1896

Burden of Proof in Cases of Contributory Negligence

Howard Owen Cobb
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BURDEN OF PROOF
IN CASES OF CONTRIBUTORY NEGLIGENCE

THESIS
PRESENTED FOR THE DEGREE OF
BACHELOR OF LAW

-BY-

HOWARD OWEN COBB

CORNELL UNIVERSITY--SCHOOL OF LAW
1896
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CHAPTER I.

INTRODUCTION --- THE QUESTION INVOLVED.

A case involving contributory negligence presents the question of what a person ought or ought not to have done under the circumstances of the particular case. Such an issue affords the basis for the application of the principle that every person shall himself bear whatever injury he brings upon himself. To guard against the unreasonableness of persons being allowed to protect themselves from responsibility for their negligent acts, the general view was adopted as to the harm the person brings upon himself, that if the plaintiff, or party injured might have avoided the consequences of the defendant's negligence by the exercise of ordinary care, but did not, the law will leave the consequences to rest upon that wrong doer upon whom they chance to fall.

The difficulty of dealing with the question of the onus in cases of the above description arises from the fact that in most cases it is almost impossible for the plaintiff to lay his evidence before a jury or
court in order to trace the fault for his injury to the defendant, without disclosing such circumstances, that either impute or tend to rebut the conclusion that the fault was mutual and the plaintiff accordingly guilty or not guilty of contributory negligence.

There are, moreover, three classes of cases under which are to be considered the question upon whom the onus probandi actually rests. Accordingly then, whether the plaintiff is bound to prove, as part of his case, his freedom from contributory negligence, we must proceed to consider each proposition as set forth in the following classification. First. In these cases, as it appears to our minds, there is no essential difference between the negligence of a defendant which may render him liable in an action of this kind, and the contributory negligence of a plaintiff which may disprove his right to recover. The very phrase contributory negligence implies that the latter is of the same intrinsic nature and contributes to cause the same effect as the former. The law presumes every one to have been diligent, or free from negligence until affirmative evidence of negligence is given, and does not, on the contrary, in the absence
of direct or circumstantial evidence, ever presume any party to have been guilty of negligence. Hence to warrant a verdict against the defendant on the ground of his negligence, the law merely requires that his negligence shall be affirmatively shown by a preponderance of the evidence, and places upon the defendant the burden of showing the negligence of the plaintiff contributing to the injury where such contributory negligence is relied upon as a ground of defense. Of course a plaintiff who pursues an unfounded action, and as it sometimes happens, is confronted with evidence elicited from his own witnesses tending to show contributory negligence on his part, may have to submit to the defendant's use of such testimony unless it be contradicted or rebutted by counter-evidence pointing toward plaintiff's diligence or freedom from negligence. But this does not and cannot affect the correctness of the rule, that contributory negligence is a matter to be proved by a preponderance of the evidence, the same as any other negligence, and that in the absence of evidence it is not to be presumed. But in another class of cases it is said that the cause of action consists in an act or omission, in-
volving not only negligence in the defendant, but the exercise of proper care by the injured party. This duty of care thus presupposed to be imposed upon the defendant for the protection of the other, is said not to be established, until the plaintiff has first shown his own relative position and performed the burden resting upon him of showing affirmatively the exercise of due and proper care on his part. In this view the absence of contributory negligence becomes a part of the plaintiff's case and should appear before the defendant can be called upon to answer the negligence imputed to himself. That such requirement does not impose upon the plaintiff the proving of a negative is contended by the courts holding such doctrine, on the ground that he is merely bound to show the duty he counts upon and the breach of it for which he sues.

The third class, briefly noticed, may be said to state the matter thus: In the absence of evidence of contributory negligence on part of plaintiff, there is no presumption either way as to his exercise of care or the want of it on his part. Perhaps the matter may be stated more clearly and logically if we should say that as in the absence of facts showing a duty of
care, the plaintiff is saved from giving evidence of such care, so the presence of facts tending to show a duty of care places the burden on the plaintiff to present some evidence from which the jury may infer that he exercised it.
CHAPTER II

ENGLISH DOCTRINE

Section I. At the Common Law after Butterfield v. Forrester

Sub. 1. The first recorded reference to the Rule. The impression seems to have prevailed to some extent that the court in the case of Butterfield v. Forrester, 11 East. 60, held that the plaintiff would not be entitled to recover in an action for negligence without showing affirmatively that the injury was not the result of his own negligence; that he would have to first establish the absence of contributory negligence upon his part. This case, the earliest leading case upon the subject of contributory negligence and the first to formulate a specific rule in connection with that subject, can not, in my opinion, be said to have so declared the law, nor, moreover, that it intended to hold such doctrine.

Sub. 2. The same: Lord Ellenborough's opinion. Such an intimation, I suppose, was inferred from the
following language employed by Lord Ellenborough who delivered the opinion in the case:

"A party is not to cast himself upon an obstruction which has been made by the fault of another and avail himself of it, if he does not himself use common and ordinary caution to be in the right. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by default of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

Sub. 3. The case considered. A casual observation of this language might justify the impression referred to supra; but when considered in connection with the facts of that case and with other portions of the opinion, it would hardly be warranted. The plaintiff in the case referred to, while riding violently in a public highway about eight o'clock in the evening was injured by being thrown from his horse which he had guided against a pole placed across the road by the defendant. When the plaintiff attempted to prove his cause of action upon the trial it appeared upon his own showing that had he been riding
at an ordinary pace or with ordinary care he could have avoided the obstruction since there was light enough at the time to discern it at a hundred yards distance. It will be seen that the injury to the plaintiff in that case was the result of his own direct act and the court, being of the opinion that the riding at the rapid pace under the circumstances as mentioned was carelessness upon his part which contributed to the injury, non-suited him. It is very evident to my mind that the language of the opinion referred to was intended to apply to the state of facts mentioned and not to lay down any general rule that would be applicable to any state of facts that might appear in that character of cases. There was, to say the least, gross negligence on the part of the plaintiff, and accordingly Butterfield v. Forrester can not be justifiably cited as authority for the rule that the burden of proof is upon the plaintiff to show his freedom from contributory negligence.

Sub. 4. Later cases : In neither of the cases of Gough v. Bryan, 2 Mees. & Welsb. 790 and Bridge v. the Grand Junction R.R. Co. 3 M. & W. 244, did the declaration contain an averment that the accident hap-
pened without any want of ordinary care on the part of the plaintiff and yet the plaintiff was allowed to recover damages for accidental injuries, a plea, which set up in a defective form, the negligence of the plaintiff, being held bad upon demurrer. If any such burden lay upon the plaintiff it would certainly have been necessary for him in those days when pleadings were required to be very precise and accurate, to allege in his declaration that the accident happened without any such negligence on his own part as contributed to cause it. And, moreover, no such declaration is to be seen in any of the cases of this general character. Both in pleading and practice in England the contributory negligence of the plaintiff has always been dealt with as if it was a separate issue from that of the defendant's negligence, and has always been so presented to the jury, the judge directing that the affirmative lay upon the defendants. The earliest statement of the rule appears in the case of Dublin, Wicklow & Wexford Railway Company v. Slattery reported in 3 app. cases 1169, where Lord Hatherly and Lord Penzance hold the opinion that, whether the question of such contributory negligence
arises on a plea of "not guilty" or is made the subject of a counter issue, it is substantially a matter of defense, and the other Lords who took part in the decision said nothing to the contrary. "That plea, equally, in my opinion," says Lord Penzance, "casts upon the defendant the burden of establishing the plaintiff's contributory negligence. Of course I do not mean that this must be done by evidence produced by the defendants. The plaintiff may in the course of his own case produce evidence by which his own negligence, as causing the accident may plainly appear. But what I intend to say is that the contributory negligence of the plaintiff must be established affirmatively, and that the absence of evidence to negative any such negligence will not entitle the defendants to a verdict as it would do, if the burden of proving that the accident happened without any such negligence, lay upon the plaintiff." . . . . "The proof of the first issue," continues the learned Lord, "which is that of the defendant's negligence is upon the plaintiff, the proof of the second, which is that of contributory negligence, lies upon the defendants."
Section II. The Rule in England today.

Sub. 1. The latest authority.—Wakelin vs. The London and Southwestern Railway Company (1887). The rule laid down in the case just considered which places upon the defendant the burden of showing contributory negligence on the part of the plaintiff, was fully and plainly approved in Wakelin vs. The London and South Western R'y Co., 12 App. Cases, 41. In that case the House of Lords laid down the latest statement of the English law as to the question and the burden of proof in cases of contributory negligence.

Sub. 2. The facts. At the trial before Manisty J. and a special jury in Middlesex, it appeared that the defendants' railway line crossed the public foot path on the level, the approaches to the crossing being guarded by hand gates. No night watchman was employed to take care of the gates and crossing. The dead body of one Henry Wakelin, plaintiff's husband was found on the line near the level crossing at night, the man having been killed by a train which carried the usual head-lights but did not whistle or otherwise give warning of its approach. No evidence was given of the circumstances under which the deceased got on to the line.

The judge left the case to the jury who having found for the plaintiff, the defendants carried the case before the Divisional Court. The verdict was set aside and judgment
entered for the defendants.

Sub. 3. Second appeal. Court of Appeals. The Court of Appeals (Brett M.R., Bowen & Fry L.J.J.) affirmed this decision. Brett, M.R. in his opinion took occasion to re-state his views previously advanced in his address to the House of Lords in Bridge's case I.R. 7 H. of L. 212; also in his charge to the jury in Radley vs. London & North Western R'y Co. 1 App. Cas. 755; and in Davey vs. London & Southwestern R'y Co., 12 Q.B. Div. 70; that the plaintiff was not only bound to give evidence of negligence on the part of the defendants which was a cause of the death of the deceased, but was also bound to give prima facie evidence that the deceased was not guilty of negligence contributing to the accident; and that by reason of the plaintiff having been unable to give any evidence of the circumstances of the accident she had failed in giving evidence of that necessary part of her prima facie case. From this decision the plaintiff appealed.

Sub. 4. Third appeal—The House of Lords. In the House of Lords, however, upon the point raised in the Court of Appeal as to the burden of proof in cases of contributory negligence, Brett, M.R. was overruled, and the correct view was determined to be that the plaintiff was required to give evidence only on the first head, that the accident was through the negligent act of the defendants. Lord Watson in his able and concise opinion maintained that no proposition in-
consistent with the view here advanced, had been adopted by the House in any previous case. In the course of his remarks, the learned lord states that the onus of proving affirmatively that there was contributory negligence on the part of the person injured is, in the first instance, upon the defendants, and that in the absence of evidence tending to that conclusion, the plaintiff is not bound to prove the negative in order to be entitled to a verdict. If the plaintiff's evidence were sufficient to show that the negligence of the defendants did materially contribute to the injury, and threw no light upon the question of the negligence of the injured party, then, in the absence of any counter-evidence from the defendants, it ought to be presumed that there was no such contributory negligence-- Even if the plaintiff's evidence did disclose facts and circumstances bearing upon that question, which were neither sufficient per se to prove such contributory negligence, nor to cast the onus of disproving it on the plaintiff, the same opinion would prevail.

Lord Blackburn concurred with Lord Watson.

Sub. 5. The same-- Lord FitzGerald's opinion.

Disagreeing with the rule laid down by the Master of the
Rolls in the Court of Appeals, "That the plaintiff in such a case is bound to establish, first, negligence on the part of the defendants, second, that such negligence caused the injury of which plaintiff complains; and further if not involved in number two, that the plaintiff is bound on his case to give affirmative evidence of the negative proposition that he did not negatively contribute to the accident." Lord FitzGerald says: "Before the passing of Lord Campbell's act, in the common law action for an injury alleged to have been caused by the negligence of the defendant, and when that most convenient plea 'not guilty' was permitted, I always understood that if the defendant relied as a defence on contributory negligence, though he was permitted to establish it under 'not guilty', yet the issue lay on him and I am not aware that any different rule has been established since the passing of that statute, or since the practice has been adopted of putting in special defenses, whether the action was at common law for a personal injury or under the statute, for a wrongful act causing the death."

