1896

The Judicial Construction of Statutes Imposing a New Liability

Otho Carleton Snider

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THE
JUDICIAL CONSTRUCTION
OF
STATUTES IMPOSING A NEW LIABILITY.

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Thesis
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Presented for the Degree of Bachelor of Laws
by
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Cornell University
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1896.
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The object of statutes imposing new duties upon individuals or corporations is to provide the general public with a protection unsupplied by the common law, or to give to individuals undergoing a liability to injury, a remedy not before in existence, or to make the common law remedy more complete. It is seldom that these purposes are expressed in words, although from the construction of the different statutes the intent is quite evident.

When the purposes of the act are not expressed, in determining the civil liability of the individual or corporation upon which the new duty is imposed, to the person injured by its neglect, it is incumbent upon the courts to consider the statute with care and to search for the motive or ends which the legislature sought to accomplish. In the process of fixing upon the real intent of the legislative enactments of this character, certain rules of construction are often followed:

1. Where a right is granted by statute or exists at common law, the enactment of a subsequent statute giving a new remedy or prescribing a penalty or forfeiture for a violation of that right, is cumulative, and is not a substitute for former remedies and penalties still existing, unless the

(a) Farmers Turnpike Co. v. Coventry, 10 Johns. 389.
statute indicates that the new remedy is exclusive of the old. In this case the party may pursue at his option, either the common law remedy or the remedy given by statute, as it is fairly inferable from the letter of the act that the old redress is not excluded.

2. On the other hand the words of the new statute may exclude any remedy existing at common law, either by implication or an express provision. In an Indiana case it was held that where the statute authorizes property to be taken, and points out a specific mode for exercising the rights of eminent domain, and a particular court in which redress shall be sought, the statutory remedy must be pursued. This is the general construction put by the courts upon statutes by which land is authorized to be taken for public use under the right of eminent domain. The common law remedy in these cases is superseded and the injured party must pursue the remedy given by statute.

3. In the third place, where no duty existed at common law and the legislature imposes a new one, a specific remedy being granted for its violation, the presumption is that this remedy is exclusive and the wronged party must seek his redress under it. It has been held that where a statute creates a new offense by prohibiting and making unlawful anything

(d) Commissioners v. Bank of Findlay, 32 Ohio State 194.
which was lawful before, and provides a specific remedy for a violation of such statute, by a particular sanction and method of proceeding, that the only indemnity is that prescribed in the statute which makes the act unlawful. Where the performance of any duty is enjoined under penalty for its non-observance, it is generally conceded that the recovery of this penalty is the sole remedy, even when not made payable to the party injured. In cases where the penalty imposed by statute is inadequate to compel a performance, and it is evident that the duty enjoined is for the benefit of an individual, then the new remedy is held to be cumulative to the common law, as where the charter of a turnpike company having provided that any person who should cut or break down, or otherwise destroy, any of the gates on their road, or should dig up or carry away any earth therefrom, "or in any manner damage the same", should forfeit and pay a fine not exceeding fifty dollars, to be recovered in an action of trespass on the case, to the use of the corporation in the name of their treasurer; it was held, that if this provision included the case of an obstruction to the road, by means of placing a large rock or building thereon, it was not intended to take away any common law remedies, for such injury or obstruction.

(a) Almy v. Harris, 5 Johns 175; Flynn v. Canton Co., 40 Md. 312; Moore v. Gadsen, 93 N. Y. 12.  
(b) Salem Turnpike Co. v. Hayes, 5 Cush. 458.
II.

DUTIES IMPOSED MERELY FOR THE BENEFIT OF THE PUBLIC.

In order that a complainant can recover for negligence he must show that he is within the class for whose benefit the statute was passed and that the legislature did not create a purely public duty. This distinction is often observed in the water supply cases where a municipal corporation has made a contract with a water-works company to supply the city with water. In this case where there is no special contract on behalf of the complainant, he could not maintain an action against the water company for breach, as the statute did not apply to him individually, but to the municipality. (a)

In the familiar English case where a statute bound the company to maintain fire plugs and to furnish a sufficient supply of water to keep the pipes charged with water of a certain pressure, so as to reach the highest story in the highest house in the area supplied, for use in case of fire, without compensation, and imposed a fine in case of neglect, the court held that the defendants were not liable for the insufficient supply of water at the fire. This act was considered in the nature of a private legislative bargain and did not create a duty to the complainant. Even if a public duty were created by the statute and special damage ensue, it does not necessarily follow that an individual cause of action will arise.

