power to inflict remote and consequential injuries upon it by virtue of such jurisdiction. The owner of land abutting upon a navigable river owns it subject to the right of the state to improve the navigation of the river, because the land is within the govermental control of the state; but it seems to me that the state obtains by virtue of its governmental powers no control over or right to injure land without its jurisdiction. Jurisdiction confers the power and the right to inflct consequential injury, but when no jurisdiction exists the right ceases to exist. It is a recognized principle that the statutes of one state in regard to real estate cannot act extraterritorially. As Connecticut has no direct jurisdiction or control over real estate situate in another state; it cannot indirectly, by virtue of its attempted improvement of its own navigable waters, control or subject to injury foreign real estate. If this resolution is a bar to an action for any consequential injury to land or to rights connected with land in Massachusetts, Connecticut is acting extraterritorially.

Let there be a decree enjoining the defendant against any further raising of its present dam, and against constructing a new dam or dams to a greater height than the height occupied by the respective portions of the present structure.

UNION TRUST CO. OF NEW YORK *v.* NEVADA & O. R. CO.

MASON and others *v.* MCMURRAY and others.

(*Circuit Court, D. Nevada.* March 29, 1884.)

RAILROAD BONDS — RIGHTS OF HOLDER UNAFFECTED BY SUBSEQUENT FRAUDULENT ISSUE.

One who purchases from a railroad company their bonds, under the assurance that no further indebtedness shall be placed on the portion of road then constructed, enjoys all his rights against the company, unaffected by those of a purchaser of bonds issued subsequently in violation of the assurance.

In Equity.

SABIN, J. The above-entitled suits are submitted upon the same testimony. The first-entitled suit was brought in this court by the Union Trust Company of New York, to foreclose a certain trust deed executed by the Nevada & Oregon Railroad Company to secure the payment of certain first mortgage bonds (310 in number, of the denomination of $1,000 each) and coupons, executed by said railroad company, in the payment of which default had been made. In that suit an interlocutory decree was entered August 7, 1883, final decree being reserved until the testimony should be taken and submitted in the two cases. The second suit was brought by complainants, who are the owners of said 310 bonds, secured by said trust deed, fore-

closed in the first-named suit. The object of this second suit is to have declared fraudulent and void, as against complainants, an issue of 147 bonds of said railroad company, (of the value of $1,000 each,) and claimed by respondents to be equally secured by said trust deed with the 310 bonds held by complainants.

The pleadings are somewhat voluminous. The bill alleges that on the twenty-fifth of April, 1881, said railroad company duly executed 3,000 bonds, of the value of $1,000 each, bearing 8 per cent. interest, payable A. D. 1930, interest payable semi-annually, and, in default of payment of interest when due, the principal should become due at the option of the holder of the bonds. On the same date said railroad company, to secure the payment of said bonds, duly executed to the Union Trust Company of New York, in trust for the bondholders, a mortgage upon its franchise and property in the state of Nevada. These bonds were to be of no validity until certified to by said trust company. The trust company certified to only 600 of these bonds. Of these bonds so certified, complainants purchased 310, for value, paying therefor, as shown by the testimony, $248,000. The bill further alleges that these bonds were so purchased by complainants on the distinct and positive agreement by said railroad company that no more than $10,000 of said bonds should be issued for each completed mile of said road, as the same should be built; that only 31 miles of said road were ever completed; that said railroad company wrongfully procured from said trust company the 290 bonds remaining from said 600 bonds so certified, and has in fraud of the rights of complainants wrongfully disposed of 147 of the same. The respondents deny that said railroad company ever made or entered into any agreement by which it was limited to an issue of bonds at the rate of $10,000 per mile of completed road, or at any limited rate whatever. And it alleges that respondents are *bona fide* purchasers of said 147 bonds, without notice, for value, and are entitled to all of the benefits arising to them as such.

In examining the testimony it will be well, to avoid confusion, to note these facts in reference to the date of the organization of the "Nevada & Oregon Railroad Company," the defendant in this action, and the organization of "The Nevada & Oregon Railroad Company," the predecessor in interest of said company, defendant. The names of the companies are the same, excepting that the definite article "the" is not prefixed to the railroad company defendant in this suit. "The Nevada & Oregon Railroad Company" was organized in Nevada on the first of June, 1880. Its object was to construct a railway 300 miles in length, more or less, with various branches. The proposed line of railway was divided into "divisions," with appropriate names for each division. The portion of the line extending from Reno to Beckwith pass, and northerly, was called the "Reno division," and is so named and called by witnesses in the testimony. On the twenty-sixth of August, 1880, this company entered into a contract with one

Thomas Moore for the construction of the road. By that contract said company agreed "that fifty-year eight per cent. first mortgage bonds, to the extent only of $10,000 per mile, and capital stock to the extent of only $20,000 per mile, for the first 185 miles, will be issued." In providing for making payments to Moore for the work, when completed, said contract further provided for the payment to him of "$100,000 in lawful money, and $310,000 in the first mortgage bonds, and $450,000 in the capital stock of said railroad stock, for the Reno division, as far as Beckwith pass, being thirty miles, more or less."