The plaintiff does not in the statement of the claim allege in terms the absence of contributory negli-
gence, and the defendant, if he relies on it, does so affirmatively by special defense as in the case now before us. "The defendants further say that the death of the said Henry Wakelin was caused by his own negligence, and that he might and could by the exercise of reasonable care and caution have seen the train approaching and avoided the accident. It has been truly said that the proof of negligence and contributory negligence are in such cases as that now before your Lordships so interwoven as that contributory negligence, if any, is generally brought out and established on the evidence of the plaintiff's witnesses. . . . If the plaintiff can establish his case in proof without disclosing any matters amounting to contributory negligence or from which it can be reasonably inferred--then the defendant is left to give such evidence as he can to sustain that issue."

Sub. 6. Bearing of the Wakelin case on the point. The case was finally disposed of in favor of the defendant, on the ground as Lord Halsbury L.C. in his opinion states to be "It being incumbent upon the plaintiff to establish by proof that her husband's death was caused by some negligence of the defendant, to which the injury
complained of in this case is attributable. That is the fact to be proved. And in the absence of direct proof, the circumstances being such as are equally consistent with the allegation of the plaintiff as with the denial of the defendant, the plaintiff failed, for the reason that the plaintiff is bound to establish the affirmative of the proposition."

Accordingly the rule here adopted does not apply to a case in which the proofs on the part of the plaintiff show, or tend to show, contributory negligence. If such negligence **conclusively** appears, the court will non-suit the plaintiff, or direct the jury to find for the defendant. If the evidence only **tends** to show such contributory negligence, the question must go to the jury to be determined like any other question of fact, upon a preponderance of evidence. But that cannot affect the question upon whom the onus lies in the first instance.
The rule is so undisputed that it is sufficient for our purpose to cite one leading or recent decision in point in the majority of the jurisdictions considered.

Section I. Application of the doctrine in the state of Alabama--

In the case of Birmingham Mineral Railroad Company vs. Wilmer, 97 A.L.A. 165, decided in 1892, the defendant in error, a brakeman in the employment of the Railway Company was injured by being thrown from a freight car by reason of the engine in the control of one of the company's servants being suddenly started. Upon a refusal by the court to charge as requested by the defendant "that, under the evidence of this case, the burden of proof of contributory negligence is not upon the defendant," the learned judge before whom the appeal was tried held that the question had been ruled adversely to demurrant in that contributory matter is a matter
of defense and in a complaint claiming damages for personal injuries received while in the service of the master, it is not necessary to aver that the plaintiff was in the exercise of due care at the time the injury was inflicted. And he further said: "The burden of proof as to contributory negligence is in all cases upon the defendant. Plaintiff's evidence sometimes obviates the necessity of proof by the defendant, that the injury was due to contributory negligence, but even in such case it is inaccurate and misleading to say that the burden is on the plaintiff or is not on the defendant. A charge to that effect is especially pernicious in a case like this, where it was a matter of pure inference to be drawn by the jury, whether plaintiff was negligent or not, and where they found that he was not negligent as they had a right to do. . . . The mere fact that there is evidence which tends to prove the affirmative of an issue, no matter from which side the evidence comes, does not as a matter of law discharge the onus resting on the party having the affirmative of that issue: the onus is not discharged by any tendency of the evidence which falls short of reasonably satisfying the jury of the facts involved in the tendency. These charges were properly
refused". The above decision is upheld and supported by that court in Mobile & Montgomery Railway Company vs. Crenshaw, 65 Ala. 566 and cases cited; Smoot vs. The Mayor, etc. of Watumpka, 24 Ala. 112.

Section II. The Arizona case.

Southern Pacific Railway Company vs. Tomlinson, 33 Pac. Rep. 710, 1893. The plaintiff's intestate lived on one side of the company's railroad track, and his store was situated on the opposite side. Intestate was struck by a train at a place used for a crossing by the residents of the village. The refusal of the trial court, at the close of the plaintiff's case, to direct the jury to return a verdict for the defendant, at the request of the defendant is assigned as error. Counsel for appellant urge in their brief that the request should have been granted for the reason that plaintiff fails to show due care and caution on part of the deceased in attempting to cross the track at the time of the accident. Sloan J. states the rule in this territory as declared by the Supreme Court in the case of Lopez vs. Mining Company, 1 Ariz. 464, to be "that in actions for personal injuries, where contributory negligence is relied upon as a defense, due care and caution
on the part of the plaintiff, in the absence of affirmative proof to the contrary, will be presumed, and the burden of proving such contributory negligence rests upon the defendant." Accordingly the trial court was upheld as properly denying defendant's request that the jury be directed to return a verdict for defendant, and judgment for defendant in error was affirmed.
Section III. The rule approved in Arkansas.

In behalf of the defendant the court charged as follows: "The mere fact of the injury does not render defendant liable. It must have been caused by defendant's negligence, unmixed with any fault on plaintiff's part. And the plaintiff must prove negligence on the part of the defendant, and that she was free from negligence on her part. And unless you find from the weight of the evidence, first, that defendant was guilty of negligence which contributed to her injury; and, second, that she was free from fault or negligence, you will find for the defendant." Smith J. said that the above prayer announced an incorrect rule of law. Contributory negligence is a defense and the proof of it devolves upon the defendant who alleges it, and therefore holds the affirmative of this issue. The courts of last resort in Massachusetts and several other states have, indeed, adopted the contrary principle—that the plaintiff must show he was in the exercise of due care, at the time the injury happened. But this, it is believed, is inconsistent with the rule of evidence,
adjusting the burden of proof according to the state of the pleadings; and it is certainly opposed to the weight of authority as settled in England, in the supreme court of the United States and a majority of the states of the union. This court has already given in its adhesion to the more reasonable rule—that the plaintiff will be presumed to have been ordinarily prudent until the contrary appears, either from his own evidence or that of the defendant.

Texas & St. Louis Railway v. Orr ad. 46 Ark. 182.

The jury in that case, had the instructions been given it which were requested by the defendant—substantially, that as the person had been injured by a fall through an open trestle of the defendant's railway company, the law presumes that his own negligence was the cause of his death, and before there can be a recovery in the action, it devolves upon the plaintiff to show that said deceased was free from fault—might well have concluded that the fact that deceased was free from fault did not appear by a preponderance of evidence. The court says:

"This instruction was properly refused as it shifted
the burden of proving contributory negligence on the plaintiff, which, in this case, rested peculiarly upon the defendant. If the plaintiff, in any case of personal injury, can show negligence upon the part of defendant, without, at the same time, disclosing, the inherent weakness of his own cause by reason of contributory negligence, then such contributory negligence is a matter of defense; in confession and avoidance, affirmative in its character, and the burden is upon the defendant to establish the defense by a preponderance of testimony, as in all other affirmative defenses of like nature." Citation, L.R. & P't's Ry. Co. vs. Atkins, id. 423.

Section IV. The California Rule.

In the case of Mac Dougall, App. v. Central Railroad Co., Resp. 63 Cal. 431, the rule, as stated in the marginal note, "In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defense, and it is error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence,"
is supported by that court's decisions in the cases of Robinson v. W.P. R.R. Co., 48 Cal. 476 Nehrbas v. C.P. R.R. Co., 62 Cal. 320.

Section V. The Colorado Case.

In Denver & Rio Grande Railroad v. Ryan, decided in 1891, the plaintiff's intestate was run over and killed by a train of the railroad company's in the city of Denver. The refusal of the trial court to instruct the jury as requested by defendant, that the burden of proof devolved upon the plaintiff to show affirmatively that the killing of Ryan was caused by the negligence of defendant, and also that the burden of proof was upon the plaintiff to show affirmatively that the accident which caused Ryan's death was not the result of contributory negligence or want of reasonable care and caution on his part; and that if plaintiff failed to thus prove either of said facts, the jury must find for defendant, was assigned as error. The court states that "where a defendant relies upon the contributory negligence of the plaintiff as a defense, such contributory negligence must be shown by a preponderance of the evidence or the defense will
be unavailing." The judgment was affirmed, citing Wall v. Livesay. 6 Colo. 465. Lord. v. Pueblo S. & R. Co. 12 Colo. 393. K. P. Railway Co. v. Twombly, Adm'x 3 Colo. 129.

Section VI. The Rule in Dakota.

Sanders v. Reister. 1 Dakota 151.

The plaintiff in this case was injured while walking from her house to another's in the night time, by falling into a cellar dug by the defendant upon his own land. One of the requests made by defendant to the court to charge the jury was in substance, that if the jury believed that the plaintiff, going from her house to Mrs. Roth's in the night time, and under circumstances to which she has testified, did not exercise ordinary care and thereby incurred the risks of the injury which she complains to have suffered, then these plaintiffs cannot recover and your verdict should be for the defendant. The court refused to so charge and delivered to the jury among other instructions, the following: "Negligence on the part of the plaintiff is a mere matter of defense to be proved affirmatively by the defendants of which you must be satisfied by preponderance
of the evidence, though it may, of course be inferred upon the circumstances proved by the plaintiffs. The law will not presume contributory negligence on the part of the plaintiff."

The appellant excepted to this instruction and claimed the court erred in so instructing the jury. Bennet J. overruled this exception and further stated that so far as the court is concerned, it is effectually settled law as set forth in the case of Railway Company v. Gladman, 15 Wal. 401, by Mr. Justice Hunt, that, "The plaintiff may establish the negligence of the defendant, his own injury in consequence thereof, and his case is made out. If there are circumstances which convict him of concurring negligence, the defendant must prove them, and thus defeat the action. Irrespective of statute law on the subject, the burden of proof on that point, does not rest upon the plaintiff."

Section VII. The Doctrine in the District of Columbia.

The case reported in 6 Mackey 39, of Tolson v. Inland & Seaboard Coasting Co. was brought to recover damages for crushing the foot of the defendant, at a wharf on the Potomac river, in effecting a landing of
a steamer in so negligent a manner that a portion of the wharf was torn up and broken, and the foot of the plaintiff was caught and crushed among the broken timbers. The plaintiff was the owner of the wharf, and was in the habit of attending to his duties of a wharfinger.

"In rejecting the third prayer of the defendant the court was clearly right," says Mr. Justice Merrick who delivered the opinion of the court. "This prayer put the burden of proof to establish affirmatively his case and prudence. This is not the law in this jurisdiction as is laid down by Muller v. D.C. 5 Mackey 289, McDade v. Washington, etc. Railroad Company, 5 Mackey 144," and, he continued, "after the plaintiff has proved negligence on the defendant's part he is entitled to rest and the burden then falls on the defendant to prove want of ordinary care and prudence in the plaintiff, if he relies upon that as his defense."

Section VIII. The Latest Case in Kansas--The Rule Stated.

In the early case Kansas Pacific Railway Company v. Pointer, 14 Kansas 38 there is the following head note: Contributory negligence on the part of the plaintiff is
matter of defense; and if the record shows negligence of the defendant, and is silent as to the conduct of the plaintiff, a judgment for the plaintiff will be upheld."

Brewer J. delivered the opinion of the court.

Upon a brief review of the latest case on this point, that of St. Louis and San Francisco Railroad Company v. Weaver decided in 1886, it appears that the defendant in error, a locomotive engineer in the employment of the plaintiff in error, a railway company, had charge of an engine drawing one of its freight trains. The injuries of the complainants were caused by the engine running into a "wash-out" in Vernon Valley, and over-turning, his arm being crushed between the driving rods of the engine. It was claimed among other things that the burden of proof rested upon the plaintiff to show that he was not guilty of contributory negligence, and not upon the defendant to show that he was. Valentine J. giving the opinion of the court says: "The rule, however, in this state is otherwise. (K.P.R'y Co. v. Pointer, 14 Kan. 38, 50, K.C.L. & S. R'y Co. v. Phillibert, 25 id. 583;) The law presumes that every person performs his duty, and this presumption continues until
it is shown affirmatively that he does not and has not. . . . Hence while it may be said in a general sense that the burden of proving his case devolves upon the plaintiff, yet if he has shown that the defendant was guilty of the negligence causing the injury complained of, and the evidence tending to show that he has performed his duty is at least equal to that which tends to show otherwise, he has made out his case. This is virtually throwing the burden of proof to show that the plaintiff has been guilty of culpable contributory negligence upon the defendant; and this has been the uniform holding of this court." (35 KAN. 412.)