(a) Atkinson v. Newcastle & Ga
It would seem that the opposite doctrine is held in (a) the Kentucky case, but it should be observed that there an express contract existed between the lumber company and the water supply company, by which for the certain price paid for two hydrants upon the premises of the former, it was agreed to furnish the water directly. It is, however, the general doctrine, deducible from the opinions in the cases that the water-works company is not liable for the inadequate supply of water for fire purposes under a contract with a city or corporation to furnish water for the extinguishment of fire, in the absence of a contract between the company and the property owner. This rule has been applied even where the water company agreed with the corporation to indemnify it against all claims made by or on behalf of any citizen or resident and may have stipulated that the action might be brought in (b) the property owner's name. Here the plaintiff in supporting his contention referred to the Kentucky case (supra) but the court in its opinion distinguished the two cases, as above, in that no privity of contract existed in the former, while in the Kentucky case there was a certain fixed rent to be paid the water company by the complainant. The mere fact that a property owner and a stranger to the contract between a water company and a municipality secures some benefit from the agreement in the protection of his property in common with all other persons having property similarly situated, does not make him a party to the contract or create any priv-

(b) Mott v. Cherryvale W. & M. Co., 48 Kan. 15.
ity between himself and such company.

While it is generally conceded that, in the absence of statutory obligation, no liability rests on the owner of a lot abutting a street, to repair or maintain in safe condition the street or sidewalk, it is insisted by authorities that failure, for example, to remove snow or ice, as required by ordinance, is a breach of duty to the public from which an individual action does not arise. In Michigan it is held that an ordinance requiring all persons to keep their sidewalks free from ice imposes a purely public duty and persons injured by slipping on the ice cannot bring private actions against the owners of the premises. Breaches of public duty must be punished in some form of public prosecution, and not by way of individual recovery of damages; although when the duty is imposed for the protection and benefit of a particular individual or class, as well as for that of the public, there may be an individual right of action for individual injury, as well as a public prosecution.

The general rule seems to be that an action by a private individual may be sustained against the municipality for negligence in the breach of a charter requiring the municipality to keep its streets and sidewalks in a good and safe condition. Chief Justice Ruger in the case of the City of


Rochester v. Campbell et al., has laid down seven propositions concerning actions of this character.

"1. That municipal corporations in this state are charged with the care, custody and control of the streets and highways within their limits, and the duty, primarily, rests upon them to keep such streets and highways in repair, so that they may be safely travelled upon by all having occasion to use them, and this duty is based upon contract" by the charter.

"2. That such corporations are liable for damages arising from a neglect to perform this duty, in an action ex delicto, to persons lawfully using such streets and sidewalks, notwithstanding a duty to repair is also imposed upon the property owners in front of whose premises the injury occurred.

"3. If a municipal corporation has been compelled to pay a judgment for damages recovered by a traveller for injuries sustained from a defect or obstruction in one of its highways, which defect or obstruction was created by the wilful act or negligence of a third person, it may maintain an action against such third person for reimbursement, and the rule is the same when it has been paid on undoubted liability without suit."

"4. So also, if the municipality has provided by contract with third persons for keeping its streets in repair and has been, through a neglect by such party to perform his contract, subjected to damages at the suit of an injured party, it may recover from such party the sum which it has been

(a)
compelled to pay."

"5. The measure of damages in such cases is the loss sustained by the injured party, and paid by the municipality with such incidental expenses as may have been incurred in defending the action."

"6. That no obligation to repair streets or sidewalks rests upon the lot owners at common law, but the duty to do so, if any, arises out of the statutory obligations imposed by the state or municipality upon them."

7. A corporation may defend the suit in case the third person who is liable to reimburse the corporation refuse, and the third person may be charged with the expenses of the suit and is bound by the result. This case cites many authorities upon the subject.
III.

DUTIES WHICH IN THEIR NATURE ARE A PROTECTION TO PRIVATE RIGHTS AS WELL.