On the fourth of December, 1880, said railroad company and said Moore entered into another contract in reference to building the road. This contract provided that the Reno division should be first constructed from Reno to Beckwith pass, the company to pay at a certain prescribed rate should the distance exceed 31 miles.

Section 6 of this contract is as follows:

"The company shall deposit with a trustee in New York, on or before January 10, A. D. 1881, $10,000 in cash and the $450,000 stock, and on or before January 25, 1881, the $310,000 in first mortgage bonds."

Sec. 7. "Nothing in this contract is to be construed as abating or impairing any portion of the contract of August 26, A. D. 1880, which is hereby extended in all matters not conflicting with the provisions of this instrument," etc.

Sec. 8. "The entire stock to be issued upon the line from Reno to the temporary terminus, as herein stated, ('at a point near Beckwith pass;' see section 1,) shall be limited to $600,000, without reference to any excess in distance over 30 miles, and the first mortgage bonds upon the same to $310,000."

On the same day, December 4, 1880, said company and said Moore entered into another contract, by which Moore was to construct 170 miles of said road from Beckwith pass to the Oregon line, "on the same basis as agreed upon for the first thirty miles of said division," and the company agreed to pay therefor "a total of $500,000 in cash and $1,700,000 in first mortgage bonds, the same being total issue upon said line, and $2,850,000 in the capital stock;" the issue of first mortgage bonds being at the rate of $10,000 per mile. On the first day of February, 1881, said Moore and said company entered into another contract, the company having failed to make payments, as stipulated in the former contract, for work done by Moore on this line from Reno to Beckwith pass—these 31 miles.

Section 3 of this contract provided:

"The party of the second part is to deliver to the party of the first part the $450,000 of stock as soon as engrossed and certificates can be signed, and the $310,000 first mortgage bonds as soon as engrossed and can be properly signed, and all on or before March 31st, proximo."

This contract was not to impair any former contracts made between the parties.

On the twenty-fifth day of April, 1881, the "Nevada & Oregon Railroad Company" was organized, the company defendant in this action.

Its object was the same as that of "The Nevada & Oregon Railroad Company." It was the successor of the last-named corporation, and by transfer and assignment it succeeded to all its rights, property, franchises, and contracts, and debts also. By contract entered into with Moore on the twenty-sixth of April, 1881, the defendant corporation adopted, ratified, and confirmed all of the contracts hereinbefore mentioned, and renewed them in all respects with Moore. On the twenty-fourth of May, 1881, Moore and the defendant corporation extended for one year the contract entered into by Moore and "Nevada & Oregon Railroad Company" for the building of the 170 miles of road from Beckwith pass to the Oregon line. Moore went on under these various contracts, and graded 32 miles on the first section north from Reno, and commenced grading on the 170 miles running north from Beckwith pass. He also laid about 17 miles of track from Reno northerly, and provided certain rolling stock and other materials. Moore became embarrassed, and on about November 16, 1881, abandoned his contracts and left the state. From that time forward the company assumed the management of the road and conducted its future operations as best it could. The company was in a very embarrassed condition. It was largely in debt, and without money or resources of any kind to meet its liabilities. It had attempted to build and equip a railroad without first having provided any adequate means for so doing.

On the twenty-fifth of March, 1882, Moore, as party of the first part, the railroad company, defendant, of the second part, D. W. Balch, H. J. McMurray, A. H. Manning, W. F. Berry, and C. A. Bragg, of the third part, and Alvin Burt, as trustee, of the fourth part, entered into an agreement, the object of which was to adjust, as therein provided, the then unsettled business matters between Moore and the railroad company. This contract recognizes the fact that the railroad company had issued to Moore these 310 first mortgage bonds; that he had negotiated them with Moran Bros., complainants in the second above entitled suit; that he had been paid for 210 of said bonds by Moran Bros., and that they held the remaining of said bonds subject to contract with Moore, to be paid for as the road was completed. By this contract Moore surrendered his rights in these bonds for the benefit of the railroad company, which subsequently drew the money due upon them. Section 11 of this contract is as follows:

"The parties of the second and third part hereby covenant and agree, for themselves and the other stockholders, and for the creditors of the party of the first part, as follows, viz.: * * * (b) That no second mortgage shall be made, issued, or recorded upon said railroad or any portion thereof.

"That the issue of first-mortgage bonds thereon shall be limited to $10,000 per mile of completed road, or such an amount that the annual interest charge thereon shall not exceed $800 per mile of completed road, and also that the issue of capital stock of said company shall be limited to $20,000 per mile of said railroad."

