riddle v. Proprietors of Locks, 7 Mass. 169; Baxter v. Turnpike Co., 22 Vt. 123; Abbett v. Board, 114 Ind. 61, 16 N. E. 127; Reardon v. St. Louis Co., 36 Mo. 555; King v. Jury, 12 La. Ann. 858; Sutton v. Board, 41 Miss. 236; Symonds v. Supervisors, 71 Ill. 355; Board of Chosen Freeholders of Sussex Co. v. Strader, 18 N. J. Law, 108.

[10] Jones, Neg. Mun. Corp. §§ 63, 64. And see Beardsley v. City of Hartford, 50 Conn. 529; City of Denver v. Dunsmore, 7 Colo. 328, 3 Pac. 705.

[11] Rigony v. Schuylkill Co., 103 Pa. St. 382; Newlin Tp. v. Davis, 77 Pa. St. 317; Rapho Tp. v. Moore, 68 Pa. St. 404; Mayor, etc., of Baltimore v. Marriott, 9 Md. 160; County Com'rs Anne Arundel Co. v. Duckett, 20 Md. 468; Baltimore & Y. Turnpike Co. v. Crowther, 63 Md. 558, 1 Atl. 279. And in OREGON, under statute. McCalla v. Multnomah Co., 3 Or. 424; Eastman v. Clackamas Co., 32 Fed. 24. But cf. Sheridan v. Salem, 14 Or. 328, 12 Pac. 925; City of Denver v. Dunsmore, 7 Colo. 328, 3 Pac. 705. In IOWA the liability exists as to defective bridges. Wilson v. Jefferson Co., 13 Iowa, 181; McCullom v. Black Hawk Co., 21 Iowa, 409; Chandler v. Fremont Co., 42 Iowa, 58. As to bridges, also, in INDIANA. Vaught v. Board, 101 Ind. 123; Knox Co. v. Montgomery, 109 Ind. 69, 9 N. E. 590.

[12] Greene Co. v. Eubanks, 80 Ala. 204; Sutton v. Board, 41 Miss. 236; Symonds v. Board, 71 Ill. 355; Abbett v. Board, 114 Ind. 61, 16 N. E. 127; Reardon v. St. Louis Co., 36 Mo. 555; King v. St Landry, 12 La. Ann. 858; Scales v. Chattahoochee Co., 41 Ga. 225.

[13] In People v. Board Town Auditors of Esopus, 74 N. Y. 310, the court says: "Commissioners of highways have, by the statute, the care and superintendence of highways. * * * On the other hand, the town, in its

should be closely examined, and no case should be cited as supporting a given rule until an examination of the statutes influencing the decision has been made.

corporate character, has no control over the highways. It cannot lay out a highway, or discontinue one. It is not liable for failure to keep highways in repair." And see Monk v. Town of New Utrecht, 104 N. Y. 552, 11 N. E. 268. The liability in New York is now imposed on the municipalities by statute. Laws 1881, c. 700.

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