The statute passed by the legislature or ordinance of the municipality may create not only a public duty, but also a duty to private persons, a breach of which may be actionable negligence. However, an individual may not be able to recover, because he is not of the class of persons for whose benefit the statute was designed. In this class may be included the acts of servants in the performance of their duties, causing injury to their fellow-servants. It has been held that an ordinance requiring a railroad company to keep flagmen at street crossings was not intended for the protection of the company's employees and creates no duty to them, the violation of which resulting in damages, is actionable negligence. The law on this subject was laid down in the case of Woodruff v. Brown, (136 Ind. 43), where it was held that the owner of a building in a populous city does not owe it as a duty at common law, independent of any statute or ordinance, to keep such building safe for firemen or other officers who in a contingency may enter the same under a license conferred by law, but such a duty may be imposed either by statute or by ordinance. The ordinance requiring the absolute safety of a building or other structure applies only

(a) Kansas City St. L. & M. R. Co. v. Kirksey, 60 Fed. 999.
to citizens in them on business and not to a fireman going
there to extinguish a fire, for as to him the owner of a
building is not supposed or held to owe a duty of maintaining
his property in a safe condition, for he has not anticipated
or invited his presence, although he is not a trespasser.

Another case defining the class of persons entitled
to the benefit of the duty created by ordinance is that of
Gibson v. Leonard, (143 Ill. 182), where it was held that the
owner of land and of buildings, assumes no duty to discover
what persons are on his premises by permission and as a mere
licensee, except that he will refrain from wilful or affirma-
tive acts which are injurious. Therefore a person who enters
on premises of another, by permission only, without any en-
ticement, allurement or inducement being held out to him by
the owner or occupier, cannot recover damages for injuries
caused by obstructions or pitfalls. In this case the members
of a fire patrol forced open the door of a building then on
fire and entered the main floor and basement and while using
an elevator, the rope broke and the counterweight which was
not suitably secured in its place, fell and injured one of
them. The owner of the building was not present and did
nothing to induce the entry. The court held that he was not
liable to the party injured, although the elevator and its
appliances were not safely constructed and maintained, not-
withstanding an ordinance of the city provided that, "in
every factory, workshop, or other place or structure where
machinery is employed, the belting, shaftings, gearing, eleva-
tors and every other thing when so located as to endanger the lives and limbs of those employed therein while in the discharge of their duties, shall be, so far as is practicable, so covered or guarded against any injury to such employees."

This ordinance was intended for the protection of employees, only, and because one, not an employee, but a mere licensee, was injured in consequence of the neglect of the owner of the elevator to maintain it properly guarded, could not recover damages on account of such neglect.

Where a statute imposes a duty upon a citizen or corporation for the special benefit of certain persons or classes of persons; anyone having a special interest in the performance thereof, may sue for any breach occurring, which has been the proximate cause of his injury. The tenement house cases are illustrative of this branch of the subject, (a) as where an absolute duty is imposed by ordinance upon the owners of tenament houses making it obligatory upon them to maintain proper egress to the roof of their buildings and in addition sufficient fire escapes, approved by an official inspector; this duty has been held for the benefit of the tenants who in case of a breach causing damage to them may maintain an action against their landlord.

One of the most common classes of cases in which it is necessary to decide for whose benefit the statutory duty was imposed, arises under the enactment by the legislatures of the different states, of statutes making it obligatory

(a) Wilby v. Mulledy, 78 N. Y. 310.
upon approaching trains to sound signals at public crossings. The statutes in the several states differ very little, their main requirement consisting in that a bell or whistle must be rung or blown at a certain distance before the crossing is reached, and until the engine has passed that crossing. These statutes give the person injured a right of action against the railroad company guilty of the breach of its statutory duty. In order that the plaintiff may maintain his action he must show that he has complied with the essential conditions which bring him within the class for whose benefit the act was passed. First, it is the general rule that only those persons who are lawfully upon the track of the defendant railroad company are of this class, thus excluding trespassers. It has been decided that a private crossing of which the railroad company had knowledge, and which is used with its consent by men and teams in drawing logs, is not a railroad crossing within the meaning of a provision of the laws of Michigan, at which signals by bell and whistle must be given. It was said that the failure to give warning of an approaching train at such a crossing is not negligence as a matter of law. If one knows that the warning is habitually omitted at such a crossing, he cannot act upon an agreement by a railroad company to give a warning. But in this case the failure to give signals required by law at a railroad crossing rendered the company liable for injuries in consequence thereof, to a person lawfully crossing the track in

that vicinity, relying upon the performance by the railroad company of its duty to give such signals. In Wakefield v. Connecticut & P. P. P. Co. (37 Vt. 330), it is said that the statutory duty to give signals on the approach of a train to a crossing exists in reference "to all persons who being lawfully at or in the vicinity of the crossing may be subjected to accident and injury by the passing of engines at that place." The facts of this case were that a traveller on a highway had passed the crossing before the train reached it, and his horses becoming frightened had turned about and dashed in front of the engine, causing the injury complained of.