Pursuant to this contract, on the twenty-sixth of April following, Moore and Moran Bros. join in a communication to Balch, as president of said railroad company, informing him of the terms upon which he can, as the road is completed, draw upon complainants for $75,000, the balance due upon these 100 bonds. These funds were so drawn, and with them the road was completed the 31 miles. It should be noted that this contract of March 25, 1882, was entered into by Balch, as president of and on behalf of said railroad company, pursuant to a resolution of the board of directors of said company, adopted January 13, 1882, prior to his departure from Reno to New York for the purpose of endeavoring to effect a settlement of the business of the company. And this contract, if not formally ratified by the directors of the company by resolution adopted to that effect, was actually ratified by the company, by its acting upon it,—carrying out, to some extent, at least, its provisions, and accepting the benefits arising therefrom, and especially in drawing and using the balance due upon the 100 bonds paid by Moran Bros. after its execution. Now, all of these various contracts conclusively show this, that this railroad company, defendant, and its predecessor, had repeatedly contracted with Moore, and promised and held out to the public that upon no part of the line of its road should there be issued more than $10,000, in first-mortgage bonds, for each mile of completed road. It was upon this condition and agreement that Moran Bros. purchased these bonds. Charles Moran, one of the complainants, testifies that the railroad company issued its circulars to that effect; that he saw them; that this limitation was the condition in the purchase of the bonds; that they would not have advanced $11,000 per mile upon the road. He is supported in this by the testimony of Moore, Fowler, and Balch, and by every contract in evidence executed either by the railroad company, defendant, or by its predecessor, and subsequently ratified by the Nevada & Oregon Railroad Company. And this testimony is wholly uncontradicted.

Can we believe that these complainants did, or that any business man or firm would, make advances to this or any railroad company upon its first mortgage bonds, and no limit be fixed upon the amount of issue of such bonds? These various contracts in evidence were affirmed and reaffirmed by this railroad company, defendant, in every subsequent transaction wherever the issue of first mortgage bonds is mentioned. The limitation upon the issue of first mortgage bonds is the sole condition which gave the bonds value, and made it possible to negotiate them; and whoever purchased any of these first mortgage bonds upon the faith of this railroad company, as pledged in these contracts with Moore, limiting the amount of issue, is as much entitled to the benefit of those contracts in this respect as though they had been made with the purchaser himself. These contracts, though private as to Moore, inure to the benefit of all in privity with him in the purchase of any of those bonds upon the faith of the company

therein plighted. If this corporation, defendant, can now set those contracts aside, can absolve itself from its obligations, repeatedly affirmed, and especially so by its contract of March 25, 1882, and after it has drawn from complainants, Moran Bros., $75,000 by virtue of that contract,—if this can be done, is it not time that men cease to enter into contracts? The directors of this railroad company knew of these contracts; they were officially bound to know of them; and had affirmed all of them which were made prior to the organization of the corporation, defendant. It is manifest, from the evidence, that they knew and realized that the issue of these first mortgage bonds was limited to $10,000 per mile of completed road, and it cannot be seriously contested.

Moore abandoned his contracts and left the state in November, 1881. The company then undertook the management and completion of the 31 miles of road. The position of the directors was far from being a pleasant one. Many of them had advanced their entire means to aid the company with, then, but little prospect or hope of recovering their advances. The directors were importuned and harrassed by creditors of the company on every side. Upon this point, Balch, president of the company, testifies: "One time, I remember, we were in session, and a lot of fellows came in there and wanted to hang us. That is the kind of talk we had." These 147 bonds had not then been issued; they were issued afterwards. Was it "that kind of talk" which finally caused them to be issued, and against the better judgment of the board of directors? From March 25, 1882, to November 20th following, the board had been acting under the contract of date March 25, 1882, made between Moore, the company, Balch and others, and Burt, recognizing its obligations and accepting its benefits. But the affairs of the company grew no better during this time, and, on the twentieth of November, a resolution was adopted by the board directing the president of the company to draw these 290 bonds from the trust company and to negotiate them. It is not a matter of surprise that he found no sale for them for cash,—no one who wished to part with his money for them. It cannot be contended, under the evidence, that any of these holders of these 147 bonds, respondents in this second suit, are, in any legal sense, innocent purchasers thereof for value. Not one of them was sold to any of said respondents for cash. Not a dollar changed hands upon their transfer. They were each and all of them issued to persons who held preexisting claims or demands against the company, or against the directors, or against Moore, which had been assumed by the company, or for services rendered, or to be rendered, to the company. There is no conflict of testimony on this point. Some of the respondents merely hold them as security for debts due them from the persons to whom they were originally issued. The creditors of the company evidently took the bonds, as they were all the company had to give, and the company issued them with a liberal hand. I cannot but hold

that this issue of these 147 bonds was and is wholly fraudulent and void as against Moran Bros., complainants in this second suit. And such is the judgment of the court thereon. To hold otherwise would be doing great wrong, not only to complainants, but to all persons who repose faith in the solemn contracts and obligations of men or corporations.

The legality of the issue of these 290 bonds, and the disposal of these 147 of the same, is the real matter to be determined in this suit. It is immaterial to complainants what might be the judgment of the court upon the action of the board of directors in auditing and allowing against the railroad company the various claims and demands, aggregating this large sum of $147,000. This subject is not properly before the court in this suit. The single issue here is, and in which both parties are alike interested, are the holders of any of these 147 bonds entitled to come in and share with Moran Bros., complainants, in the proceeds arising from the sale under the trust deed, foreclosed in the first-entitled suit. The court has adjudged that they are not,—at least not until complainants shall be first paid the amounts due them, with interest and costs, from the proceeds arising from such sale. A large amount of testimony has been taken upon this outside issue, but the court does not feel called upon to decide or consider this branch of the case.

