The issue between the members of this court is clearly defined. On the one hand it is maintained that it is for the court to determine whether the acts of Whittle, under all the special and peculiar circumstances surrounding the case, constitute contributory negligence in law; and the contention on the other hand is that whether those acts constitute contributory negligence is a question of fact for the jury, and not of law for the court. The question is not to be obscured by confounding it with the generality of cases in which, if there is either no evidence or not sufficient evidence to warrant a verdict, the court may take the case from the jury for want of evidence. This case is not one of lack of evidence. The contention of the majority is not that there was no evidence to go to the jury, but that the facts proved constituted contributory negligence in law. The contention of the minority is that it is the province of the jury to determine what constitutes contributory negligence from the proven facts. It would be an affectation of learning to cite the hundreds of cases in this country and in England which hold this question is one for the jury. In addition to the cases already cited I content myself with citing two or three of the judgments of the supreme court of the United States on this question. The position of the majority is expressed in the following sentence in their opinion:

"We think that the undisputed evidence contained in the record shows that the deceased was guilty of an act of negligence which directly contributed to his death."

Against this assumption of the majority that it is their province to decide upon the facts proved whether the "deceased was guilty of an act of negligence," I interpose the clean-cut and emphatic declaration of the supreme court of the United States that:

"Although the facts are undisputed, it is for the jury, and not for the judges, to determine whether proper care was given, or whether they established negligence." Railroad Co. v. Stout, 17 Wall. 657.

In Railway Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, the lower court, in its charge, told the jury:

"You fix the standard for reasonable, prudent, and cautious men under the circumstances of the case as you find them, according to your judgment and experience of what that class of men do under these circumstances, and then test the conduct involved, and try it by that standard; and neither the judge who tries the case nor any other persons can supply you with the criterion of judgment by any opinion he may have on that subject."

And the supreme court held this was the law, and affirmed the judgment. In the same case the supreme court said:

"It is earnestly insisted that although the defendant may have been guilty of negligence in the management of its train, which caused the accident, yet the evidence in the case given by the plaintiff's own witnesses shows that the deceased himself was so negligent in the premises that, but for such contributory negligence on his part, the accident would not have happened. * * * To this argument several answers might be given, but the main reason why it is unsound is this: As the question of negligence on the part of the defendant was one of fact for the jury to determine under all the circumstances of the case, and under proper instructions from the court, so, also, the question of whether there was negligence in the deceased, which was the proximate cause of the injury, was likewise a question of fact for the jury to determine, under like rules."

In Jones v. Railroad Co., 128 U. S. 443, 9 Sup. Ct. 118, the lower court instructed the jury to render a verdict for the defendant upon the ground that the plaintiff had been guilty of contributory negligence, but the supreme court reversed the judgment, saying:

"But we think these questions [of negligence] are for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as this as well as others."

The supreme court of the United States has twice referred approvingly to the case of Sullivan v. Railroad Co., 154 Mass. 524, 28 N. E. 911. In Railway Co. v. Ives, at page 432, 144 U. S., and page 688, 12 Sup. Ct., the court say:

"The substance of the case is stated in the syllabus by the reporter[1] as follows: 'Plaintiff, a woman about 65 years of age, of ordinary intelligence, and possessed of good sight and hearing, was injured at a railroad crossing. The railroad had been raised several feet higher than the sidewalk, and the work of grading was still unfinished, and the crossing in a broken condition. There were three tracks, and a train was approaching on the middle one. The view was obstructed somewhat with buildings, but, after reaching the first track, it was clear. The evidence showed that the plaintiff was familiar with the passing of trains; that she did not look before going upon the track; and that, if she had looked, she could have seen the train a quarter of a mile. When the whistle sounded, she looked directly at the train, and hurried to get across. Plaintiff testified that she looked before going upon the track, but did not see the train or hear the whistle; that the only warning she had was the noise of its approach, after she was on the first track; and that she did not then look to see where it was, or on which track it was coming, but started to cross as fast as possible, and, in so doing, stumbled, and fell between the rails. The signals required by the statutes were not given. *Held*, that it did not appear as matter of law that plaintiff was guilty of gross or willful negligence, and that it was proper to submit the question to the jury."

