ON MOTION FOR NEW TRIAL.

December 5, 1889.

Before BOND and SIMONTON, JJ.

BOND, J. It appears from the statement of facts in this case that the plaintiff, Lucas, was walking along the track of the defendant company, where the people of the neighborhood were accustomed to walk when visiting from one village to another. He saw the train of the defendant company approaching, and stepped off the track, and placed himself in an upright position, nine feet from the track, with his back against the bank of earth left there when the cut was made through which the track was laid. The engine and tender were propelled at the rate of 60 miles an hour. After it had passed about 20 minutes, the plaintiff was discovered seriously wounded in the road. There was, near where the plaintiff was standing, found imbedded in the bank a piece of wood like that found at a neighboring wood-pile where the tender had been supplied with wood. It appears the embankment against which plaintiff was standing was about breast high, as some say, others making it as high as his head. The piece of wood was not found on this elevation. Upon this district judge, then sitting in the circuit court, directed the jury to find a verdict for the defendant. A motion for a new trial was made, which, at the request of the district judge, I have heard argued. I do not see upon what ground the plaintiff can recover. He was walking upon the railroad track, a common place to walk, perhaps, but still the railroad company was bound to exercise no extraordinary care because

of any permission or license he may have acquired by custom to walk there, and there is no proof that they were not as careful on this occasion in the management of their locomotive and tender as on any other part of their road. To run a train at 60 miles an hour is not negligence, nor in itself to be reprimanded. The plaintiff, when he undertook to walk the defendant's track, took all the risks of such a promenade incident to the railroad's proper conduct of its business. While standing there the plaintiff says he saw the shadow of something in the air, which struck him, and then he lost consciousness. This is all the proof there is that the thing that wounded him came from the engine or tender of the defendant, except that a stick was found imbedded in the bank, behind his back, not head, after he was picked up. It would be mere guesswork for the jury to find that the wound was produced by this stick of Wood. It might have been there for weeks. There was no blood on it; nothing but the shadow of something in the air to indicate the cause of plaintiff's unfortunate wound. But suppose, for the sake of the case, the stick of wood fell from the tender, or, already upon the track, was struck by the cow-catcher, and sent flying through the air. What help would that be to plaintiff's case? Would any amount of care prevent this? Is not a cow-catcher put on the engine to knock things off the track? The plaintiff in this case, it seems to me, took all the risks of danger and accident incident to running cars on the track where he was. If it were proved, which it is not, that the accident was caused by defendant's engine or tender, and it appeared, as it does, that the machinery was run in the ordinary way, he would not be entitled in law to recover. Sixty miles an hour for short distances is not unusual. I think the district judge was right in instructing the jury that plaintiff had no case, and directing a verdict for defendant.

SIMONTON, J., concurred.