deliberation on the part of the jury, occupying a day and two nights, and when they had returned into court and announced that they were unable to agree, he gave them further instructions by which he withdrew from their consideration any question of the contributory negligence of the plaintiff, and informed them that, inasmuch as it appeared that the plaintiff was struck on the crossing by the defendant's train, the plaintiff was entitled to a verdict, unless they were able to find that the defendant did all that the law required, and all that reasonable prudence required to prevent the injury, and could not avoid it. The defendant duly excepted to the refusal of the court to instruct the jury to render a verdict for the defendant, and to that part of his instructions withdrawing from their consideration the question of the plaintiff's contributory negligence, and embodying the proposition that he was entitled to recover unless the evidence disproved negligence on the part of the defendant.

It is not necessary, for present purposes, to consider whether the defense resting upon the ground of the contributory negligence of the plaintiff was not so persuasively and conclusively established that the jury should have been instructed to find for the defendant. The plaintiff was aware, from the presence of the freight train on the side track, that a train was expected on the main track, and that such train might be the express train coming from the north. He had been driving rapidly for an eighth of a mile, with his view of the track in that direction cut off by the interposed freight train. Driving rapidly, as he had been, and being totally deaf in the ear towards the track, he could not but be aware that, although he had been listening for them, he might have failed to hear the signals from the express. Before he reached the crossing he knew that the van of the freight train was so near to it that he would be unable to see the main track to the north until his horse would be upon the track. Under these circumstances, common prudence required him, as he neared the tracks, to proceed cautiously, to look, to listen, and, as we think, to stop, in order that he could listen more perfectly, before attempting to cross. He did neither, but kept his attention so exclusively upon his horse that he did not see the signals of danger which were being made to him from men in full view, on his right hand and on his left, at each side of the crossing, and urged his horse to dash rapidly across. If these undisputed facts were not such as to leave no room for inferences, such that a jury could legitimately draw no other conclusion from them than that the plaintiff had failed to exercise reasonable care and prudence, they were certainly sufficient to justify such a finding, and in no possible view could they justify the court in deciding to the contrary as a question of law. The most culpable negligence on the part of a defendant will not authorize a recovery in behalf of a plaintiff whose own negligence has contributed to his injury.

It is urged in support of the refusal to leave the question of the plaintiff's negligence to the jury, that such an issue was not raised upon the pleadings. This is the only conceivable ground upon which that refusal can be justified. No question that the issue was not within the pleadings was raised upon the trial. Much of the testi-

mony of the defendant was introduced for the purposes of maintaining that issue, and had no other bearing; and, as has been stated, the question was originally submitted to the jury by the trial judge. In his final instructions to the jury, in which he withdrew that question from their consideration, no such reason for doing so was suggested by him. Nevertheless, in considering the motion for a new trial, the learned trial judge placed his denial of the motion, in part, upon the ground that the contributory negligence of the plaintiff was not in issue. To this conclusion we are unable to accede.

The declaration contains three counts. The plea was not guilty. The first two counts of the declaration are concededly in case. The third sets forth, as the cause of action, special facts and circumstances, showing a case of negligent injury by the defendant to the plaintiff's person and property while he was crossing the defendant's railway. It avers that the defendant did not provide a reasonably safe passage over the highway crossing; that it carelessly and negligently suffered the same to be obstructed; that it did not manage and control its engines and cars with due and proper care; that it carelessly and negligently ran them at a high rate of speed; that it did not ring a bell upon the locomotive, or blow a steam whistle, until the locomotive had passed over the crossing, by reason whereof he and his horse and sleigh were struck and injured.

If the third count was in trespass, inasmuch as, under a plea of not guilty, the defendant in such an action is not permitted to prove that the plaintiff was guilty of contributory negligence, and inasmuch as the statute of Vermont relating to pleadings requires that, in counts where case and trespass are joined, pleadings must conform to those in trespass, the conclusion of the learned trial judge was correct. But we are of the opinion that the third count, like the first and second, was in case. It sets forth a cause of action in which, although the injury was immediate, the fault of the defendant consisted in negligence; and, as the defendant was a corporation, which could only act through its agents and servants, case was the only appropriate form of remedy.