Section IX. The Rule in Kentucky.

In Paduca and Memphis Railway Company v. Hoehl, 12 Kent. 41 the head note states the rule as follows: "The burden of proof is on the plaintiff to make out his case—the onus is on the company to show that the plaintiff's own negligence contributed to the injury complained of. When the plaintiff has shown the negligence of the company, and the injury caused by it the cause of action is made out, and unless his own proof shows contributory negligence on his part he is entitled to a
recovery."

The action in the case of the Kentucky Central R.R. Company v. Thomas's administrator, 79 Kent. 160 decided in 1880, was an action brought by the personal representative of the deceased, Thomas, to recover damages for the loss of his life on the ground that the injury was caused by the negligence of the agents and employees of the railroad company, the plaintiff in error. The deceased, a passenger, was at the time of the accident riding in the express car when he should have been in the passenger coach. Chief Justice Cofer delivering the opinion of the court, said: "Contributory negligence is a defense and avoids the plaintiff's case, and must be made out by showing affirmatively not only that the plaintiff was guilty of negligence, but that such negligence co-operated with the negligence of the defendant to produce the injury.

Section X. The Rule of the Maryland Case.

The county commissioners of Prince George's county v. Burgess, 61 M'd 29, was a case in which the Appellees horse was so injured by getting into a hole in one of the bridges of the defendant county, and across which he was
driving, that the horse died. The principle question presented by the bill of exceptions arose upon refusal of the court to grant the first prayer of the appellants which was as follows: "That the plaintiff is not entitled to recover in this suit unless the accident complained of happened while he was exercising reasonable prudence and care, and as he has offered no evidence on this point their verdict must be for the defendants."

Irving J. says: "It is well settled in this state, that the burden of showing contributory negligence on the part of a plaintiff, is on the defendant. Bacon's case, 58 Md 484. This rule has been laid down in suits against railroads for injury occasioned by them; and we see no reason for establishing a different rule as applied to accidents occasioned by defective county roads and bridges. The presumption that a man will act prudently and with care for his own safety and will not recklessly rush into destruction must exist as well in the one case as in the other."
Section XI. The Minnesota decisions.

Hocum v. Weitherick, 22 Minn. 152, "Contributory negligence is defensive matter, not required to be negatived in the complaint, or disproved by the plaintiff, to make out a prima facie case. The onus of proving it rests upon the defendant. If, however, it appear from the plaintiff's evidence, it will defeat a recovery."

Cornell J. upon this ground supported the lower court in its refusal to charge as requested by defendant in substance that it was required to appear, to the satisfaction of the jury, that plaintiff was exercising due care, that is to say, he must prove this as part of his case, to enable him to recover, and also that the burden of proof was upon the plaintiff to show affirmatively that he was free from any contributory negligence on his part.

Lorimer v. St. Paul City R'y Company, 48 Minn. 391, laid down the further rule that a statute subjecting railroad companies to liability to their servants for the negligence of fellow servants, does not change the rule as to the burden of proof of contributory negligence.
Section XII. The Doctrine in Missouri.

Thrope v. The Missouri Pacific R'y Company, 89 Mo. 650. This is a suit for damages for personal injury sustained by the plaintiff, whilst in the employment of the defendant as a switchman in its yards at Kansas City, Mo.: "Contributory negligence is a matter of defense and need not be alleged or proved by the plaintiffs".

Fulks v. The St. Louis & San Francisco R'y Company, 111 Mo. 335. In this case the plaintiff brought suit to recover damages for injuries which he received while attempting as a passenger to get on a moving freight train of the defendant's at a station. The court instructed the jury that the attempt of the plaintiff to get upon a moving train was in itself negligence, and that the burden is upon the plaintiff to relieve himself of such imputation of negligence by showing that he had permission or was directed to do so by the employees of defendant in charge of the said train." It appeared upon the trial that the plaintiff was in the habit of riding upon this train as a passenger. "These instructions", says Black J. "are faulty for the reason that they placed the burden of proof upon the plaintiff to
show that he was not guilty of contributory negligence. Whatever the law may be elsewhere, it is well settled in this state that contributory negligence is a matter of defense. The burden is upon the defendant to plead such a defense, and to sustain it when pleaded, by proof."

Section XIII. The Recent Montana Case. With statement of corollary to the rule.

In Nelson v. City of Helena, (Mont.) 39, Pac. Rep. 905, action was brought by the plaintiff to recover damages for personal injuries sustained by reason of his falling upon one of the sidewalks of defendant, it being alleged that the injury occasioned by reason of defendant's negligence in allowing ice to accumulate upon said sidewalk. The plaintiff appeals from the judgment entered in favor of defendant alleging error in the court giving among other instructions, the following: "The injury sustained by plaintiff is admitted, but before he can recover he must prove that it resulted from negligence on the part of defendant, and without negli-
ligence on his own part directly and immediately contribut- ing to the accident." Upon this charge Dewitt J. says: "It is a law of this jurisdiction that, in actions for damages for personal injuries, contribu- tory negligence is a matter of defence, and that the absence of contributory negligence is not required to be proved by plaintiff, as part of his case. Citing Higley vs. Gilmer, 3 Mont. 97. There is a corollary rather than an exception to this rule (Ken- non vs. Gilmer, 4 Mont. 433.) the corollary being to the effect that whenever the plaintiff's own case raises a presumption of contributory negligence the burden of proof is immediately upon him. In such a case it devolves upon the plaintiff, as of course, to clear himself of the suspicion of negligence that he has himself created. He must make out his case in full, and where the circumstances attending the injury were such as to raise a presumption against him, in respect to the exercise of due care, the law requires him to establish his freedom from contributory negli- gence. Beach on contributory negligence, section 157. But this corollary is not applicable in the case at bar.
Section XIV. The last holding in Nebraska.

Anderson admr. vs. Chicago B. & Q. or Co. 35 Neb. 95.

In this case complaint is made of the giving of certain instructions, one of which, was that "the burden of proof is upon the plaintiff to establish the fact that the deceased himself was not guilty of carelessness or negligence, which caused or contributed to the accident and death."

The intestate; a brakeman, while coupling the cars of the defendant, was caught between certain projecting timbers on a flat car and the box car, and killed. It was claimed that this instruction misstated the rule as to the burden of proof upon the question of contributory negligence. That instead of the plaintiff being obliged to prove that the deceased was free from fault, the burden rested upon the defendant to establish that the intestate was guilty of contributory negligence. The same point was considered by the court in the case of The City of Lincoln vs. Walker, Neb. 244, where after a consideration of conflicting authorities, it was ruled that "when
the plaintiff makes out his case without showing negligence on his part, contributory negligence is a matter of defence, and the burden of establishing it is on the defendant." The instruction under consideration was accordingly held to be error.

Section XV. The decisions in New Hampshire. Smith vs. the Eastern Railroad. 35 N.H.316.

The declaration of the plaintiff in this case, alleging in substance that the plaintiff's horse, being upon the tract of the defendant's road, was negligently and carelessly run over and killed by defendant's train, was held to be sufficient by Fowler J. in his review of the case, in as much as whatever defect there might have been in omitting to state as to the manner in which the horse came upon the tract, was cured by the verdict.

Since if the horse were there wrongfully or rightfully, the defendants were responsible if they killed it, as expressly charged and the court so found.
White vs The Concord Railroad, 30 N. H. 207 is a similar case. Upon appeal the ruling of the court was held to be correct; namely that as the plaintiff's animal was rightfully upon the crossing and was killed by the defendant's train, the burden of proof was upon the defendant, to show that it was done by no fault of theirs, but by some accident, or by the fault of the plaintiff.

Section XVI. The settled Doctrine of New Jersey.

In 24 N. J. 268, the case of Moore v. Railroad Co., there is given by Ogden J., a complete review of the old English cases and the early cases of Massachusetts which are the authorities generally cited to support the rule that the burden is upon the plaintiff to prove himself free from contributory negligence; and in conclusion the court sustains the objection of the defendants that the verdict should have been for the defendants. Potts J., however, limited the doctrine which he conceived to be laid down in those cases and says: "Where facts and circumstances appear either
in the case made by the plaintiff, or that shown by the defendant, upon which the question of plaintiff's negligence comes up in the case, the onus is then thrown upon the plaintiff to show ordinary care on his part. Such facts and circumstances appear in this case."

In New Jersy Express Co. v. Nichols, 33 N. J. 434, the court held that the plaintiff is not, as a condition precedent to his right to maintain his action, bound to prove affirmatively that the injury was not contributed to by his own negligence, under penalty of being nonsuited. The reasons assigned in the court below why the non-suit should be granted were as appears by the bill of exceptions, that the plaintiff was bound to prove not only that the injury by him sustained was caused substantially and proximately by the negligence of the defendants, but also that the plaintiff was free from negligence, and did not, by his own conduct, contribute to the injury complained of; and the plaintiff in this case having failed to make proof accordingly, that the said defendants were entitled to a non-suit. The judge overruled this motion and was sustained by Depue J., for the reason as he said, that "the law in
this state has been settled otherwise in this court, in Durant v. Palmer, 5 Dutcher 544, and at the present term in the case of Drake v. Mount."

Section XVII. The true rule in Oregon.

In Grant Admr. v. Baker et al. a case reported in 12 Oregon 329, the circuit court granted the defendant's motion and the appellant was non-suited. The second ground for the non-suit was "that the appellant had failed to show the deceased was without fault at the time of the action; that the appellant was required to show that the deceased was at the time of his death, free from contributory negligence, before recovery could be had."

Upon appeal, Thayer J. in his opinion says: "The circuit judge allowing this motion, followed what he supposed to have been held in Walsh v. Oregon Railway & Navigation Co., 10 Oregon 250, where however, upon appeal to this court a new trial was ordered to be given and the non-suit which had been granted upon substantially the same motion, was set aside. The court further says:}
"I think it has always been understood by this court that contributory negligence is a defense and must be answered as such." The appellant in this case, administrator for deceased who was killed by falling from a street in the city of Astoria, offered evidence, sufficient to authorize the inference that the deceased, while lawfully traveling the street received his injury in consequence of its being so filled up with timber and lumber, and the rail being off the side, which had been placed there as a protection to persons passing along the same, as the street was built upon piles across some tide land, and several feet above the surface. Accordingly the new trial was granted, the judge overruling the non-suit on the ground stated supra.

In the very recent case of Nord v. Umatilla County App., 15 Oregon 313 decided in 1887 by Thayer J., the head note states that: "The plaintiff must establish that he was injured by the negligence of defendant by testimony that does not tend to show contributory negligence upon his part; but beyond this, the burden of proof to establish contributory negligence is upon the defendant."
The appellant's counsel asked the court to instruct the jury that before any recovery could be had, the plaintiff must have submitted to them a case clear of contributory negligence on his part: that the injury must have resulted exclusively from the negligence of the defendant, before it could be called upon to respond in damages therefor. "This proposition" says the court, "would seem to imply that the plaintiff was required to establish that he was not guilty of negligence in the affair which is not the rule. He was obliged to show that the injury was received in consequence of the defendant's negligence and would not then be entitled to recover if his proof showed that he was also guilty of negligence, which contributed to the injury. It is immaterial whether a plaintiff in such a case is, as a matter of fact, guilty of negligence or not, unless the evidence upon one side or the other shows it. If it does not appear from the evidence adduced by the plaintiff, then the defendant must establish it. It primarily belongs to the defendant to prove it as a defense, though he may avail himself of the benefit of evidence tending to prove it, appearing from the plain-
Section XVIII. The rule as stated in Rhode Island.


The plaintiff sues as administrator for deceased who is found fatally injured in an excavation in a highway. All that was known of the matter was that on that evening he had been seen walking along the highway in his usual manner. The plaintiff alleges that having large stones on the foot-path constituted the negligence of the town's authorities which resulted in the deceased death. The presiding justice non-suited the plaintiff on this state of proof, and plaintiff excepted and brought this petition for a new trial. Potter J., giving his opinion, says: "We think the case should have been submitted to the jury. There is ordinarily a certain degree of presumption that a person of ordinary intelligence will not purposely expose himself to danger. . . . If the plaintiff's own case shows that he brought the injury on himself by his own carelessness, he may be non-suited; but if it does not he should not
be non-suited, but the question is for the jury. . . .
When the plaintiff shows negligence on the part of the
defendant, and there is nothing to imply that the plain-
tiff brought on the injury by his own negligence, then
the burden of proof is on the defendant to show that the
plaintiff was guilty of negligence." Petition was
granted.