The courts of Georgia hold that although statutory signals are intended primarily for the protection of persons crossing the track and not for those walking along it, a failure to perform this duty imposed by statute, is evidence of negligence to be considered by the jury. On the other hand, in many other instances the courts have said that such statutory signals are intended only for the benefit of persons crossing, or at least travelling, upon the highway near the crossing. This language, however, seems to have been confined usually to cases in which stock in fields received damage, or concerning persons trespassing upon the railroad track, or at some place where their presence could not have been anticipated by the engineer or person in charge of the approaching train. The opposite doctrine seems to have been

(b) Central R. Co. v. Ranford, 82 Ga. 400.
(c) Nashville C. & St. L. R. Co. v. Pembree, 85 Ala. 481.
sustained in Georgia, where a horse was killed on a railroad track not far from a crossing, and it was held that failure to give the required signal was proper to be considered in determining the company's negligence.

It is almost universally held that persons using the railway track as a path and walking thereon are not entitled to the benefit of the statutory signals of trains approaching a crossing. This language is also applicable to trespassers upon the other property of the railroad company.

Under the general rule of law, that one who enters the service of another, takes upon himself the ordinary risks of the negligent acts of his fellow-servants in the course of their employment, a servant of a railroad company is not entitled to the benefit of a statute requiring signals of the approach of a train to a crossing.

Another question arises in the cases where a highway is parallel to and near the track of a railway, although not crossing it at that particular point. In these cases the question to be considered is whether the traveller upon the highway alleged to have been injured by the failure of the company to sound the statutory signal, can sustain his claim. In studying one case, it might seem that he would be unable to do so, but upon further consideration we find that the injured party was travelling upon the highway more than a quarter-

(d) East Tenn. V. & T. R. Co. v. Feathers, 10 La. 103.
ter of a mile from the crossing. In these facts it was held by the court that the plaintiff had no right to depend upon the signal, for at the place of the injury the railroad company was under no statutory obligation to give a warning.

The general rule seems to be that the fright of a horse being driven on a highway near a railroad crossing, which was caused by the approach of a train without giving the signals required by law, renders the railroad company liable for the resulting damages, although there was no collision.

In determining the question, at what crossings the duty is imposed upon the railroads to give warning of their coming trains, it should be remembered that something more than a mere dedication to the public of an easement is necessary. The street must be travelled and known to be a public street as well as a public right. Where the railroad company has for years recognized and treated a certain place as a public crossing and the public have also used it as such, the duty of sounding signals at that point is laid upon the company operating its trains over that road, and passing such crossing. In Alabama the courts have held that where a highway crosses a railroad by a bridge, it is not necessary that the train sound the customary signal used at public crossings, but on the contrary in New York, a crossing at which a railroad is elevated above the highway over which it passes upon

(b) Missouri Pac. R. Co. v. Lee, 70 Tex. 496.
(c) Louisville & N. R. Co. v. Hall, 87 Ala. 708.
a bridge, so as to prevent danger of collisions between travellers on the highway, and the trains upon the track, is within the statute requiring signals at a railroad crossing, as the danger of frightening teams as well as of actual collision, was intended to have been guarded against. The same rule has been sustained by the courts of Pennsylvania. Failure to give signals of a train at a private crossing is not generally within the rule.