Case is the appropriate and proper remedy for negligent injuries at common law. In Claflin v. Wilcox, 18 Vt. 610, the rule is stated to be that, when the fault of the defendant consists in negligence, it is mere nonfeasance; and, although the injury is immediate, the appropriate remedy is case. All the authorities upon common-law pleading state the rule to be that, while trespass is the proper remedy for an immediate injury inflicted by the willful act of the defendant, yet case lies where the act is negligent; and, where injuries are occasioned by the carelessness or negligence of a servant of the defendant, the plaintiff must generally bring case. Chitty says:

"If the injury arise from a want of care or negligence of the servant, case is the remedy; but if it occurred as the necessary, probable, or natural consequence of the act ordered by the master, then the act is the master's, and he should be sued in trespass, if the act were forcible and immediate."

See 1 Chit. Pl., 131; Huggett v. Montgomery, 2 Bos. & P. N. R. 446; Morley v. Gaisford, 2 H. Bl. 443; McManus v. Crickett, 1 East, 106.

The rule is thus stated in Campbell v. Phelps, 17 Mass. 245:

"In general, the true distinction is, when the injury is done directly by the person sued, the action should be trespass; when it is consequential, as when done by a servant, and the master is sued on account of his liability for the acts of his servant, case is proper."

It is entirely well settled that, under the plea of not guilty in an action on case, the defendant may show that the immediate or proximate cause of the injury was the negligence of the plaintiff. Flower v. Adam, 2 Taunt. 315; Williams v. Holland, 10 Bing. 110; Vennall v. Garner, 1 Cromp. & M. 21; Bridge v. Grand Junction Ry. Co., 3 Mees. & W. 244; Sills v. Brown, 9 Car. & P. 601; Smith v. Dobson, 3 Man. & G. 59; Holden v. Coke Co., 3 C. B. 1.

The adjudications of the supreme court, to the effect that the contributory negligence of a plaintiff is matter of defense, and the burden of proof is upon the defendant, do not touch the question of pleading which arises here. That question is controlled by the rules which obtain in the state in which the action is tried, and in some of the states, under the code system of pleadings which prevails, the defendant may be required to specifically allege the defense in cases in which the complaint does not allege that the plaintiff was free from negligence on his part. As in Vermont the rules of pleading which obtain are those of the common law, and under these rules a defendant, in an action upon a case, is permitted, under a general traverse, to show that the plaintiff's negligence contributed to the injury, we are unable to doubt that the defendant in the present case was entitled to avail himself of the defense, and that the instruction to the jury which is complained of by the assignments of error was erroneous.

The judgment is accordingly reversed.

AMERICAN CREDIT INDEMNITY CO. v. WOOD et al.

(Circuit Court of Appeals, Second Circuit. April 7, 1896.)

1. PARTNERSHIP—EVIDENCE.
   It is not error, in an action between persons who sue as partners, and a third party, to permit persons, whose business relations with the alleged partners are intimate, to testify as to the apparent relations between them, although the partnership may have been constituted by indentures or other writings.
2. INSURANCE—WARRANTY IN APPLICATION—BURDEN OF PROOF.
   It is not necessary for the plaintiff in an action on an insurance policy to aver and prove the truth of representations, amounting to warranties, which are contained in the application only, and not in the policy itself; but it is incumbent upon the defendant, who relies upon the breach of such warranty, to allege it and assume the burden of proof.
3. CREDIT INSURANCE—IDENTITY OF INSURED—CO-PARTNERSHIP.
   A policy of credit insurance, issued to W. & Co., provided that it should cover only losses on sales of merchandise owned "by the indemnified." *Held*, that such provision did not require that the business of the indemnified should have been conducted, throughout the term of the policy, under exactly the same firm name, if the firm had been in existence, composed of the same members as when the policy was issued.