The railroad company, defendant, or the stockholders therein, might seek to avoid and set aside the action of the board of directors, in assuming any or all of the claims and demands which were by the board of directors audited and allowed against the company. But the voice of the company is not heard in its own behalf in this case. The personal interest of the directors in this suit has risen superior to that of the company which they represent. A very large majority, in amount, of the claims audited and allowed by the board of directors, and for which these bonds were issued, were the personal claims and demands of the directors themselves, and embraced almost every conceivable demand. Should any one care to examine, in the light of the law, the action of this board of directors in the management of the affairs of the company, the following authorities will be found applicable and instructive: Pierce, R. R. 36, 40; Field, Corp. §§ 162–167, 172–175, and notes; Perry, Trusts, 207, 814; *City of San Diego* v. *S. D. & L. A. R. Co.* 44 Cal. 106; *Wilbur* v. *Lynde*, 49 Cal. 290; *Forbes* v. *McDonald*, Id. 98; *Chamberlain* v. *P. W. G. Co.* 54 Cal. 103; 1 Lead. Cas. Eq. (H. & W.) 208–222; *Cumberland Coal Co.* v. *Sherman*, 30 Barb. 553; *Wardell* v. *Railroad Co.* 103 U. S. 651.

Tested by these authorities, the action of this board of directors would, in many respects, be subject to criticism at least.

Let final decrees be entered in each of the above-entitled cases, in accordance with the opinion herein expressed.

CREW *v.* ST. LOUIS, K. & N. W. RY. CO.[1]

(Circuit Court, E. D. Missouri. April 26, 1884.)

1. EVIDENCE—BURDEN OF PROOF.
   In an action for damages for an injury caused by the defendant's negligence, the burden of proving the negligence alleged is on the plaintiff; the burden of proving contributory negligence is on the defendant.
2. SAME—PRESUMPTION OF FACT.
   Other things being equal, positive testimony is more to be relied upon than negative.
3. NEGLIGENCE—SELECTION OF EMPLOYES.
   It is the duty of railroad companies, in employing servants, to use care and diligence, to select only those persons who are fit and proper for the positions they are intended to fill. The degree of care required is measured by the nature of the duties to be performed by the servants. The more important the duties the greater the care.
4. SAME—NEGLIGENCE OF CO-EMPLOYE.
   Where an employe of a railroad company is injured through the negligence of a co-employe the company is not liable unless the employe at fault was incompetent, and was known, or might, by the use of diligence, have been known, to be so when employed, or was retained in his position by the company after it knew, or should have known, of his incompetency.
5. SAME.
   But where the negligence of the co-employe, in combination with the company's negligence, causes the injury, the company is liable.
6. SAME—INTEMPERATE CONDUCTOR.
   It is an act of negligence on the part of a railroad company to employ or keep in its employment a freight conductor known to be intemperate, or who is intemperate, and whose intemperance it might have discovered by the use of proper diligence.
7. SAME—NEGLIGENCE OF CO-EMPLOYE.
   Where an employe of a railroad company is injured without negligence on his part, by an accident contributed to by the negligence of a co-employe, whom it was negligent on the part of their employer to employ, the company is liable.
8. SAME—WHO ARE NOT CO-EMPLOYES.
   Train dispatchers and train masters are not co-employes of locomotive firemen, within the meaning of the rule as to negligence of co-employes
9. SAME—RULES AND REGULATIONS.
   It is negligence on the part of railroad companies to fail to adopt such rules and regulations as are proper and necessary for the protection of the safety of its employes.
10. SAME.
    It is equally negligent to adopt rules tending to impair the safety of employes.
11. SAME—USAGES AND CUSTOMS—DUTY OF EMPLOYES.
    It is the duty of the employes of railroad companies to comply with all reasonable rules and regulations of the company, and all reasonable usages and customs of the road, which are brought to their knowledge.
12. SAME—EXEMPTION FROM RESPONSIBILITY FOR NEGLIGENCE.
    A railroad company cannot exempt itself from responsibility for negligence by its rules and regulations.
13. SAME—CONTRIBUTORY NEGLIGENCE.
    Where the plaintiff's own negligence has directly tended to cause the injury complained of he cannot recover.
14. SAME.
    Employes of railroad companies are bound to use that degree of care to escape injuries which the nature of their employment calls for.

[1] Reported by Benj. F. Rex, Esq., of the St. Louis bar.

15. SAME—INJURIES SUSTAINED IN THE PERFORMANCE OF DUTIES OUTSIDE OF THE SCOPE OF EMPLOYMENT.

Where a man voluntarily assumes duties that do not belong to him, and is injured in consequence of his own ignorance, negligence, or lack of skill, combined with the negligence of defendant, he cannot recover; but if a subordinate is commanded by his superior to do anything outside of his employment and which he is not competent to perform, and his lack of skill or ignorance, combined with the negligence of his employer, causes him to suffer an injury, the question of whether or not he has been guilty of negligence is a question of fact for the jury.