Section XIX. Statement of the South Carolina rule.

In the case of Crouch v. Charleston & Savannah R'y
Co., 21 S.C. 495, upon the trial before the lower court,
the defendant moved for a non-suit which was refused,
and now appeals to this court from the ruling of the
judge in refusing to sustain the demurrer and dismiss
the complaint upon the grounds of, first—"Because the
complaint does not state that the plaintiffs were in the
exercise of ordinary care in passing defendant's bridge,
and second—Because it does not state facts, from which
it might be inferred that the plaintiffs were in the
exercise of ordinary care in so passing the bridge."
Mr. Justice McGowan in delivering the opinion of the
court, says: "This court has held in the recent case
of Carter v. C. & G. R.R. Co., 19 S.C. 28, that contributory negligence is a matter of defense and the burden of proving it is with the defendant. We think it follows from the onus of proof being on the defendant, that it is not necessary for the plaintiff to make the allegation of due care in his complaint.

In the most recent case, that of Whaley v. Bartlett, 42 S.C. 454 decided in 1894, the defendant's appeal from the charge given by the court and move for new trial on the ground, among other things, that his honor erred in failing to charge as requested by the defendant, that in order to recover anything "plaintiff must show that even were there negligence on the part of the employees of the defendant that he used all reasonable effort to avoid and fend off the results of this negligence." Upon this consideration of the several exceptions to the judge's charge, Mr. Chief Justice McIver, says: "The fifth exception alleges error in failing to instruct the jury as requested in defendant's seventh request. That request is based upon the erroneous assumption that a plaintiff is bound to negative any contributory negligence on his part. This is not only
in conflict with the principles of logic, but, what is more important, it is in conflict with several distinct decisions of this court. A party is not required to prove a negative, and as to this particular matter, it is settled that contributory negligence is an affirmative defense, and the burden of proof is upon the defendant."

It was so expressly held in Carter v. R.R. Co. and in Crouch R'y Co., 21 S.C. 495. This exception must, therefore, be overruled.

Section XX. The latest case in South Dakota.

As recent as 1893 there is authority for the proposition that "The burden of proving contributory negligence on the part of the plaintiff rests upon the defendant, unless the plaintiff in making out his case, prove, or give evidence tending to prove, that he was guilty of such contributory negligence; and when there is no evidence upon the subject it is the duty of the court to assume that the plaintiff was not guilty of such contributory negligence, and so instruct the jury." Smith v. Chicago m. & St. P. R'y Co., 4 S.D. 71. This was an action to
recover damages alleged to have been sustained by plaintiff through negligence of the defendant, in permitting sparks to escape from its engine on the line of its railway, whereby a quantity of hay belonging to the plaintiff was destroyed. It was contended by the counsel for the appellant, that as the plaintiff alleged in his complaint that he "was not guilty of any negligence which in any way contributed to the loss of the hay," and this allegation was denied by the general denial in the answer, it was therefore an issue in the case, and that the court erred, not only in omitting to call the jury's attention to this issue, but also in refusing to give the instruction asked for by the defendant. Corson J., in his opinion, maintained that the allegation in plaintiff's complaint, above set out was surplusage and its denial raised no material issue that plaintiff was required to prove, and that such instruction to the jury by the lower court was as favorable to the defendant as the facts in the case would justify.
Section XXI. The true doctrine in Texas.

In the Dallas Wichita R'y Co. v. Spicker, 61 Texas 427 the marginal note says: "In an action for injuries caused by an alleged failure of duty on the part of the defendant, when the failure of duty and injuries are shown by the plaintiff, and there is nothing that implies that he brought the injury on himself by his own negligence, then the burden of proof is on the defendant to prove the plaintiff was guilty of such negligence. On the other hand, when the plaintiff's own case exposes him to suspicion of negligence, then he must clear off such suspicion." "This" says the court, "we believe to be the true rule." Wharton on negligence, 426.

There was no fact in proof in this case which tended to show contributory negligence by the deceased. The defendant, in his answer, alleged the defects in its bridge from which resulted the injury to Spicker, were known to him, and the court below instructed the jury that the burden of proving such knowledge was on the defendant. There was held to be no error in the judgment for which it should be reversed, and the court accordingly affirmed it.
The marginal note in the case of The Texas & N.O. R'y Co. v. Crowder, 63 Texas 502 (1885), states that, "The servant who seeks to recover for injuries claimed to have been inflicted through negligence for which his employer is liable must establish that negligence by proof, and that he himself was not in fault but exercised due care." Stayton Associate Justice citing Mayo v. Boston & Me. Railroad, 104 Mass. 37

Section XXII. The Virginia rule.

Southwest Improvement Co. v. Andrew, 86 Va. 270.

In this case the court through Lacy J. says: "The second ground of exception to the declaration is, that it does not allege a want of contributory negligence on the part of the plaintiff. This is not necessary or proper. In an action for damages occasioned by the negligence or misconduct of the defendant it is not necessary for the plaintiff to allege and prove the existence of due care on his part to entitle him to recover. If the defendant relies upon contributory negligence of the plaintiff to defeat the action, he
must prove it, unless indeed the fact is discovered by the evidence of the plaintiff, or may be fairly inferred from the circumstances."

As proof of due care is not a part of the plaintiff's case it is of course, not necessary he should aver it in his declaration. In the late case of the Baltimore & Ohio R.R. Co. v. McKenzie a late case in this court, reported in 81 Virinia 781, Lewis J., delivering the unanimous opinion of this court, used the following emphatic language: "If the defendant relies on the defense of contributory negligence it was incumbent on it to prove it, and in the absence of satisfactory proof to establish such defense, the plaintiff must be presumed to have been without fault. This, indeed, is not disputed."
Section XXIII. The Washington case.

Spurrier v. Front Street R'y Co. Appellant. 3 Wash. 659 (1892).

The principal contention of the appellant in the argument of the case upon appeal, was, that the court erred in refusing to give the following instructions asked by the defendant; in part, that it is the law that the plaintiff cannot recover in this case unless he has established by a fair preponderance of evidence the two propositions, "that there is negligence on the part of the defendant, and the absence of contributory negligence on his part." Upon this part of the instruction the court says, Dunbar J. delivering the opinion, "This instruction asked raised the question whether or not contributory negligence is an affirmative offense. The court instructed that it was, and that the burden of proof was upon the defendant on this proposition... we think the weight of authority, as well as the better reasoning, sustains the view taken by the court below. This has been the universal holding of the supreme court of the United States." The plaintiff in this action was injured by a collision of a cable car with
her wagon, which she was unable to get off the track because of the refusal of her horses to move and the verdict in her favor was sustained.

Section XXIV. The rule in West Virginia.

The facts of the case reported in 18 W. Va. 579, of Fowler v. B. & O. R.R. Co. decided in 1881 were briefly as follows: the plaintiff was on the road to Baltimore in charge of cattle on a stock train. On a dark night while looking after the cattle, an express train while running at a very high speed struck and injured the plaintiff who was on the track under assurance from the conductor of the train that the stock train was entitled to the main track and that it would pull out shortly. It was insisted, by the plaintiff in error, that the declaration ought to have alleged that the plaintiff when injured was in the exercise of ordinary care—Johnson, announcing the opinion of the court, says on this subject: "This was wholly unnecessary, because, if the plaintiff's want of ordinary care, or his contributory negligence was the proximate cause of the injury, it was purely a matter of defense and need
not be alleged in the declaration, the burden of proof of such negligence being on the defendant. Citing Snyder v. Pittsburg, Cina & St. Louis R'y Co., 11 W. Va. 14; Sheff et ux v. City of Huntington, 16 W. Va. 307. The demurrer to the declaration was properly overruled."

Section XXV. The recent Wisconsin case.

In Dugan v. Chicago, St. Paul, Minneapolis & Omaha R.R. Co., 85 Wis. 609--decided in 1893--the marginal note says: "The statute providing that every railroad company shall be liable for damages sustained by any employee without contributory negligence on his part, when such damage is caused by the negligence of other employees specified does not change the rule as to the burden of proving contributory negligence." In this case error was assigned because the court refused to charge the jury to the effect that the burden was upon the plaintiff of showing due care and freedom from contributory negligence on his part. The jury found that the plaintiff's injury was caused by the negligence
of the defendant's engineer in charge of the locomotive at the time, and consisted in moving his engine in violation of the rule. Cassidy J. says, in delivering the opinion of the court: "It is, in effect, conceded that independent of this statute the burden of proving contributory negligence, when not disclosed by the evidence on the part of the plaintiff, was purely a matter of defense. Hoye v. C. & N. W. R. Co., 67 Wis. 15 and cases there cited. . . . The mere fact that the legislature embodies in the act in question the words, 'without contributory negligence on his part', when the courts would necessarily have supplied the same by construction had they not been so embodied, cannot operate to change the burden of proof from the defendant to the plaintiff."
Section XXVI.-- The Federal Courts.

Sub. 1. The latest case upon this subject.

The latest case upon this subject in the Federal Courts is that of Cohen vs. West Chicago Street Railway Co., 18 U.S. App. 593, decided in 1894 in which case the action was brought to recover damages sustained by reason of an injury to the person of the plaintiff received while attempting to board one of the defendant's cars in the city of Chicago. One of the principal questions which the court was called to pass upon was, whether or not there was error in the charge (to which exception was taken) "that plaintiff might have boarded either of the trailers behind the grip car, . . . . and that he should have done so because they were nearer to him, and this part of the charge proceeded upon the assumption that the trailers attached to the grip car were open on the side on which the plaintiff boarded the grip car."

Brunn, District Judge, says on this point; "There could have been no presumption of fact, such as the court's charge proceeded upon, that the cars attached to the grip car were open on the south side, so that they may have been boarded from that side by the plaintiff. There was no proof upon this point either way. This part of the charge bears upon the question of the contributory negligence of the plaintiff, and the presumptions on this question were in his favor, the burden being upon the defendant to prove such contributory negligence." For this and other reasons, the court
held the charge erroneous, and reversed the judgment, and a new trial was granted.

Sub. 2. The rule in the Federal Courts stated in connection with the Ohio decisions.

Horns adm'r. vs. Baltimore & Ohio Railroad Co. 6 U.S. App. 381, in marginal note, states that, "The rule in the Federal Courts is that the onus of showing contributory negligence is on the defendant, and that defense may be founded upon the facts shown by the plaintiff's evidence alone." The court speaking through Swan, District Judge, reviews the holding upon the statutes under which the recovery in this case is sought to be obtained, as laid down in Penn. Co. vs. Rathgeb, 32 Oh. St. 66; Baltimore & O. Railroad Co., vs. Whitacre 35 Ohio St., 627, 630; 28 Ohio St., 340; and declares their ruling that "before the plaintiff can recover because the signals were not given, he must cause it to appear that this failure of duty brought about the disaster, for if his own imprudence was the moving cause, he can not maintain his action, although the company may not have observed the provisions of the statute?" does in no way conflict with the rule of the Federal Courts, as stated supra.

Section XXVIII.-- The United States Supreme Court.

Sub. 1. The earliest rule in this court. The case of Railroad Company vs. Gladmon. As early as 1872, in case of Railroad Company vs. Glad-
mon, where a small child of seven years was injured by a car, this rule was adopted as the true and settled doctrine to be followed. The defendant in that case upon refusal of the court to charge, "that if the jury find from the evidence that the plaintiff's injuries resulted from his attempting to cross a street in front of an approaching car, driven by an agent of defendants, the burden of proof is on the plaintiff to show affirmatively, not only the want of ordinary care and caution on the part of the driver, but the exercise of due care and caution on his own part . . . ." brought the case here on exception.

Mr. Justice Hunt, delivering the opinion of the court, observes, that as applied even to adult parties this proposition is not correct. And further says "While it is true that the absence of reasonable care and caution, on the part of one seeking to recover for an injury so received, will prevent a recovery, it is not correct to say that it is incumbent upon him to prove such care and caution. The want of such care or contributory negligence, as it is termed, is a defense to be proved by the other side."

