"The court erred in overruling the general demurrer of the said Southwestern Telegraph & Telephone Company to the original petition and cause of action of the said J. B. Robinson, as will appear from an inspection of the said petition, demurrer, and judgment of the court thereon."

John W. Wray, for plaintiff in error.
M. L. Crawford, *W. O. Davis*, and *J. L. Harris*, for defendant in error.
Before PARDEE, Circuit Judge, and LOCKE and BRUCE, District Judges.

BRUCE, District Judge, (*after stating the facts.*) The question and the only question for review here is whether the plaintiff stated a cause of action in his petition, and if the demurrer to the cause of action, as stated by the plaintiff in the court below, was properly overruled. In *Railroad Co.* v. *Jones*, 95 U. S. 439, it is said negligence is the failure to do what a reasonable and prudent person would ordinarily have done, under the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done. It would seem too plain to require argument that the allegations of the petition show negligence on the part of the telephone company. Under the facts and circumstances stated the wire was an obstruction upon the public highway. Travelers were liable to collide with it, and injurious consequences to them would follow as the natural and probable result of such contact. Article 622 of the Revised Civil Statutes of Texas provides:

"Corporations created for the purpose of constructing and maintaining magnetic telegraph lines are authorized to set their poles, piers, abutments, wires, and other fixtures along, upon, and across any of the public roads, streets, and waters of the state, in such manner as not to incommode the public in the use of such roads, streets, or waters."

The duty on the part of the telephone company was clear to prevent its wire from becoming an obstruction on the highway. Under the circumstances shown the defendant in error might have been hurt by coming in contact with the wire of the telephone company, and injuries to the defendant in error might have resulted, independent of the fact that the wire at the time was loaded with a charge of electric fluid from the clouds and storm then prevailing. So that it is difficult to see how this verdict could be disturbed even if the contention of the plaintiff in error is correct, that the electricity with which the wire was charged at the time was the proximate and immediate cause of injury to the defendant in error, for which the telephone company cannot be held responsible. Negligence is a mixed question of law and fact, and is a question for the jury, under proper instructions from the court. It is not claimed here that the court misdirected the jury in its charge on the law of the case, and the verdict is: "We, the jury, find for the plaintiff in the sum of twenty-five hundred dollars." The jury found negligence on the part of the telephone company, resulting in injuries to the defendant in error, and for which they assess his damages at $2,500. It is not shown that the jury found that the wire of the telephone company was charged with electricity at the time the defendant in error came in

contact with it, and that the electric fluid was the cause of the injury to the defendant in error, and so it is not clear that there was any error in the ruling of the court, even upon the theory of the case insisted upon by the plaintiff in error. No point is made on the question of contributory negligence, and the contention of the plaintiff in error seems to be that the petition states the cause of action to have been the injuries which resulted from the fact that the wire at the time of the contact with it by the defendant was charged with electric fluid, for the creation and existence of which the telephone company was in no sense responsible. Persons, however, must be held to know the ordinary operation of the forces of nature, and to use proper means to avert danger. If the electric fluid with which the wire of the telephone company was charged at the time was an element or the main element in the production of the injuries to the defendant in error, still it is clear that the displaced wire furnished the means of the communication of the dangerous force which resulted in the injury to the defendant in error. Science and common experience show that wires suspended in the atmosphere attract electricity in the time of storms, and when so suspended and insulated are dangerous to persons who may at such times be brought in contact with them, and the petition charges that, during electric or thunder storms, such wires ordinarily become heavily charged with electricity, of power sufficient to cause death or great injury to those coming in contact with them; and whether this is so or not is a question of fact. To say that the agency of the telephone wire in the production of the injury was inferior to that of the electric current, which was the main cause, is not satisfactory. It is, in fact, to admit that the company's displaced wire furnished the means by which the dangerous force was communicated to and injured the defendant in error. True, it was a new force of power which intervened, with the production of which the telephone company had nothing to do, but upon this point, in *Insurance Co.* v. *Tweed*, 7 Wall. 52, the court say:

"If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote."

The new force or power here would have been harmless but for the displaced wire and the fact that the wire took on a new force, with the creation of which the company was not responsible, yet it contributed no less directly to the injury on that account. In *Gleeson* v. *Railroad Co.*, 140 U. S. 435, 11 Sup. Ct. Rep. 859, the court held that a landslide in a railway cut caused by an ordinary fall of rain is not an act of God, which will exempt the railway company from liability to passengers for injuries caused thereby while being carried on the railway; and on page 441 (page 861, 11 Sup. Ct. Rep.) of the opinion in that case the court, quoting from an English case, say "that the plaintiff was entitled to a verdict on the ground that, if a person maintains a lamp projecting over a highway for his own purposes, it is his duty to maintain it so as not to be dangerous to persons passing by; and if it causes injuries, owing to a want of repair, it is no answer on his part that he had employed a competent man to repair it;" citing 1 Thomp. Neg. pp. 346, 347. No

case is cited like the one at bar, but the principles upon which cases of this character have been decided sustain the verdict in this case, and the judgment of the court is affirmed.

TEXAS & P. RY. CO. *v.* NELSON.

(Circuit Court of Appeals, Fifth Circuit. May 30, 1892.)

No. 25.

1. CONTINUANCE — ABSENCE OF WITNESSES — DISCRETION OF COURT — STATE PRACTICE NOT FOLLOWED — REV. ST. § 914.
   A continuance because of the absence of material witnesses rests within the discretion of the circuit court, without regard to the practice of the state courts, notwithstanding the statute conforming the practice and procedure of the circuit courts to that adopted in the courts of record of the state where such court is held, because the mode of summoning witnesses and taking testimony in the courts of the United States is regulated by statutes of the United States.
2. PLEADING — EVIDENCE — ACCIDENT AT RAILWAY CROSSING.
   In an action for personal injuries sustained at a railway crossing, defendant alleged contributory negligence on the part of the plaintiff in failing to stop, look and listen for the approaching train. *Held*, that plaintiff could testify that several people, who were in the wagon with him at the time of the accident, did not make any outcry indicating that a train was approaching.
3. RAILROAD COMPANIES — MUNICIPAL REGULATIONS — RINGING BELL.
   Under section 80 of the charter of the city of Ft. Worth the city council is empowered "to direct the use and regulate the speed of locomotive engines in said city, or to prevent or probibit the use or running of the same within the city." *Held*, that the city council were authorized under this section to enact an ordinance prohibiting the running of an engine or car in said city without a bell attached thereto being rung before starting, and all the time the same should be in motion within such city.

Error to the Circuit Court of the United States for the Northern District of Texas. Affirmed.

W. W. Howe, *R. S. Lovett*, *Henry Finch*, and *George Thompson*, for plaintiff in error.

M. L. Crawford, for defendant in error.

Before PARDEE, Circuit Judge, and LOCKE and BRUCE, District Judges.

PARDEE, Circuit Judge. The defendant in error, B. F. Nelson, instituted a suit in the district court of Tarrant county, state of Texas, against the Texas & Pacific Railway Company, to recover damages for personal injuries suffered by the said Nelson in being run over by one of the locomotives of the railway company at a railway crossing in the city of Ft. Worth. The railway company appeared in the state court, filed a demurrer and answer to the petition, and thereupon, by a proper petition and bonds, removed the case into the circuit court of the United States for the northern district of Texas. After transcript filed in the circuit court, the railway company filed its first amended original answer, wherein it demurred to the sufficiency of the plaintiff's petition, then excepted to the sufficiency thereof, and for special answer said:

"That, if plaintiff received any of the injuries alleged, same were caused and occasioned by reason of his own carelessness and want of care in failing to