16. MEASURE OF DAMAGES.

In computing damages for a physical injury, impairment of capacity to earn money, loss of time, and the pain and anguish suffered, should be taken into consideration.

Motion for a New Trial.

This was an action brought by a locomotive fireman to recover damages for a physical injury alleged to have been caused by the negligence of a freight conductor in the defendant's employment.

MCCRARY, J., (*charging jury orally.*) You are, I suppose, aware that the controlling question in this case is the question of negligence. The plaintiff's allegation is, that he was injured by the negligence of the defendant, the St. Louis, Keokuk & Northwestern Railway Company. That he was injured while in the service of that company is not disputed; and the case must turn, under the facts given to you in evidence and the law as the court will state it, upon your decision of the question whether the railway company was guilty of negligence causing or contributing to the plaintiff's injury; and if that is found in the affirmative, then the other question, whether the plaintiff himself was guilty of contributory negligence; that is, negligence on his part which contributed to his injury. These questions you are to determine upon the proof that is before you, in the light of the law, as I shall state it.

The particular negligence which the plaintiff alleges or charges against the railway company is—*First*, in employing one Shields to act in the capacity of a conductor upon one of its freight trains, the said Shields being an unfit and improper person to perform the duties of that office, by reason, as is alleged, of being addicted to habits of intemperance. That is the allegation of the plaintiff. It is for you to say from the proof whether that allegation is sustained. In considering it you will bear in mind the well-known rule of evidence, that positive testimony is always more to be relied upon than negative testimony. If certain witnesses testify to having seen particular things, and others testify that they did not see them, the testimony of those who affirm is more to be relied upon than the testimony of those who deny. And so in regard to a fact of this character. The positive testimony of witnesses that a man was intoxicated at a particular time is better than the testimony of those who say that he was not intoxicated.

The law upon this subject is that it is the duty of a railroad company in employing its servants to use ordinary care and diligence to

select only those who are fit and proper persons to be engaged in that duty. I use the term "ordinary care and diligence," but in this connection these words have a different meaning from what they would have in some other connections. The care and diligence which is required is measured by the nature of the duties to be performed by the servant who is employed. If he is employed to perform very difficult and dangerous duties, and if by the neglect of these duties human life may be imperiled, then, of course, the care which the railroad company must exercise in this selection is much greater than it would be if he were employed to perform other and less important duties. It has been said by the supreme court of the United States that it is not improper, in connection with this subject, to say that a railroad company must exercise proper care and caution, because the care and caution to be exercised in this selection of agents to discharge duties so important as these is great, and more than would be required with respect to other matters; and I may say that the very same rule applies also to the other branch of the subject. The diligence which was required of the plaintiff himself in the performance of his duties as an employe was such as the circumstances and surroundings required him to exercise. If he was performing a very dangerous duty, he was called upon to exercise corresponding care and diligence, and so with regard to the employment of this man Shields as a conductor. If you find from the evidence that he was a person of intemperate habits, the court charges you as a matter of law that he was an unfit person to be employed in such service, and if the railroad company knew the fact, or if by proper diligence it could have ascertained the fact, it was negligence on its part to employ him. Furthermore, if, after his employment the railroad company was advised, through its managing agents, of course, of the fact that he was an intemperate and improper person and failed to discharge him, or if by the exercise of proper caution and care it could have ascertained the fact of his being an improper person and did not do so, then his employment or detention, as the case may be, was negligence on the part of the railway company. It does not, however, necessarily follow from the fact that the defendant employed an incompetent and unfit person as conductor that the plaintiff's injury resulted therefrom. It is the duty of the plaintiff to show, by a preponderance of testimony, that the accident which resulted in his injury was caused in whole or in part by the negligence of this incompetent and unfit conductor, if you find that he was such.

It is also charged as a matter of negligence against the railway company that this conductor was guilty of certain acts of negligence, and it is necessary that I should say to you here that if you find that the conductor was an unfit and improper person to be employed in this capacity, and the company had notice, within the rule that I have laid down to you, then his negligence becomes the negligence of the company, and for which the company is responsible. In view

of that rule, the plaintiff has charged that this conductor, being thus unfit and incompetent, was guilty of certain acts of negligence which contributed to the injury complained of. Those acts of negligence are as follows: It is stated in the petition that the conductor negligently delayed his train at the station mentioned; that while the train was delayed at the station he negligently failed to give any warning to an approaching train; that he failed to carry three red lights on the rear of his car for the purpose of giving notice to an approaching train; and that the defendant was guilty of negligence, independently of any act of this conductor, by failing to adopt such rules as were necessary and proper for the protection of the safety of their employes in this particular case,—a rule by which this approaching train would be warned of the fact that the train with which it collided was at the station. It is for you to consider, upon all the proofs in the case, whether any of these allegations of negligence against the railway company have been sustained.