After laying down the rule as quoted under the Federal decisions, Hunt J. observes, "The plaintiff may establish the negligence of the defendant, his own injury in consequence thereof, and his case is made out. If there are circumstances which convict him of concurring negligence, the defendant must prove them, and thus defeat the action."
Irrespective of statute law on the subject, the burden of proof on that point does not rest upon the plaintiff." And as authority for this doctrine he cites the early New York decisions treated of under that jurisdiction. "Generally as here," he continues, "the proof which shows the defendant's negligence, shows also the negligence or the caution of the plaintiff. The question of the burden of proof is, therefore, not usually presented with prominence."

Although the later New York cases do not bear out the learned judge's opinion, still that has in no way effected the holding of this court as is shown by the statements in the following cases which are illustrative of various phases of the rule just stated.

CHAPTER IV.

AMERICAN JURISDICTIONS

HOLDING THE CONTRARY DOCTRINES

Section I.--Applications of the rule in the decisions of Indiana.

In Indiana as early as 1851, the court in the case of the President etc. of Mt. Vernon vs. Dusouchett, declared that merely because a person receives a special damage by riding against a public nuisance in a street, he can maintain a suit for the injury, even against the person who put the nuisance there. The declaration in a suit for such damage, must show that there was no fault on the plaintiff's part. 2 Ind. Rep. 586.

In Maxfield vs. The Cincinnati, Indianapolis, & Lafayette Railroad Company, 41 Ind. 269, the court laid down the rule that a complaint seeking a recovery from a railroad company on the ground of negligence in running a train of cars, whereby the plaintiff has been injured, must expressly allege that the injury occurred without the fault or negligence of the plaintiff, or it
must clearly appear from the facts which are alleged that such must have been the case.

The question involved upon the appeal was the correctness of the ruling of the lower court in sustaining a demurrer to the complaint which did not aver that the plaintiff did not by his own fault or negligence contribute to the injury by him received, and the facts stated fell short of showing that the injury must have occurred without the fault or negligence of plaintiff. Buskirk J. accordingly held the complaint to be fatally defective and affirmed the judgment for the reason stated supra.

"Contributory negligence is not a matter of defense in this state, and the plaintiff must show affirmatively, by pleading and proof, that his fault or negligence, did not contribute to his injury, before he is entitled to recover"; quoted from the head note of case, The Cincinnati, Hamilton & Indianapolis Railroad Company vs. Butten, 103 Ind. 31, decided in 1885. The opinion of the court being given by Mitchell J., who further says "The verdict will be upheld if these facts are made to affirmatively appear either directly or circumstan-
It is only when the facts and circumstances surrounding the injury point neither one way nor the other, that the plaintiff must fail for want of affirmative proof—thus stating a corollary to the general rule as laid down by this court supra. The latest case, that of the Chicago & Indiana Coal Railway Company vs. McDaniel, 134 Ind. 166, also follows the above holdings.

Section II.—The Iowa decisions.

In the case of Nelson vs. The C.R.I. & P.R.R. Co., 38 Iowa, 564, the plaintiff who was in the employ of defendant was injured while in the discharge of his duty, by being thrown from and under the car which ran over him, the train having been suddenly started without signal. And the question again was, whether the court erred in instructing the jury to find for the plaintiff, "unless they further find from the evidence the plaintiff's own carelessness and negligence directly contributed to produce the injury." The court says, that under this ruling, the jury would be required to find for plaintiff, if there was no evidence whatever respecting the carelessness of the plaintiff; whereas under the rule long recognized, followed and settled, in this state that in an action for injuries resulting from negligence,
there is no doubt but that the burden of proof is on the plaintiff to show to the jury that the accident happened without any want of reasonable care on his part. The plaintiff in order to recover, must show that he did not contribute to the injury by his own fault, or by the want of ordinary care." Citing Rusch vs. The City of Davenport, 6 Iowa 443, and cases cited 452. But, as was said, in the case first above cited, "although the burden of proving the exercise of ordinary care rests on the plaintiff, yet it need not be directly shown, and may be inferred from the circumstances of the case."

In 1880 in case of Bonce vs. The Dubuque Street R'y Co. 68 Iowa 530, the Court again laid down the principle that the burden rests upon one seeking to recover for injuries arising from negligence of a carrier to aver and prove his own freedom from contributory negligence. This rule is also laid down in Raymond vs. The Burlington, Cedar Rapids & Northern R'y Co. 65 Iowa, 152, with a slight exception; the case was as follows: the plaintiff was injured by being thrown from the platform of the defendant's car by reason of the sudden starting of the train, while the plaintiff, as a passenger, was in the act of leaving it at a station. The question was, whether it was sufficient to shift the burden of proof for the plaintiff to show his acts, if they failed to show contributory negligence. The Court says: "Where there is no question of negligence by reason of an omission, and no question in regard
to the surrounding circumstances, and the only inquiry is as to whether the injured person, in view of the conceded circumstances, was negligent in what he did, we are unable to see how the plaintiff could do more than prove what he did. In proving what he did, he would prove what care he exercised; and acts fully disclosed and understood must always be deemed sufficiently careful which evince no negligence."

The Court further held that, if the plaintiff showed what his acts were, and they did not appear to be negligent, the jury would be justified in finding that he was free from negligence, while not correct as an abstract statement of the rule, was not erroneous in this case, where it was clear that plaintiff was not guilty of contributory negligence, unless it was by reason of something which he did.
Section III. The rule as finally settled and determined in Louisiana.

In the early case of Moore v. The Mayor of Shreveport 3 La. Ann., 643, decided in the year 1848, the principle, that the burden is upon the plaintiff to show freedom from negligence, is not decisively laid down, as the determination of that question was not necessary to the decision of the case, but Eustis, C.J. cited the case of Adams v. The inhabitants of Carlisle, 21 Pick. 147, showing the tendency of the Louisiana Court on this point.

However, in the case of Clements et ux vs. Louisiana Electric Light Co., 44 La. Ann. 692, the marginal note lays down the first recorded holding on this rule to be "When the action of both parties must have concurred to produce the injury, it devolves upon the plaintiff to show that he was not himself guilty of negligence. He must show affirmatively that he was in the exercise of due and reasonable care when the injury happened. 40 Ann. 787. This proof need not be direct, but may be inferred from the circumstances of the case.

In McGuire vs. the Vicksburg, Shreveport & Pacific Railroad Co., (1894) 46 La. Ann. 1543, Miller J. says, delivering opinion of court, "In an action against a railroad company by the surviving parents for the loss of their son run over and killed by the locomotive, the defense of contributory negligence will not avail if by reasonable care on the
part of those in charge of the train, the accident could have been avoided." Quoting from Grand Trunk R.R. v. Ives, 144 U.S. Rep. 429, "Although the defendant's negligence may have been the primary cause of the injury, yet an action for such injury can not be maintained, if the proximate and immediate cause can be traced to the ordinary care and caution of the persons injured. Subject to this qualification grown up in recent years, that the contributory negligence of the party injured will not defeat recovery, if he shows the defendant might, by the exercise of ordinary care and prudence, have avoided the consequences of the injured party's negligence."

To this opinion and reversal of the judgment of the lower court which had been in favor of the defendant railway company, McEnery J. dissenting, says, The uniform doctrine of this court has heretofore been that if the evidence shows that the plaintiff himself was guilty of contributory negligence there can be no recovery, and that the plaintiff must show that he was in the exercise of due care when the injury happened. The proof need not be direct, but may be inferred from the circumstances. "It is useless to cite authorities, as every case in our reports where the fact of contributory negligence has been discussed this doctrine has been affirmed."

In the case of White et ux vs. Vicksburg, Shreveport & Pacific Railroad 42 Ann. 992 in referring to this well established doctrine the court said : "The defense is a general
denial and a plea of contributory negligence. It has been ruled with such frequency and uniformity as to make its iteration here merely formal, that, to sustain recovery in such a case it must appear from the record: (1) that the defendant was guilty of negligence; (2) that the party injured was guilty of no contributory negligence, i.e. negligence but for which notwithstanding defendant's negligence, the injury would have been avoided."

"The Ives case quoted approvingly in the opinion, is opposed to the views expressed in the opinion. In that case the court emphatically announced the doctrine that if the deceased contributed by his negligence to the injury, the railroad was not responsible and the opinion of the court is in line with the weight of authority and the few cases referred to therein."
Section IV.-- The decisions in Maine.

The latest exposition of the rule in Maine, is laid down in the state of Maine vs. Maine Central Railroad Company, 76 Maine 357 by Walton J.: The question on which the case was appealed was, whether the evidence justified the verdict for the plaintiff-- the Court declared it as settled law in that state that, in actions against railroad companies for injuries to persons, whether in form civil or criminal, the burden is upon the party prosecuting to show that the person injured or killed, did not by his want of ordinary care contribute to produce the accident. Upon the evidence the Court held that a person in the full possession of his faculties, who undertakes to cross a railroad track at the very moment a train of cars is passing, or when a train is so near that he is not only liable to be, but is in fact, struck by it, is prima facie guilty of negligence; and, in the absence of a satisfactory excuse, his negligence must be regarded as established.

The cases of Gleason vs. Bremen, 50 Me. 222; State vs. Grand Trunk R'y Co., 58 Maine 176, are in point and favor the above contention. In the case first cited it was held that the law is clear and unquestioned that the plaintiff must satisfy the jury, as an affirmative fact, to be established by him, as a necessary part of his case, that at the time of the accident, he was in the exercise of due care. And in the second case cited it was held,
after a full and careful examination of the question, that in the trial of indictments against railroads to recover the forfeiture created by our statute for negligently causing the death of a person, "the same rule of evidence and the same principles of law, should be applied, as in like cases when redress is sought by civil action for damages."

Section V.-- A review of the Massachusetts holdings.

The first case in this country involving the question of contributory negligence in this respect was Smith vs. Smith, decided in 1824. In that case the Massachusetts Courts adopted as settled law the doctrine therein set forth. In that action, brought for an injury done to the plaintiff's horse by a wood pile which the defendant had placed in the highway, Parker C. J. upon deliberation, came to the conclusion, "that the action could not be maintained, unless the plaintiff can show that he used ordinary care; for without that, it is by no means certain that he himself was not the cause of his own injury:" The case from which the judge devolved the law, was Butterfield vs. Forester, 11East 60, which he thought very strong to the point. In that case it was proved, that if the plaintiff had not been riding very hard he might have seen the obstruction and avoided it, and on this ground he failed in the action. Quoting Lord Ellenbor-
ough "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right". And in the Common Pleas, in the case of Flower vs. Adam, 2 Taunt. 314, the same principle is recognized as law, the plaintiff being prevented from recovering, because it was proved he might have avoided the obstruction, if he had managed his horse with ordinary skill and care. These cases are cited in Wheaton's edition of Selwyn's Nisi Prius, and the principle is admitted into the text, that to entitle the plaintiff to an action for damages resulting from a nuisance, he must show that he acted with common and ordinary caution.

In 1831, Lane vs. Crombie, 12 Pick. 176, where the plaintiff was injured by defendant's driving on the highway, the cause was tried before Putnam J. and a verdict was found in favor of the plaintiff. Upon a motion to set aside the verdict on the ground of misdirection, in that the Court in the course of the charge, stated that the burden of proof was upon the plaintiff to prove negligence in the defendants, that being the gist of the case, but that when the defendants relied upon the fact, that the plaintiff conducted herself carelessly, the burden of proof was upon the defendants to show that the plaintiff had not used ordinary care, the rule was laid down as settled law that to enable the plaintiff to recover under such circumstances, he must not only show some
negligence or misconduct on the part of the defendant, but
ordinary care and diligence on his own part, citing Butter-
field vs. Forester; Harlow vs. Hummiston, 6 Cowen 191;
Smith vs. Smith, 2 Pick. 64: and the Court further said that
the burden was upon the plaintiff to show that the accident
was not occasioned by her own negligence, in placing her-
self in a hazardous position, without due precaution and for
that reason the verdict was set aside and new trial granted.
The case of Adams vs. Carlisle, 21 Pick. 146 is a similar hold-
ing, and was decided upon the same grounds by Shaw C. J.