Another instance in which the legislatures of many states have imposed a new duty upon a railroad corporation, is that requiring them to fence their tracks. These statutes may not point out, in terms, what shall be the rights on one side, and the liabilities on the other, if the duty is neglected, and it is then incumbent upon the courts to determine the relation of both. It is important to decide whether the duty is imposed upon public grounds exclusively and if not, what persons or classes of persons are within its intended protection. In the absence of statutory requirements, as at common law, railroad companies were under no obligation to fence their tracks, so as to prevent cattle straying thereon, in order to protect both, the cattle from injury and the trains from danger of wreck. Under these circumstances, the owners of cattle injured upon the tracks of a railroad would have no remedy against the corporation, while they might even be responsible for any injury caused to the property of the

(c) St. Louis etc. R. Co. v. Ferguson, 57 Ark. 16.
railroad, if negligence could be imputed to the owners in (a) suffering the cattle to stray. At the present time it is quite generally required by statute that railroad companies shall fence their tracks. The purposes of this obligation, are as mentioned above, two-fold, in that they are made, first, in order to protect the persons of the travelling public, who are in great danger when cattle are allowed upon the track, and, second, to protect the cattle themselves; ordinarily accomplished by making the railroad companies responsible for animals injured upon their unfenced tracks.

IV.

CONCERNING THE VIOLATION OF THE DUTY IMPOSED

AND ITS CAUSAL RELATION TO THE HARM SUFFERED.

The legislature having enacted statutes defining the precautions under which certain acts must be performed, have exonerated an individual or corporation, complying with those precautions. In these cases no extra-statutory care need be used if the letter of the law is strictly complied with. Where a railroad company was compelled by statute to place upon some part of every locomotive engine used by such company, a bell of a weight of not less than thirty pounds or a steam whistle, which can be heard distinctly at a distance of at least three hundred yards, and shall cause such a bell to be rung or steam whistle to be blown at a distance of at least three hundred yards from highway crossings, until such crossings are passed; compliance with these precautions exonerates the railroad company from any further duty. If there is a bell upon the engine of the statutory weight and it is rung in the manner required, as far as the giving of an audible signal before reaching a public crossing is regarded, the company has performed its duty, whether the signal so given is heard and heeded or not by a person crossing the railroad track on the highway.

In the decided cases is found considerable judicial

dicta in favor of the views that a prescribed statutory duty is only cumulative, by which is meant, that, aside from the statute, the common law imposes a duty upon the managers of any dangerous machine to employ such precautions against harm to others as is commensurate with the danger. Questions touching the duty of extra-statutory care have arisen in railroad cases where a crossing has been said to possess unusual features of danger. In such cases it has been held that the company is under a duty to maintain flagmen or gates as the crossing. But this duty arises only when this peculiarly dangerous feature is in consequence of the act of the company itself in constructing its road or buildings.

In some cases, compliance with the statutory duty may not exclude a common law duty where ordinary care would command that those in charge of a train shall give additional warning or take further precautions in conducting the train than those imposed upon them by the legislature. It is not always sufficient to satisfy the requirements of ordinary care that the statutory signals alone, upon approaching a crossing, should be complied with. In reaching the proper conclusion the jury will take into consideration all the facts and circumstances surrounding the case, before deciding whether the demands of ordinary care have been complied with.

(a) Atkinson etc. R. Co. v. Hague, 54 Kan. 284.
(b) Alabama & V. R. Co. v. Philips, 70 Miss. 14.
a statute prohibiting the same, running a train through a
city at a less speed was not always lawful, for circumstances
may arise, and often do, where a rate less than six miles per
hour is grossly negligent. If but for the statute negligence
would be imputed to the company, it cannot be absolved from
the charge of negligence by the statute. Although a new duty
may be imposed by statute upon an individual, he is not re-
lieved thereby of his common law duty in the conduct of his
lawful business, to exercise ordinary care to prevent injury
to others. Nor can an employee waive the performance of cer-
tain requirements of statutes making it criminal for an em-
ployer to use machinery without the statutory guards. These
statutes are passed for public policy and no employee has the
power to excuse their performance. Of course, parties may
waive statutory provisions made for their own personal bene-
fit, for public policy has no particular interest in such
transactions. The existence of a custom in a certain place
will not excuse the performance of a statutory duty. Where a
custom was prevalent of violating the duty to exhibit lights
on a boat moving at night, the failure to perform this statu-
tory obligation will not thereby be excused, and a railway
company violating an ordinance by running its trains at a
rate of speed faster than that allowed by the terms of such
ordinance, cannot set up as a defense that the officers and

(a) Chicago etc. R. Co. v. Spiker, 134 Ind. 380
(b) McGill v. Pittsburg & W. R. Co., 152 Pa. St. 331; McDon-
ald v. International etc. R. Co., 86 Tex. 1; Durgin v.
Kennett, 29 At. Rep. 414.
(c) Simpson v. N. Y. Rubber Co., 80 Hun. 415.
(d) Billings v. Breinig, 45 Mich. 65.
citizens of the city had never enforced the ordinance, although it had been enacted many years before.