A good deal of discussion has been had before you about the rules of the railway company, and I have been requested by counsel to give my views with respect to the construction, force, and effect of a number of them. I do not propose, however, to go over all of them, but shall only refer specifically to one. I say generally that the railway company has a right, and it is its duty, to make rules for the protection of the safety of its employes, and such rules its employes are bound to regard and obey. But under the form of making rules, of course, a railroad company cannot exempt itself from negligence. Its rules must be such as tend to the protection of the lives of its employes. With this general statement in regard to the rules, you may take and consider them. They are before you in evidence. I will say to you, however, that the terms which are employed in these rules may be explained and understood, in the light of the testimony, as to what is understood by the words employed in railroad parlance among railroad men. Rule 4, under the head of "signals," is important to be considered in this connection, and I will read it:

"Two red signal-lights must be carried on the rear of each passenger-train, three red lights on the rear of each freight or other train, and one on the rear of the tender of the engine, if the engine is alone, when running at night."

By the terms of this rule three red lights are required to be kept on the rear of a freight train, and one of the allegations of the plaintiff's petition is that by reason of a failure to comply with this rule the collision occurred. You will determine from the evidence how many red lights were upon that car and where they were placed, and when you have so determined you will decide, upon the evidence, whether this rule was complied with, and if it was not complied with, then whether the absence of one or two of the red lights, as the case may be, was the cause of the collision. If you believe from the evidence that the fact that there was but one light there in sight from the rear as this train approaches, and that that light was dim, so

that the engineer in charge of the approaching train was led to believe that it was a light at the bridge, and not a light upon a freight train, and that if the three lights had been there in their proper places the collision would have been avoided; and if you also believe from the evidence that the plaintiff was not guilty of any contributory negligence,—then the plaintiff is entitled to recover; but if the absence of this light did not contribute to this accident, if it would have occurred if all the lights had been there, or if the plaintiff, by his negligence, contributed to the injury,—then he cannot recover.

It is, perhaps, necessary that I should explain to you a little more fully what is meant by the negligence of the railroad company. I say, in general terms, that the plaintiff must show that the railroad company was guilty of negligence which caused the injury; but I do not mean by that that the negligence of the railroad company must have been the sole and only cause of this injury. It may be that you will find upon the testimony that the railroad company and the coemployes of the plaintiff were guilty of negligence, and that the negligence of the two contributed or combined to cause the injury. If that be so, and the plaintiff himself was free from negligence, he is entitled to recover. It is enough, in that case, to show that the negligence of the railroad company contributed to, that is, had a share in causing, the injury. But if, after having shown that the railroad company was guilty of negligence within the meaning of the rule, as I have stated it, it is still necessary for the plaintiff to show, or, at least, it must appear from the evidence, that the plaintiff was not guilty of contributory negligence. The burden, however, of showing contributory negligence on the part of the plaintiff is upon the defendant, while the burden of showing the negligence of the defendant is upon the plaintiff.

A good deal has been said about the custom and usage which existed at the time of the accident upon this railroad. The employes of a railroad company are bound to take notice of all reasonable rules which the company may establish for their protection. They are also bound to take notice of the customs and usages of the company, if they have been in the service of the company long enough to ascertain what they are. What I have said about rules I must repeat in regard to customs. Those customs must be reasonable, they must be proper, they must be such as tend to the safety of the employes. In other words, the railroad company cannot, either by rule or custom, exempt itself from liability for what in law is negligence. So that it comes back, after all, to the question of negligence; and it might be that there would be negligence by the mere fact of making a rule if it was one which in its nature did not tend to protect, but rather tended to endanger, the lives of the employes. I do not say that any of the rules of this company are of this character, but I speak in regard to rules and customs generally, and say that they must be reasonable and proper, and being such, the employes must take notice of them,

and they are bound by them. The negligence of the persons who are employed by the railroad company to direct the movements of trains, by telegraph or otherwise,—as, for example, the train dispatcher, train-master, or whoever the persons are,—is not chargeable to a person occupying, as this plaintiff did, the position of a mere fireman. The negligence of such persons is the negligence of the company, if there be such negligence shown by the testimony in this case. And so it is a proper question for you to consider whether the rules of this company were such as reasonable care and prudence on the part of the company required them to make for the safety of the persons operating the trains. There is a rule here which requires the sending out of signals where a train is detained upon a track, but it is said that that applies only to trains detained elsewhere than at the stations, and the testimony seems to show that such is the understanding of the rule. If you find that is the meaning of the rule, as it is understood by the employes of the company, and that it is a reasonable and proper rule, then you must also find that the plaintiff was bound to take notice of it, and to act in view of it.