In Railroad Co. v. Everett, 152 U. S. 107, 14 Sup. Ct. 474, it is said:

"In Sullivan v. Railroad Co., 154 Mass. 527, 28 N. E. 911, it was held that 'the court is not permitted to take from the jury these questions of negligence and to decide them for the jury and for the case, unless the evidence shows that the negligence of the defendant in error was gross and willful. If it was less than that, then the questions of negligence were for the jury, and are all settled in favor of the defendant in error by the verdict."

Probably the clearest and most comprehensive statement of the rule is found in Railway Co. v. Ives, supra, where the court say:

"There is no fixed standard in the law by which the court is expected to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence

[1]As published in 28 N. E. 911.

or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered one of law for the courts."

In the case at bar, 16 men—12 jurymen and 4 judges—have been called upon to draw a conclusion from the same evidence. Of this number, the 12 men appointed by the constitution to be the exclusive triors of the question have found that Whittle was not guilty of contributory negligence, and the learned and experienced trial judge and one member of this court have found that the testimony abundantly supports the verdict of the jury, and two judges of this court are of a different opinion. The rule of the supreme court is that, unless "all reasonable men" would draw the conclusion that the party was guilty of contributory negligence, the verdict of the jury must stand; but the majority of the court have substituted for the rule of the supreme court a rule which, if put into words, would read that if, out of 16 reasonable men, 2 can be found who draw conclusions different from the 14, the verdict of the 2 shall prevail over that of the 14. But this statement of the new rule falls far short of illustrating the extent of the invasion of the functions of the jury in this case; for I hazard nothing in saying that a fair and impartial jury cannot be found in this circuit, of 11 states, who would not, upon the evidence in this record, return the same verdict that was returned by the jury that tried this case.

The degree of proof required to establish contributory negligence must not be overlooked. The rule is "that the evidence against the plaintiff must be so clear as to leave no room to doubt, and all material facts must be conceded or established beyond controversy." Field, Dam. 519; Beach, Contrib. Neg. § 447; Railway Co. v. Sharp, 27 U. S. App. 334, 11 C. C. A. 337, and 63 Fed. 532, and cases cited. Juries are the constitutional triors of the facts, and it is their exclusive province to decide what facts are proved. "It is a point too well settled to be now drawn in question that the effect and sufficiency of the evidence are for the consideration and determination of the jury." U. S. v. Laub, 12 Pet. 5. "Whether evidence is admissible or not is a question for the court to decide; but whether it is sufficient or not to support the issue is a question for the jury." Bank v. Guttschlick, 14 Pet. 19, 31. The court in Ewing v. Burnet, 11 Pet. 41, 51, said: "It is the exclusive province of the jury to decide what facts are proved by competent evidence." In Richardson v. City of Boston, 19 How. 263, the court said: "If there be 'no evidence whatever,' as in the case of Parks v. Ross, 11 How. 362, to prove the averments of the declaration, it is the duty of the court to give such peremptory instruction. But, if there be some evidence tending to support the averment, its value must be submitted to the jury, with proper instructions from the court. If this were not so, the court might usurp the decision of facts altogether, and make the verdict but an echo of their opinions." In Chandler v. Von Roeder, 24 How. 224, the court said: "Whether there be any evidence is a question for the judge; whether there be sufficient evidence is for the jury." In Gregg v. Moss, 14 Wall. 564, Mr. Justice Miller, speaking for the court, said: "The brief of the plaintiff proceeds to argue

that the evidence before the jury does not sustain either of the allegations of advancing the money to the partnership, or the agreement of the plaintiff to convert it into capital of the partnership. With this we can have nothing to do. It was the province of the jury to determine whether either of these allegations was proved."

This was the unquestioned doctrine in all the courts for the first half century of the existence of the government. It is only in recent times, and since corporations have absorbed the capital and business pursuits of the country, that a tendency has developed, in some courts, to impinge on the functions of the jury and the constitutional rights of suitors. This invasion of the functions of the jury is attempted to be justified upon the ground that juries are prejudiced against corporations, and that it is the duty of the courts to protect them from such prejudice. This is an unfounded assumption. The danger to life and property growing out of the management and operation of railroads has been greatly lessened in recent years, and this improvement is largely due to the verdicts of juries. Corporations formed for pecuniary profit act from pecuniary considerations alone, and it was not until it became obvious that it was cheaper to incur the expense necessary to give greater security to life and property in the operation of their roads than it was to pay the damages awarded by the verdicts of juries, for negligently failing to provide reasonable safeguards, that railroad companies exercised more care, and adopted better and safer methods, for the operation of their roads. Juries whose intelligence and impartiality are impugned have no opportunity to be heard in their own defense. If they were accorded an opportunity to answer this charge of the judges against them, they would probably content themselves with a reference to the "mote" and the "beam," with an earnest asseveration that the beam was not in their eye.