(a) Cleveland C. C. & I. R. Co. v. Harrington, 131 Ind. 426.
CONTRIBUTORY NEGLIGENCE OF ONE SEEKING REDRESS

UPON THE GROUND OF STATUTORY LIABILITY.

In proving negligence it is necessary to show that a specific duty placed upon the party causing the injury has not been performed, before any action will arise. After this duty has been established it is requisite that the plaintiff point out that he is within the class of persons for whose benefit the duty was imposed, for a duty owing to the general public does not establish a cause of action until some certain person is placed in a position giving him the right of insisting upon the compliance of the party charged with the breach, with the terms of the act raising the statutory duty. Having shown these facts it is further necessary that the party suffering the harm, prove the absence of any negligence on his part which may have contributed toward the injury, no one being allowed to recover damages, where, from the circumstances, it is evident that but for his own contributory negligence no injury would have occurred. Therefore, where the injury complained of is brought about by the concurring negligence of both parties, the courts apply the theory that no person can establish the foundation for an action for damages suffered by reason of his own fault.

(a)

Where "on July 4, 1891, while the plaintiff was

(a) Evans v. Waite, 83 Wis. 286.
lawfully riding on horseback on the public highway, in company with the defendant, the defendant being then and there armed with a revolver loaded with powder and ball, negligently and carelessly discharged the said revolver so that the ball therefrom struck the plaintiff in the hip, and passed on through the flesh into his thigh, where it became lodged, causing a dangerous wound, the court held that the defendant was liable to the plaintiff for the injury, because the defendant was a minor and carried a revolver in violation of statute. The court held that, because the statute was violated, the question of the plaintiff's negligence in being with the defendant and consenting to his unlawful carrying of the revolver, was not of importance, and did not charge him with contributory negligence.

But it has been held that the doctrine of contributory negligence applies to actions arising from the neglect of statutory duty, where a plaintiff brings an action against a railroad company for injury caused by the failure of the company either to erect or to maintain fences on the line of its road, as in other actions for negligence, contributory negligence is a defense. As neither the consent nor other conduct will justify the disregard of a positive statutory duty, the action of the individual seeking redress must amount to contributory negligence before such a breach of duty will be construed as a license in the form of a justi-

(a) Curry v. Chicago etc. R. Co., 43 Wis. 665.
(b) Knott v. Wagner, 16 Lea. 481.
fication, of the violation. (a)

In a California case, the doctrine that one who, aware of an obstruction in a street, negligently falls over it, is barred from establishing an action upon an ordinance of the city requiring a lighted lantern to be maintained at such a place, is laid down. This was an action to recover damages for a personal injury arising from falling over a rail left by a street railroad company upon the sidewalk, which the railroad company expected to use in the construction of the road, where the plaintiff, knowing the presence of the rail and having seen others fall over it, the court said that the contributory negligence as a matter of law barred the recovery.

(a) Davis v. California St. C. R. Co., 105 Cal. 131.
VI.

WHETHER A BREACH OF STATUTORY DUTY IS NEGLIGENCE AS A MATTER OF LAW, OR MERELY EVIDENCE OF NEGLIGENCE.

A difference of opinion exists in the authorities as to whether the mere breach of the statutory duty constitutes negligence per se, or whether the breach of duty must be taken along with other circumstances and left to the jury and is not negligence as a matter of law. In Indiana it has been decided that in an action against a railroad company to recover damages for a personal injury, caused by the failure of the company to comply with certain statutory duties, a general averment that the injury happened without the fault or negligence of the plaintiff is sufficient to sustain his claim. It is not necessary to set out affirmatively all the precautions taken to avoid the injury. It is negligence per se to run a train of cars in violation of a city ordinance, and if anyone is injured in consequence of such negligence, without being himself guilty of contributing to the cause of the harm suffered, he may recover damages for such injury.