There is one view of the case in which you may be called upon to consider the question whether this accident was caused by the contributory negligence of a co-employe of the plaintiff. If you find that the company was guilty of negligence, and that the plaintiff was not guilty of negligence, then you will inquire whether the accident occurred by reason of the negligence of the plaintiff's co-employe. I think I must correct that statement, because it is not exactly as I intended to make it. If the railroad company is shown to have been negligent itself in employing an improper person to act as conductor, and the plaintiff was not guilty of contributory negligence, then the question of the negligence of the plaintiff's co-employes is entirely immaterial, and you need not consider it at all; because, as I have said, the negligence of the railroad company, combined with the negligence of a co-employe, makes the railroad company liable; but if the railroad company was not guilty of negligence in the employment of this man as a conductor, or if the negligence of the company did not contribute to the injury, then it might be claimed, perhaps, that the injury resulted from the negligence either of the plaintiff himself or of his co-employes. If it resulted from either, he cannot recover. That is what I desire to state. Unless the company was guilty of negligence, the plaintiff cannot recover, whether his own negligence or that of his co-employes was the occasion of the injury. So that the case must turn upon the question whether the company, in the employment of this conductor, or in the failure to make the rules that might have been made,—if you find it to be so,—for the protection of trains running on the same track, or any of those matters alleged in the petition, was guilty of negligence.

When you come to the question of the alleged contributory negligence of the plaintiff, you will have then to consider the question that

I was about to mention a moment ago. It is said that the plaintiff was negligent from the fact that this train was running at a dangerous rate of speed, and that proper care was not taken to stop it before it came to the station. If he was, and by that negligence he contributed to his injury, he cannot recover; but if he was acting outside of his duties as fireman, then the question arises whether he was guilty of negligence. He was called upon, it appears from the evidence, temporarily to occupy the place of the engineer. Now, the law upon this subject is that if a man voluntarily assumes duties that do not belong to him while in the service of the railroad company, if he takes the risk of the performance of those duties, or of his incompetency to perform them, he is guilty of negligence, and if that negligence contributes to the injury, he cannot recover. But if one man is placed by the company under the orders of another, and in obedience to those orders he undertakes a duty which is not within the line of his employment, it is for the jury then to determine whether in obeying such orders he is guilty of negligence. And so here. If you find that Mr. Crew, the plaintiff, voluntarily undertook to act in the capacity of engineer for the time being, and while so acting was guilty of negligence, and that negligence contributes to his injury, then he cannot recover; but if you find that he was directed by his superior officer, the engineer, to take his place for the time being, and that what he did while so acting was in pursuance of the order of his superior, then you are at liberty to consider, upon the facts as they are developed, whether his action was negligence on his part or not. If the train was running at a high and dangerous rate of speed, and proper efforts were not made to check it before reaching the station, in accordance with the rules of the company, and in accordance with the duties which devolved upon the men in charge of it, then, of course, somebody was guilty of negligence in that respect; and if you find that that is so, then your only inquiry in regard to that will be whether it was the negligence of the plaintiff, or the negligence of his co-employe; in other words, whether he was voluntarily acting in the capacity of engineer, and therefore for the time being responsible for the movement of the train, or whether he was for the time being acting under the orders of his superior, and in so doing whether he was guilty of negligence or not.

Mr. Trimble. Will your honor allow me to make a suggestion. If the co-employe was guilty of negligence, and the company was not guilty of negligence, then the plaintiff cannot recover.

Judge McCrary. I am speaking now, of course,—and it is necessary for you to bear that in mind, gentlemen,—upon the hypothesis that the conductor was an unfit and improper person for his post, and that his negligence contributed to the injury of the plaintiff. That being established, then you come to the question of his contributory negli-

gence, and in considering that you may consider whether he was acting voluntarily in the position he was in, or whether he was acting under orders of a superior. That is all I need to say, gentlemen, upon the main question in the case,—the question of negligence. If you find for the plaintiff, you will allow such damages as he has sustained, not exceeding the sum of $10,000. In passing upon the question of damages, you may consider the loss of time to the plaintiff, if you find any, his impaired capacity to earn money, his physical pain and suffering, and the anguish to which he may have been subjected. It is for the jury, upon all the facts and circumstances, to allow the plaintiff such a reasonable sum as they may think him entitled to.

I may add, in regard to the custom which may have existed on this railroad with respect to its employes, that if the custom was a reasonable one, and the plaintiff knew of it, of course he was bound to obey it. I think I said that to you before, but the counsel for the defendant (Mr. Trimble) thinks that perhaps I did not.

Mr. Trimble. I ask your honor to instruct the jury that if the plaintiff knew of the custom, whether it was reasonable or not, he was bound to follow it.

Judge McCrary. I decline to give that instruction.

The jury returned a verdict for the plaintiff in the sum of $5,000.

The following opinion was rendered upon a motion by the defendant for a new trial.

George F. Hatch and *Hagerman, McCrary & Hagerman,* for plaintiff.

James Can and *H. H. Trimble,* for defendant.

BREWER, J., (*orally.*) The motion for a new trial in this case was argued before us the other day. In the examination and decision of this matter we are, naturally, under considerable embarrassment from the fact that the case was tried before another judge. While this is nominally a motion for a new trial, pending in the same court in which the trial took place, still, being unfamiliar with the testimony and having seen none of the witnesses, it really comes before us in the same way that it would come before an appellate court. The question in all such cases is not whether some technical error may not have crept into the instructions, but whether, taking the case as a whole, and looking at the instructions as a whole, it is apparent that the law was presented fairly and correctly to the jury. We are not in a position to review the testimony and say that it did prove this or that fact in the case.