Shaughnessey vs. Sewall and Day Cordage Company, 160
Mass. 331,(1893). Upon a declaration alleging in substance,
that while the plaintiff was in the process of oiling a ma-
chine while in the defendant's employ, it suddenly and unex-
ectedly started into motion; occasioning injury to the
plaintiff; that when shut off for the purpose of oiling, it
was likely to start; that the defendant knew or ought to have
known that it was likely to start; and that the defendant
omitted to caution the plaintiff as to its liability to start;
the case was tried upon the theory, on the plaintiff's part,
that the machine started of itself; and, on the defendant's
part, that it was started by a fellow servant of the plain-
tiff. Plodgett, J., of the Superior Court, charged the jury
that the plaintiff had the burden of proving that the machine
started of itself; that he could not recover unless he proved
this; and that, if the jury were unable to decide what caused
the machine to start, she was not entitled to recover.

Allen J., upon appeal, opinioned that the charge to the jury was correct and plaintiff's alleged exceptions were overruled. The true rule of this jurisdiction and one of general application, appears to us to be that stated in the case of Mayo vs. Boston & W. R'y Co., 104 Mass. 140. It is stated in these words: "All the circumstances under which the injury was received being proved, if they show nothing in the conduct of the plaintiff, either of acts or neglect, to which the injury may be attributed in whole or in part, the inference of due care may be drawn from the absence of all appearance of fault."

Section VI.-- Exposition of the rule as set forth in the Michigan decisions.

In the first case in which this point was involved, the Court said, "the facts which the plaintiff sought to establish were that he was injured, and that the negligence of the defendants was the approximate cause. Necessarily intermingled with this, however, was the question whether the plaintiff had not also been guilty of negligence which materially contributed to the injury; and this question was so involved in the examination of plaintiff's witnesses, that it was impossible to keep it out of view for a moment. . . . . . And the plaintiff found it necessary in this case to put in evi-
dence such facts concerning the management of the train by the defendants as would tend to relieve him from this apparent liability to censure. In the marginal note the following is accordingly stated: where the plaintiff brings action for a negligent injury, and the action of the two parties must have concurred to produce it, it devolves upon him to show that he was not himself guilty of negligence. Detroit & Milwaukee R.R.Co. vs. Van Steinburg, 11 Mich. 99, (1868).

Quoting Ch. J. Christianity, in case of Lake Shore & Michigan Southern Railroad Co. vs. Miller, 25 Mich. 275, it appears to be settled "that an injury resulting from the negligence of both, though in an unequal degree, gives no cause of action to either, and the abstract fact of the collision alone, would turn the scale in favor of neither, neither makes out a cause of action till he shows that he exercised due care, and that the other party did not. The absence of contributory negligence on the part of the plaintiff is therefore just as essential an element in the cause of action as the negligence of the defendants, and just as clearly constitutes a necessary part of the plaintiff's case; and until he has shown it, or until it in some way appears from the evidence, he does not make a prima facie case": citing 17 Mich. 99; 17 Ind. 102.

In one of the most recent cases, that of Mitchell vs. Chicago & Grand Trunk R'y Co. 51 Mich. 236, there is stated in the head note the following holding: "Negligence of a
railway company will not be presumed in an action against it for a personal injury, it must be shown, and there can be no recovery unless it appears to be the efficient cause of the injury without contributory fault in the plaintiff."

Section VII.-- The Mississippi cases.

The Court, in the case of Miss. Central R.R. Co. vs. Mason, states the general rule with regard to concurrent negligence to be "that the party seeking legal redress must not only show his adversary to be in the wrong, but must also be prepared to prove that no negligence of his own has tended to increase or consummate the injury." And then the further requirements that the party in an action on the case for negligence, must show himself in the right and the defendant in the wrong; that he has performed his duties and that the defendant has neglected his, and that the damages are the legitimate consequence of the negligence of the defendant. 51 Miss. 224.

In the city of Vicksburg vs. Hennessy, 54 Miss. 391, where the defendant in error had been injured by a fall while walking upon the streets of a city, the court says: "The universal rule in this class of cases is that the injury must proceed wholly and solely from the defective highway, and that the plaintiff must be entirely free from any negligence which contributed to the result, and that the burden of showing affirmatively that he exercised at least ordinary care
and prudence is upon him. Unless he establishes this he must fail, notwithstanding he has shown the greatest remissness on the part of the corporate authorities— and cites Lane vs. Crombie, 12 Pick 177, Moore vs. Abbot, 32 Me. 46.

Section VIII.— The rule as modified in North Carolina.

The intestate of plaintiff, in the case of Owens vs. Richmond and Danville R.R. Co., 86 N.C. 502 (1883), who was an engineer in the employment of defendant company, and as such in charge of the fast mail train then moving rapidly southward from Thomasville, its last stopping place, a little after the hour of 11 p.m., brought the train in sudden and violent contact with an unobserved obstruction consisting of stone and dirt, which, becoming loosened from the upper portion of a deep cut through which the railroad ran, was piled upon the track— both intestate and fireman were instantly killed from the shock. The question was simply as to the character or quality of the intestate's own act, as determined by the attending circumstances: the Court among other instructions charged the jury: "If the jury believe that the defendant was guilty of negligence, then it devolves upon the defendant to satisfy the jury by a preponderance of evidence that the plaintiff's intestate was killed by his own negligence, or that he contributed to his death." Smith J. speaking for the court says: "It was not proper to burden the defense with the re-
moval of the presumption thus raised for the plaintiff, and put it in the scale with the evidence on one side of the proposition to outweigh that adduced on the other. The inquiry should have been free from that embarrassment, and simply left to the jury to solve upon the evidence heard. As this was not done in the present case, but an inappropriate rule applied, to the prejudice of the defendant" the Court goes on to say, "it is entitled to a trial before another jury". Up to this time, 1883, it had been an open question, and to the decision given supra, Ruffin J. dissented.

However in 1893, in the case of Jordan vs. Ashville, 112 N.C. 743, MacRae J. giving the opinion of the Court corrects His Honor, Bynum J. who had upon the trial before the Superior Court, stated the proposition that "the plaintiff claims that she has been injured by the negligence of the defendant, and the burden is on her to show by a preponderance of the evidence that fact, and the following fact, that she herself was not guilty of negligence," by saying that under the statute which requires that, in actions for the recovery of damages resulting from the negligence of the defendant, contributory negligence, if relied upon as a defense, shall be set up in the answer and proved on the trial, there is no presumption that the plaintiff contributed to the injury by her own negligence. By placing the burden upon her the conditions were changed. Therefore it was error in the judge to so charge, though the defendant offered no testimony.
CHAPTER V.

AMERICAN JURISDICTIONS
IN WHICH THE DOCTRINE IS UNCERTAIN

Section I.-- The rule in Connecticut.

In this state there is to be observed a tendency to incertitude upon this question, but we will here merely outline the leading cases in point, treating of the same trend of adjudications later on in the New York decisions.

The case of Fox vs. The Town of Glastenbury, 29 Conn. 204, was one in which an action was brought on the statute with regard to highways and bridges, to recover damages for the loss of life by reason of negligence of defendants in not maintaining a railing along the sides of a causeway, which was a part of a public highway of the town. There was a freshet in the river and the water covered the causeway, flowing with a strong current; the plaintiff with another woman attempted to drive over the causeway laid across a cove. After passing over the bridge, becoming alarmed, they drove off the causeway and the plaintiff's testatrix was drowned.

Upon appeal from a verdict for the plaintiff, the court applied what it termed the well settled rule of law, as laid down by Mr. Justice Gridley in Spencer vs. Utica and Schenectady R.R.Co., 5 Barb. 337, that a party who would recover for
an injury caused by the negligence of another, must show that his own negligence has not contributed to cause the injury—which rule the learned judge, declared to be "a stern unbending rule which had been settled by a long series of adjudged cases", and this rule must be considered as the settled law of the state. In order to entitle the plaintiff to a verdict, he was bound to show, affirmatively, not only the culpable negligence of the town, but also that the decedent conducted herself with ordinary prudence and discretion. Citing Beers vs. Housatonic R.R.Co., 19 Conn. 566, Park vs. O'Brien, 23 id. 339.

In the case of Park vs. O'Brien, 23 Conn. 339, the first error assigned for appeal is, that the lower court omitted to charge the jury that the burden of proof was on the plaintiff below, of proving that when the injury complained of was committed, he was in the exercise of reasonable care and prudence. Storrs J. in his opinion accords entirely with the decisions cited by plaintiff in error to substantiate his exception and further says, the reason of the rule is, that the plaintiff must prove all the facts which are necessary to entitle him to recover, and this is one of those facts. It was necessary for the plaintiff to prove, first, negligence on the part of the defendant, in respect to the collision alleged, and, secondly, that the injury to the plaintiff occurred in consequence of that negligence. But in order to prove this latter part, the plaintiff must show that such in-
jury was not caused, in whole or in part, by his own negligence; for, although the defendant was guilty of negligence, if the plaintiff's negligence contributed essentially to the injury it is obvious that it did not occur by reason of the defendant's negligence. Hence to say that the plaintiff must show a want of concurring negligence on his own part, contributing to the injury, is only saying that he must show that the injury was owing to the negligence of the defendant. In this case he plaintiff assumed the burden of proving that fact; and the defendant also had the benefit in the charge, in the rule, which he requested the court to express to the jury, although not in the precise words in which he sets it forth supra. The other grounds assigned for error being disposed of, a new trial was not granted.

Section II — The doctrine in Georgia. — Development of the rule.

In Brannan vs. May, 17 Ge. 136, the Court laid down the rule as stated in Butterfield vs. Forester that, "To maintain an action for an injury received from an obstruction in a highway, two things must concur: an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it, on the part of the plaintiff"— and so far seems to have imposed the burden upon the plaintiff to show his exercise of care— but no further ground for such an inti-
In Campbell vs. Atlanta & Richmond Air Line Railroad Company, 53 Georgia, 488, the marginal note is as follows: "In the case of an injury to an employee of a railroad company caused by the running of a train, whilst the burden is on the company to prove that it used proper care and diligence, it is necessary for the plaintiff to show that the injury was caused without fault or negligence on his part."

In Thompson vs. Central Railroad & Banking Company, 54 Ga. 509, the marginal note states that the fact that the employee was without fault or negligence is not a condition precedent to his recovery; in his case, as in others, the presumption is against the company, and it is for it to show its agents without fault or negligence and the injured employee either at fault or negligent.

Prather vs. The Richmond & Danville R.R.Co., 80 Ga.427 (1888). The plaintiff's husband, one of a gang employed on defendant's material train, to load and unload the cars, was thrown off and killed by the car striking a cow crossing the track. An engine of defendant was at the time pushing the car. Exception was taken (and made one of the grounds for new trial) because the Court charged the jury that "the burden is on the plaintiff to show that her husband was without fault, or that the defendant was in fault." The Court remarks that upon this matter the rule has been so long settled by this Court, that we do not think it necessary to de-
vote any time to show the correctness of it-- Further charg-
ing that "the burden is upon the plaintiff to show that he
did not thus contribute; and if she has failed to do this,
it will be your duty to return a verdict for the defendant."
"We see no error in this charge taken in connection with the
entire charge upon the same subject. It is certainly a sound
proposition, under the decisions of this court, that
before an employee can recover from a railroad company, he
must be free from fault... If he disobeys these rules or
orders (as it appeared from the evidence that he had so done)
the burden is upon the plaintiff to show that the disobedience
did not contribute to the injury."

The marginal note in the latest case, that of City Coun-
sel vs. Hudson, 88 Ga. 599, decided in 1891, states the
latest exposition of the rule to be, that when the plaintiff,
in an action against the owner of a toll bridge proves his
injury and the owner's negligence as alleged, he is not bound
to go further and prove his own diligence. Want of care on
his part is matter of defense.

Section III.-- The modification of the rule in Illinois.