As illustrating the proper regard to be paid to the verdict of juries by appellate courts, I refer to Johnson v. U. S., 157 U. S. 320, 15 Sup. Ct. 614. This was a capital case, and the supreme court conceded that, in the view they took of the evidence, there "was room for a reasonable doubt of the defendant's guilt." This concession would, of course, have compelled the court to set aside the verdict of the jury if it was the court's opinion of the evidence, and not that of the jury, which was to prevail. They did not set aside the verdict, however. The court said: "The impression has been made upon us, by our examination of the evidence, that there was room for a reasonable doubt of the defendant's guilt. But," say the court, "the jury that found him guilty saw and heard the witnesses, and we must infer from the conduct of the court in overruling the motion for a new trial that it was satisfied with the verdict." And, notwithstanding their impression of the evidence was different from that of the jury, they refused to set aside the verdict, affirmed the judgment, and the defendant was hanged. Why should the verdict of a jury be held more inviolable when a man's life is in the scale, than it is when only a money liability of a railroad company is in the scale? A verdict should be as conclusive upon an artificial as upon a natural person. There should be no discrimination.

Without pursuing the subject further, I refer to and reaffirm what is said by this court in Railroad Co. v. Ellis, 10 U. S. App. 640, 4 C. C. A. 454, and 54 Fed. 481, and in the dissenting opinions in Laclede Fire Brick Manuf'g Co. v. Hartford Steam Boiler Insp. & Ins. Co., 19 U. S. App. 510, 9 C. C. A. 1, and 60 Fed. 351, and Finalyson v. Milling Co., 14 C. C. A. 492, 67 Fed. 507, on the subject of the respective functions of the court and jury.

The ruling of the majority of the court holding that, upon the evidence, Whittle was guilty of contributory negligence, is an invasion of the province of the jurv. and a denial to the plaintiffs of their constitutional right to have the facts of their case tried by a jury.

THE ALBANY.

McCULLOUGH et al. v. THE ALBANY.

(District Court, S. D. New York. April 27, 1896.)

COLLISION—FERRYBOATS—LIGHTS HID BY INTERVENING VESSEL.

Libellants' ferryboat S. left Chambers Street and navigated up the North river a little to the eastward of the higher ferryboat Hamburg, which hid the red light of the S. from the view of vessels to the westward. The ferryboat A. coming down from Weehauken was also obscured from the view of the S. by the intervening ferryboat Hamburg. The S. and the A. both turned at about the same time to pass under the stern of the Hamburg, and they first came in sight of each other when they were too near to avoid collision: *Held*, that each was to blame for swinging so near under the stern of a high intervening boat, and the damages were therefore divided.

Wilcox, Adams & Green, for libellants.
Ashbel Green, and H. E. Kinney, for respondents.

BROWN, District Judge. About 9:45 p. m. of February 20, 1895, the libellants' ferryboat Susquehanna left her slip at the foot of Chambers Street, New York, on a trip to the Pavonia Ferry, Jersey City. As the Susquehanna came out the Hoboken ferryboat Hamburg, a double-decked boat, was passing the slip on her way to Hoboken. The Susquehanna rounded up the river from 100 to 200 feet to the eastward of the Hamburg with her bows lapping the Hamburg's stern. The ferryboat Albany was at the same time on her way down from Weehauken, bound for Franklin Street, and was to the northward and westward of the Hamburg, so that the colored lights of the Albany and the Susquehanna were obscured from the view of each other by the high double deck of the Hamburg. The latter was going somewhat faster than the Susquehanna, and when off Franklin Street, and probably about one-third of the way across the river, and heading a little to the Jersey shore, she drew away from between the Susquehanna and the Albany, so that the red lights of each became suddenly visible to the other a few hundred feet apart. Each ferryboat at once ported her helm, and very soon each reversed her engine; but they came in collision before the progress of either was stopped. The witnesses for the Susquehanna contend that at the time of collision the Susquehanna was heading nearly straight up the river, and that the collision was brought about by the improper swing of the Albany for her slip at Franklin Street