A single objection was presented in the argument on the admission of testimony, but I do not think that that is of any significance. The common law prevails in this state, and in order to charge the railroad company for an injury to one employe by another it must

appear, not merely that the co-employe was guilty of negligence, but that the company was responsible for that negligence by reason of having employed, knowingly, or continued knowingly in its employ, an incompetent servant. The judge who tried the case presented the law to the jury very clearly in regard to that; that is, that before the company could be charged with this injury it must have retained in its employment an incompetent servant, knowing him to be incompetent. It was not seriously contended in the argument that the testimony was not ample to show that the conductor of the way-freight train was not a habitual drunkard, and known to be such by the company. There were two or three charges of negligence against him,—one of which was in failing to send out signals to the rear while stopping at the way station of Old Monroe; and another, in failing, as the rules of the company required, to have three red lights on the rear end of the caboose. Consequently, in presenting the questions to the jury, on the testimony, Judge McCRARY placed it before them principally upon this man's alleged dereliction in failing to have proper signals,—that is, such red lights as were necessary on the rear of the caboose,—in consequence of which failure the following train was deceived as to the location of the way-freight train, and ran into it, causing the accident. It seems to us that Judge McCRARY stated the question fairly and fully for the instruction of the jury, and their verdict, which was substantially that the conductor, Childs, was guilty of negligence in failing to take the proper precautions by putting the requisite signals on the rear end of his train, must be sustained.

There was also a question in this case, as there is in almost every case of this kind, as to the alleged negligence of the plaintiff; and the instructions of the court were that if he was guilty of contributory negligence which directly tended to cause the injury, he could not recover. In looking at these instructions, it seems to both of us that the court stated the law fully and clearly to the jury, and, notwithstanding one or two technical criticisms that have been made upon some of the expressions in the instructions, it seems to us that the law was presented to the jury correctly, and that their verdict upon the facts must be sustained.

The motion for a new trial will therefore be overruled.

ALFORD *v.* WILSON.

(*Circuit Court, D. Connecticut.* April 29, 1884.)

CONTRACT—FACTS OF CASE REVIEWED.

Where a letter was written to the defendant proposing that as a part of a contract he should agree to furnish $15,000 in stock, and requesting him to signify his acceptance of the terms by telegraphing back "proposition as to fifteen thousand stock accepted," and the defendant telegraphed "I will provide for the fifteen thousand stock," intending the dispatch to be regarded as an acceptance, *held*, on the facts found by the court, that a refusal to furnish the stock rendered him liable.

SHIPMAN, J. This is an action at law which was tried by the court, the parties having, by a duly signed written stipulation, waived a trial by jury. Upon said trial so had to the court, both parties appeared, and having been fully heard by their counsel and with their witnesses, I find the following facts to have been proved and to be true:

In June, 1882, the Wilson Sewing-machine Company of Chicago was a corporation for the manufacture and sale of Wilson sewing-machines, located in Chicago, and theretofore incorporated under the laws of the state of Illinois, with a capital stock of $500,000. The defendant, a citizen of Illinois, was the president of the company, and owned all its stock except 40 shares. The plaintiff was at the same time living and doing business in the city of New York, under a contract with said company, dated January 4, 1882, by which he had the exclusive power of selling the said machines in the states of New York, Connecticut, New Jersey, Delaware, Maryland, and Virginia, and the District of Columbia, and specified portions of Pennsylvania and North Carolina, and by which the company agreed to sell to him its machines at specified prices. In June, 1882, the defendant came to New York city for the purpose of collecting or settling the plaintiff's debt to said company of about $20,000. After negotiations with the plaintiff and his bondsmen, said contract was terminated by mutual consent on June 23, 1882, and 16 notes for said indebtedness were given by the plaintiff to said company, each for the sum of $1,250, each four of said notes being also signed by one of the four persons who had been his sureties for the fulfillment of said contract. Thereupon, on said day or the next, conversation and negotiations were had between the defendant on the one part and the plaintiff, and George A. Delaree, a broker, on the other part, in regard to the formation of a joint-stock company in the city of New York, with a capital of $50,000 for the sale of said sewing-machines in the territory formerly occupied by the defendant. It was understood that the plaintiff and said Delaree should proceed and endeavor to form such a company, but as the parties differ in regard to the terms upon which the services were to be rendered, and as those terms are not necessary to the determination of this case, I make no finding upon that point. The plaintiff and said Delaree say that the defendant was to give or furnish each of them $5,000 paid-up stock in this company. The defendant says that he simply agreed to pay for the legal expenses of organizing such a company, provided they did not exceed $50.

About June 24th the defendant returned to Chicago, and the other two persons made some attempt to start this proposed corporation. The defendant, in a few days, conferred with James H. Sheldon, the general manager of the company, as to the expediency of forming a company at the east for the purchase of the machinery, tools, fixtures, and good-will of the business of said Chicago corporation. This necessarily involved the abandonment of the en-