Missouri Furnace Company vs. Abend, 107 Ill. 44. In this
case an engineer who was in the employ of the defendant fell
from the locomotive, was run over and killed. The deceased
had complained to the defendant of the defective condition
of the engine, and was told the defects would be speedily repaired. The principal question is whether, the deceased was, himself, guilty of such negligence by remaining in defendant's service after he knew the foot board of the engine was in a dangerous condition, as will bar a recovery. This question being decided in the negative, the Court further held that the law does not always require positive proof of due care and diligence on the part of the plaintiff. Under certain circumstances it may be taken for granted that he observed usual and ordinary care for his personal safety. The criticism made upon this charge that it assumes deceased was in the exercise of due care and diligence is not well founded, for there were circumstances tending to show deceased observed ordinary care and that was sufficient to warrant giving of the instruction.

Kepperly vs. Ramsden, 83 Rll.354. Plaintiff in this case was injured by falling into an excavation in the sidewalk made with a view to construct coal vaults for the use of the adjoining building. This Court upon appeal laid down the settled principle that before any recovery can be had, it is incumbent on plaintiff to show she had herself been in the observance of due care for her personal safety. That being the law Mr. Justice Scott said that the lower Court ought to have given the instruction asked by defendant, which declares the burden of proving that fact upon her. Other instructions given state the proposition that she was bound to observe due
or ordinary care, but none of them declare as the law is, the burden of proving that fact is on the plaintiff. Chicago, Burlington & Quincey R.R.Co. vs. Gregory, 58 Ill. 272. The judgment was accordingly reversed, and the cause remanded.

The first case bearing upon this point is The Aurora Branch R.R.Co. vs. Grimes, 13 Ill. Rep. 585, decided in 1852 by this Court. At the hearing in the lower Court, Grimes recovered damages for the value of his horse which was killed in a well belonging to the railroad company. Upon appeal the Court said that where the party ceased to recover damages for a loss which has been caused by negligence or misconduct, he must be able to show that his own negligence has not concurred with that of the other party introducing the injury, and the burden of proof is upon the plaintiff to show not only negligence on the part of the defendant, but also that he exercised proper care and circumspection; or, in other words, that he was not guilty of negligence. Citing Lane vs. Crombie 12 Pick. 177.

This holding was followed in Dyer vs. Talcott, 16 Ill. 300, and the latest decision in this jurisdiction has moreover, laid down the rule, that before a plaintiff can recover on ground of mere negligence, he "must show that the negligence of which he complains was caused by the negligence of the defendant, and that he himself was in the exercise of ordinary care"—per Bailey J. in North Chicago Street R'y Co vs. Eldridge, 151 Ill. 542.
Section IV.-- The conflict of decisions in New York.

Sub. 1. The early cases--- Spencer vs. Utica & Schenectady R.R.Co.

In the earliest reported cases in the jurisdiction of New York there appeared no holding bearing directly upon the question of burden of proof with which we are here dealing. The first intimation of any rule upon the subject is given in the case of Spencer vs. Utica & Schenectady R.R.Co., reported in 5 of Barbour, 337. It appears in this old case decided in the year 1849, Ridley J. delivering the opinion of the Supreme Court, that the undisputed facts alone made it impossible to maintain that the plaintiff was free from negligence, and the Court based particularly its decision upon Hartfield vs. Roper, 21 Wend. 615, a case where this question of onus probandi was not at all involved nor adjudicated. So much then was necessary for the decision of the case. But the Court further said: "It was equally necessary for the plaintiff to establish the proposition that he himself was without negligence and without fault. This is a stern and unbending rule, which has been settled by a long series of adjudged cases, which we cannot overrule if we would." (Citing 1 Cowen's Report 71; 6 Hill 592; 19 Wend. 399; 6 Cowen 189; 5 Hill 282.) The cases given as authority for this settled law, as the learned judge terms it, do not in my opinion very strongly sustain his honor in such a doctrine; in fact, not one of them bears directly upon the point involved, but are
decided on a rather indefinite rule fashioned after the wording in Butterfield vs. Forester. So much for one of the principal authorities relied upon as upholding the later decisions of these courts as to this question.

Sub. 2. The earliest rule.

In this jurisdiction we shall look in vain in the reports for any earlier adjudication upon the point in discussion than is to be found in the case of Johnson vs. Hudson River R.R.Co., 5 Duer. 21. This case was decided in 1855 by the Superior Court, Judge Duer giving the opinion. His statement contains the clearest and ablest presentation of the law in this behalf, and the fairest and most satisfactory argument upon it to be found in any of our American decisions upon the subject. In arriving at this opinion the Court entered into a very full discussion of the general rule.

The question to be decided in that case was, whether the complaint ought to have been dismissed, as it was, for the reason that was alleged, namely, that the plaintiff had failed to prove that the deceased was free from negligence, which was imputed to him by the answer of the defendants. In other words, had failed to prove a negative. The Court says: "It is certainly true, as a general rule, that there can be no recovery in these actions, when it is proved that there was a want of ordinary care, on the part of the person accidentally injured, which directly contributed to the accident; but it by no means follows, that the plaintiff is, in the first
instance, bound to show that the person so injured could not have been guilty of the negligence imputed." The rule therein adopted is clear and concise. It states that the burden of proving that there was a want of ordinary care on the part of the person injured, which contributed directly to the accident, rests upon the defendant. The plaintiff, in order to maintain the action, is not bound to prove a negative by showing affirmatively that there was no such want of ordinary care. The judgment dismissing the complaint was accordingly held erroneous, and was reversed.

Upon the trial before the General Term, Slosson J. sitting as the Court, the decision of the trial court was upheld; the court declaring that it had never recognized the rule which seems to be laid down by the Supreme Court in Spencer v. Utica, Schenectady Railroad Company, where it was held that the absence of negligence on the part of the plaintiff is to be shown by him affirmatively, but on the contrary have held otherwise.

Sub. 3. The supposed exception to this Rule.

Following this early authority is a great array of adjudications. At a term held in the year 1858, the great case of Button v. Hudson River Railroad Company, 18 N.Y., 248, was decided in the court of appeals, being the first intimation of that court's tendency toward an exception to this doctrine as stated in the preceding case. The intestate had been run over and killed by a horse car of the de-
fendant moving along West Street, in the City of New York,
at the hour of eleven in the evening. The opinion of
Mr. Justice Strong contains in substance, whatever arguments
were used in the succeeding years by the New York courts
in favor of the rule as thereafter laid down, and they amount
it is submitted, to this: that—"In regard to all the cir-
cumstances essential to the cause of action, the plaintiff
held and was required to sustain the affirmative. Among
those circumstances were, that the defendants were negligent,
and that the injury resulted from that negligence. If the
intestate was negligent, and his negligence concurred with
that of the defendants in producing the injury, the plain-
tiff had no cause of action. . . . In this view the
exercise of due care by the intestate was an element of
the cause of action, without proof of it, it would not
appear that the negligence of the defendants caused the in-
jury." The cases cited by the learned judge in support
of his position, which, he says "lead to the same conclu-
sion", do not in my opinion, very clearly declare such a
doctrine. No one of them is any clearer citation to this
point than is the first case above mentioned, that of Butter-
field v. Forrester, from which the rule is a mere inference.
The court, however, qualifies the former statement of the
doctrine, by observing that "It must not be understood that it
was incumbent on the plaintiff in the first instance, to
give evidence for the direct and special object of
establishing the observance of due care by the intestate; it would be enough if the proof introduced of the negligence of the defendants and the circumstances of the case, *prima facie*, established that the injury was occasioned by the negligence of the defendants; as such evidence would exclude the idea of a want of due care by the intestate aiding to the result. Ordinarily in similar actions, when there has been no fault on the part of the plaintiff, it will sufficiently appear in showing the faults of the defendant, and that it was a cause of the injury; and when it does so, no further evidence on the subject is necessary. The fact must appear in some way, but in what particular mode is unimportant. The evidence of it may be direct and positive or only circumstantial. Whatever the nature of the evidence, if there is any conflict as to the fact, there must be a preponderance of proof in support of it, or the action must fail".

Sub. 4. The opinion in the Johnson case upon trial in the Court of Appeals.

The decision of the lower court is affirmed, but the open stand there assumed is so modified that exceptions and refinements upon the doctrine followed in a copious flood, so that all the modern law as to the burden of proof may, without the least extravagance, be said to have had its origin in the effect of this case upon subsequent jurisprudence. No other reported case, either in this country or in England has had so great an influence in changing the current of the
decisions more radically, to the final establishment of an exception to the former doctrine. Judge Denio, in his admirable opinion says: "The culpability of the defendant must be affirmatively proved before the case can go to the jury, but the absence of any fault on the part of the plaintiff may be inferred from the circumstances, and the disposition of men to take care of themselves and keep out of difficulty, may be properly taken into consideration . . . . The true rule, in my opinion," continues the judge, by way of summing up, "is this: The jury must eventually be satisfied that the plaintiff did not, by any negligence of his own, contribute to the injury. The evidence to establish this may consist in that offered to show the nature or cause of the accident, or in any other competent proof. To carry the case to the jury, the evidence must be such as, if believed, would authorize them to find that the injury was occasioned solely by the negligence of the defendant. It is not absolutely essential that the plaintiff should give any affirmative proof touching his own conduct on the occasion of the accident. The character of the defendant's delinquency may be such as to prove prima facie the whole issue; or the case may be such as to make it necessary for the plaintiff to show by independent evidence that he did not bring the misfortune upon himself. No more certain rule can be laid down."
Sub. 5. Illustrative holdings.

In Wilds vs. Hudson River Railroad Company, 24 N.Y., 430, the court, as authority for the holding that the great-est negligence on the part of the defendant will not cure the defect of the least negligence contributing to the inju-ry on the plaintiff's part, cites Johnson vs. H.R.R.R. Co., 20 N. Y., 73, which it declares states the full extent of this position as held by this court to be that "to carry a case to the jury, the evidence on the part of the plaintiff must be such as, if believed, would authorize them to find that the injury was occasioned solely by the negligence of the defendant."

In the case of Ernst vs. Hudson River Railroad Company 24 Howard's Practice, 97 (1862), we find that the court for the first time was fully and plainly committed to the rule that requires the onus to rest on the plaintiff. The opin-ion of the court there is, that-- "A party suing for negligence must come into court faultless; he must not present a mere balanced case. The burden of proof is upon him and he must satisfy the court, by the greater weight of testimony, that, without any careless ness of blame on his part, he has suf-fered injury."

In 1873 this court took an opposite ground, declaring that, "the concurring negligence of the plaintiff is matter of defense, and the plaintiff is under no obligation to prove anything to entitle him to recover but the injury, and that
it was caused by defendant's negligence." Hackford vs. N. Y. &c. R. Co., 6 Lans. 381- also Robinson vs. N. Y. &c. R. Co., 65 Barb. 146

However, the former doctrine, as approved and upheld in Warren vs. N.Y.C. R.R. Co., 44 N.Y., 471; Reynolds vs. N.Y. C. & H.R.R. Co., 58 N.Y., 248; Cordell vs. N.Y.C. & H.R.R. Co., 75 N.Y., 330, was again firmly established in Hale Vs. Smith 78 N.Y., 488, where it is said by Rapallo J., "that the absence of contributory negligence is part of the plaintiff's case, and the burden of satisfying the jury upon that point rests upon him. To the same effect is the opinion of the court, Miller J., in the case of Hart vs. Hudson River Bridge Co., reported in 84 N.Y., 56; "It was incumbent upon the plaintiff to show affirmatively that the negligence of the defendant was the sole cause of the death of the deceased. But it needs not that this be done by the positive and direct evidence of the negligence of the defendant and of the freedom from negligence of the deceased. The proofs may be indirect, and the evidence had by showing circumstances from which the inference is fairly to be drawn that these principal and essential facts existed."

Sub. 6. The latest cases.

Lee vs. Troy Citizens Gas Light Co., 98 N.Y. 115. In this case it was first contended that the complaint was insufficient because it nowhere alleged the absence of contributory negligence. The court, Finch J. delivering the opin-
ion, says: "Such separate and direct averment in the pleading, however, was unnecessary as held in Hackford vs. N.Y. C. R.R. Co.; aff'r 53 N.Y. 654; for such allegation is substantially always involved in the averment that the injury set out was occasioned by the defendant's negligence. To prove that, it is necessary for the plaintiff to show, and the burden is upon him to establish, that his own negligence did not cause or contribute to the injury"; citing Hale vs. Smith, 78 N.Y. 480.