As regards the question of the proximate cause of the harm done, it has been held that it is not necessary that the cause should be near in point of time. In the case where

(a) Pennsylvania Co. v. Horton, 132 Ind. 189.
(c) Salisbury v. Herchenroder, 106 Mass. 458.
an ordinance forbids any person to suspend a sign over a public street and a person does so in direct violation of the ordinance, using ordinary precautions in so doing, and an extraordinary wind-storm in the nature of an act of God, blows the sign from its fastenings and in its fall a bolt from which the wire holding the sign was suspended, injured the plaintiff, the court was of the opinion that although a natural cause or "actus major", contributes with the unlawful act of a person to inflict an injury, the defendant was not relieved from liability to the person suffering the injury. The cause of the harm was not so remote as to excuse the defendant from liability for his breach of duty imposed by the city ordinance.

(a)

It is held in New York that where a druggist makes a sale to a person of a poisonous substance which he fails to label as such, the druggist is guilty of negligence *per se*, but if the druggist explains to the purchaser the dangerous qualities of the drug, he is relieved from liability. The druggist in this case was under a statutory duty to label the liquid sold, "poison", and under ordinary circumstances a failure to do so is negligence as a matter of law, but here the fact that he warned the buyer of the inherently fatal effects of the poison, absolved him from that duty. In another case arising under the violation of an ordinance, in which it was proved that the plaintiff was injured by a runaway horse

(a) Wohlfahrt v. Beckert, 92 N. Y. 490.
(b) Siemers v. Eisen, 54 Cal. 418.
left unfastened in a public street, contrary to the provisions of a city ordinance, the court decided that it was not necessary to leave the question of negligence to the jury, but on the contrary instructed them that the evidence established it, holding that where any person failed to perform a duty, imposed upon him by statute, or other legal authority, the neglect of duty constituted negligence itself and not evidence of negligence.

Numerous authorities, on the other hand, hold that a breach of the statutory duty is not negligence per se, but merely evidence of negligence which is to be weighed in connection with all the circumstances of each case. The question arose in an action for damages resulting from the failure of the defendant to comply with a municipal ordinance, which forbade any person to put ashes into a wooden ash barrel. As it is manifestly not negligent at all times and under all circumstances to put ashes into a wooden ash barrel, for instance cold ashes, the court held that it was not negligence as a matter of law, but merely a question of fact in each case. The court said, among other things, "City ordinances are necessarily made general, and impose duties which in a given case may be of no special importance. It is quite possible that under certain circumstances, and in various surroundings, it is in no way dangerous to put ashes in wooden barrels . . . Whether the use of them is culpably negligent in a given case must usually be a question of fact to be

determined by the jury on the facts and not by the court."

This question is further discussed in a case arising in the ice cutting business on Lake Champlain in an action on the case to recover the value of a pair of horses drowned. It was alleged and proved that the defendant had not complied with a statute of Vermont requiring persons in the ice industry to maintain suitable guards about the holes cut, to prevent persons or teams from falling into such openings. A team belonging to the plaintiff ran away and dashed into such an opening, which had been left unguarded, and were drowned. The charge to the jury in the lower court was, in substance, that if the guards would not have prevented the accident, the plaintiff could not recover, although he was not guilty of contributory negligence, but was in the exercise of ordinary care and the defendant was negligent; however, if the team would have been stopped by a proper guard or would have been turned away by its presence, the plaintiff could recover for their loss. The court in deciding the case was of the opinion that negligence must not only be shown by the evidence, but must also be proved that it was the proximate cause of the injury complained of. The question was left to the jury to decide whether suitable guards at that place would have prevented the disaster.

In an action against a railroad company for damages for personal injury, the court decided that proof of the vio-

lation of a city ordinance by the railroad company does not establish a cause of action against the violator, but on the contrary is evidence bearing upon the question of negligence. The facts of this case were that a city ordinance required a railroad company to maintain gates at its grade crossings and to attend them at all times when trains were passing and to close them at least one minute before a locomotive passed. The cause was to recover damages resulting from a person's death alleged to have been due to the failure of the company to close the gates; it was held this circumstance was insufficient to sustain a judgment on the ground of negligence, unless other circumstances were proved making it culpable negligence.

(a) In New York it is said to be an open question whether the violation of a municipal ordinance is negligence per se, and it is held that the city ordinance should be submitted to the jury with the other evidence as bearing upon the question, but not conclusively proving it. The result of the decisions, therefore, is that the violation of the ordinance is some evidence of negligence, but not necessarily negligence itself.