And again in the case of Tolman vs. The Syracuse, Bing-hamton & N.Y. R.R. Co., 98 N.Y. 198, reversing 31 Hun. 397, the same judge sitting as the court, says: "In an action for negligence causing death, the burden of establishing affirmatively freedom from contributory negligence is upon the plaintiff; and while, although there were no eye witnesses of the accident, and although its precise cause and manner of occurrence are unknown, absence of contributory negligence may be established, sufficiently to make it a question of fact for the jury, by proof of such facts and surrounding circumstances as reasonably indicate or tend to establish that the accident might have occurred without negligence on part of defendant. Yet if the facts and circumstances, coupled with the occurrence of the accident, do not indicate or tend to establish the existence of some cause or occasion therefore which is consistent with proper care and prudence, the inference of negligence is the only one to be
drawn, and defendant is entitled to a non-suit." And the learned judge, disagreeing with the General Term, further held that the burden was upon the plaintiff of showing affirmatively, either by direct evidence or the drift of surrounding circumstances, that the deceased was himself without fault, and approached the crossing with prudence and care, and with senses alert to the possibility of approaching danger. On the ground that there was no evidence direct or inferential of the exercise of such care and prudence by the deceased, the evidence leaves no rational grounds for any other inference than one of neglect and want of care. In this case, the intestate early in the evening was approaching a crossing over defendant's tracks with his horse and sutter on his way from Syracuse to his house. Evidence was given tending to show that at a distance of over one hundred feet from the rails one could, in daylight, see the tracks in the direction from which the train came, for a long distance. It appeared on the trial that the night was dark, foggy and misty, and that it was impossible to see far, or to hear distant sounds. The charge of the lower court that it is only when it appears from the evidence that a traveler might have seen had he looked, or he might have heard had he listened, that the jury in the absence of evidence upon the question is authorized to find that he did not look and listen, was accordingly overruled, judgment reversed and new trial granted.
Section V.-- The Ohio Doctrine.

In Robeson vs. Gay, 28 Ohio St. 241, Day J., speaking for the court, says: "It is only when the injury is shown by the plaintiff, and there is nothing that implies that his own negligence contributed to it, that the burden of proving contributory negligence can properly be said to be cast on the defendant; for when the plaintiff's own case raises the suspicion that his own negligence contributed to the injury, the presumption of the care on his part is so far removed that he cannot properly be relieved from disproving his own contributory negligence by casting the burden of proving it on the defendant. . . . . . The question should be left upon the whole evidence to the determination of the jury, with the instruction that the plaintiff cannot recover, if his own negligence contributed to the injury."

And in Baltimore & Ohio Railroad Co., vs. Whitacre, 35 Oh. 627, this doctrine was substantially upheld in the following terms--"In an action for an injury, occasioned by negligence, where the circumstances require of the plaintiff the exercise of due care to avoid the injury, and his testimony does not disclose any want of such care on his part, the burden is on defendant to show such contributory negligence as will defeat a recovery. But if plaintiff's own testimony in support of his cause of action raises a presumption of such contributory negligence, the burden rests upon him to remove that presumption." This doctrine is ap-
proved in the later case of Cincinnati Street Railway Co., vs Nolthenius, 40 Ohio St., 376.

Section VI.— The Pennsylvania Cases.

In this jurisdiction there are adjudications sustaining both views.

Baker vs. Westmoreland & Cambria Natural Gas Co., App. 157 Penn. 593. This case, decided in 1893, involved the question of defendant's negligence, causing the injury complained of, and also contributory negligence of the legal plaintiff. One of the specifications alleging error, charged that the court erred in refusing to affirm defendant's third point, which was as follows: "The plaintiff in this case, before he can recover, must show that the loss resulted solely from the negligence of the defendant company, and that Mrs. Baker (the plaintiff) in no way contributed to her own loss by her own negligence". In the opinion by Mr. Chief Justice Sterrett, it was held no error in the court's answer to defendant's point as recited above. "The vice of the point, as presented," says the learned judge, "is that it puts upon the plaintiff the burden of proving a negative, viz.; 'that Mrs. Baker in no way contributed to her own loss by her own negligence.' Contributory negligence is a matter of defense, and the onus probandi is on the defendant, unless the plaintiff's own evidence sufficiently discloses the fact of contributory negligence. In that event, the
plaintiff cannot recover, and of course defendant is relieved from necessity of proving what has already been established by the plaintiff's evidence. If, however, the plaintiff makes out a prima facie case, without disclosing contributory negligence, the defendant must assume the burden of making out his defense: Canal Co. vs. Bentley, 56 Pa. 30, 33.

But several of the late decisions hold that it is the duty of plaintiff to show that he was exercising proper care. In Baker vs. Fehr, 97 Penn. 70, the marginal note states, that, "In an action for death or injury alleged to have been caused by the negligence of the defendant, the burden is upon plaintiff to prove that the negligence of the defendant caused the death or injury, without contributory negligence on the part of the person killed or injured." This rule was upheld in Phil. & Reading R.R. Co., vs. Bayer reported in the same volume at 91.

Section VII.-- The rule in Vermont.

In this state there is no settled doctrine, but the majority of the holdings place the burden on the defendant. Hill Vs. Town of New Haven, 37 Vt. 501. In this case the defendant claimed that affirmative proof of the plaintiff's intestate's conduct and management on the occasion was careful and prudent; or that he was not guilty of negligence or imprudence, was necessary in order to make out a prima facie
case for the plaintiff.

Poland ch. J. says: "We do not consider this proposition strictly correct; that in this class of cases for injuries caused by insufficient highways, that the plaintiff is bound to establish as a distinct affirmative point in the outset that he was not guilty of negligence or want of care in his own conduct or management, in order to show an apparent right of recovery. . . . . This is a question as to the burden of proof merely; is the plaintiff bound to establish in the outset, as a distinct affirmative proposition that he was guilty of no negligence on the occasion? We think he is not. The defect in the highway being conceded or proved, the plaintiff is bound to give sufficient evidence to establish prima facie, that he sustained an injury by reason of such defect. . . . . If the plaintiff's proof discloses nothing but that his conduct at the time was proper and prudent, he is not bound to go farther, until this has been impugned by some evidence on the other side."

The true rule on this subject was laid down by Phelps, J., in the early case of Lester vs. Pittsford, 7 Vt., 158, where he says: "It was not incumbent on the plaintiff to negative the charge of negligence or imprudence on his part, such proof being properly matter of defense." Nor is it to be understood that what is said in the case of Barber vs. Essex 21 Vt., 62 by Redfield ch. J., there is substantially from what is here held: in that case a special request was made
upon the court to charge that the burden was upon the plain-
tiff to show that he was exercising due care at the time the
accident occurred, and it is to be noticed that though the
request was not complied with, still the judgment was affirm-
ed.
Section I. Objections to the rule contrary to the general doctrine.

It is not here intended to undertake a refutation of the doctrine holding contrary to what has been shown to be the general rule. It may be briefly urged in objection upon this point that inasmuch as it is essentially a question of public policy, it is a harsh rule that requires a person to first show affirmatively the exercise of due and proper care on his part and the absence of contributory negligence, before the party who has inflicted this injury can be compelled to respond to his liability.

Moreover this question of expediency and general convenience was decided in the early adjudications which established the doctrine of presumption of innocence in the criminal law. What was and still is good sound public policy in those cases, it is possible, is not policy in any sense now, and so Beach would have us think. But conceding that the jurists were correct
in their divination of those sound principles, which were sustained at the time when the Butlerfield case was decided, no change in the position of human affairs so extraordinary has occurred, we think will be admitted, as will warrant such a radical departure as some of the courts have seen fit to adopt. It is undisputably the rule of justice and humanity. Its intrinsic force and reasonableness is certainly shown by the decisions of the highest tribunals of both England and America whose importance can not be considered of too great weight. And further to require a plaintiff (in addition to establishing the sufficiency of the negligent act of the defendant to produce the injury and their relation to each other as proximate cause and effect), to negative a possible defense by either an averment in the complaint of his freedom from contributory negligence, with proof of such fact, or by affirmative proof alone would be to disregard an established, elementary rule of pleading and evidence. There are no rules of evidence based upon surer and juster grounds of equity and good sense, than that which casts the burden of proof in every controversy upon that party who maintains the
affirmative, whether said fact be to sustain the action or bar a recovery.

It is in consequence of the fact that the complaint in an action for negligence may and often does contain the averment that the injury was caused by negligence of defendant without any fault or negligence on part of the plaintiff; that the plaintiff has been supposed to necessarily offer some affirmative evidence of the absence of negligence on his part, in the first instance. But such is not the case, for as in the absence of evidence of defendant's negligence, the defendant is absolved from liability, so in the absence of evidence of plaintiff's contributory negligence, should he be free to recover. Accordingly, then, when a defendant relies upon such defense, whether the averment in respect thereto appear negatively or affirmatively, such contributory negligence of the plaintiff must be shown by the evidence or the defense will be of no avail.
Section II. The reasoning of the Massachusetts and New York doctrine.

It is clear in our mind that this exception to the rule that the onus probandi in cases of contributory negligence is upon the defendant, had its origin in the common law in the case of Butterfield v. Forrester, in England, and in Smith v. Smith, 2 Pick. 621, in the United States. We shall look in vain in the reports of either country for any earlier adjudications bearing upon this subject. Upon a close examination of the doctrine as adopted in the first Massachusetts decision, we ascertain that no reasons were given to show the justice or propriety of such a rule; it was rested neither upon argument nor analogy but upon the adjudications of Butterfield v. Forrester, and Flower v. Adam, 2 Taunt 214 which the court held itself bound to follow. The case first cited as authority, already discussed supra as a further review here with the other case, may be briefly summarized as proving, not that a person is unable to recover unless he shows affirmatively that there was no want of ordinary care on his part as could have contributed to the accident, but merely, that when it appears by the evidence on the part of the plaintiff,
that by the exercise of ordinary care he might have avoided the accident, he is not permitted to recover.

In the first proposition the negligence which is a bar to recovery is, without proof, presumed to have occurred, in the second, it is proved. And so, as the decisions in the early Massachusett cases have no adequate support from authority, they have also been shown to have none from reason or analogy.

A consideration and scrutiny of the later cases of both jurisdictions will show that the doctrine as first upheld has been gradually lessened in its severity upon the plaintiff until it no more exacts that he should prove due care on his part by direct affirmative evidence. The inference of such care, it is held, may be drawn from the absence of all appearance of fault, either positive or negative, on his part in the circumstances under which the injury was received.

And further, as is seen in the recent case of Copley v. New Haven & Northampton Co., 136 Mass. 6, a statutory exemption as to the plaintiff's proof is enacted in the cases of injury received by a person being run over and killed at a place where a highway crossed the defendant's railroad at a grade; the court
in that case holding that the burden of proof was upon the defendant to show that plaintiff was guilty of gross or wilful negligence in addition to want of ordinary care. Also where person injured is a passenger, the burden is, by force of statute, placed upon defendant to show that deceased was negligent. And in most of the jurisdictions where the same rule prevails, like enactments modify the harshness of the doctrine:

Section III. Text Writers as to solution of the Question. Conclusion.

A great deal of speculative discussion is to be observed in the texts of the early writers upon the subject of contributory negligence and a variety of opinions was the result. Some held that the entire burden was upon the plaintiff; others maintained that no general rule should prevail, but that each case should be a rule unto itself; while the largest number, without using any abstruse or subtle reasoning in arriving at their conclusion, sustain and support the more rational doctrine so ably advocated by Professor Wharton that "the plaintiff by his negligence so contri-
buted to the injury as to break the causal connection between such injury and the defendant's act, is a matter of defense, which, in the ordinary process of proof, it is incumbent on the defendant to make out."

In the opinion of the author, after a careful examination of all the authorities, in addition to the many adjudication on this point, no entirely satisfactory reason for the exception to the general rule is to be found.

The early reported cases simply apply the fundamental rule of the Roman Law governing recovery in cases of this general character, and so our research has necessarily been confined to the present century. But, while the origin of the rule is not far to seek, its development from 1809 down to the present time, we humbly submit the opinion, can be far better appreciated by the practitioner from a study of the adjudications in England and America herein collected and reviewed, than from any views we might be tempted to advance in our capacity as a thesis writer.

Shearman and Redfield on Contributory Negligence.