The well-established and just rule which holds the railroad company to the exercise of constant and strict care against injury through its means is applicable only to the relation on which it is founded, of an existing duty or obligation. This active or positive duty arises in favor of the public at a street crossing or other place at which it is presumable that persons or teams may be met. It is not material, so far as concerns this inquiry, whether the place is one for which a lawful right of passage exists, as it is the fact of notice to the company, arising out of its existence and the probability of its use, which imposes the positive duty to exercise care; the requirement of an extreme degree of care being superadded because of the hazards which attend the operations of the company. The case of a trespasser on the track, in a place not open to travel, is clearly distinguishable in the absence of this notice to the company. There is no constructive notice upon which to base the obligation of constant lookout for his presence there, and no actual notice up to the moment the trainmen have discovered the fact of his peril. As that peril comes wholly from his unauthorized act and temerity, the risk, and all positive duty of care for his safety, rests with the trespasser. The obligation of the company and its operatives is not, then, pre-existing, but arises at the moment of discovery, and is negative in its nature,—a duty, which is common to human conduct, to make all reasonable effort to avert injury to others from means which can be controlled. This is the issue presented here. It excludes all inquiry respecting the character of the roadbed, cattle guard, locomotive, brake appliances, or other means of operation, or of the speed or manner of running the train up to the moment of notice, because no breach of positive duty is involved. It is confined to the evidence relating to the discovery by the engineer and fireman of the plaintiff's peril, and to the efforts then made to avert the injury, and, out of that, to ascertain whether, in any view which may justly be taken, it is shown that these men, or the engineer, in disregard of the duty which then confronted them, neglected to employ with reasonable promptness the means at hand for stopping the train. The contention on behalf of the plaintiff affirms this upon the following propositions, substantially: (1) That negligent delay is expressly shown by the plaintiff's personal testimony; and (2) that, laying aside the adverse testimony introduced by the defendant, the fact of such delay is clearly inferable from that on the part of the plaintiff, taken as a whole. Unless one or both of these claims are well founded, the inquiry is readily solvable, as both presumption and affirmative proof are clearly with the defendant.

1. The plaintiff testifies, in effect, that he saw the train when it was near the depot, steaming towards him; that "a little ways from the depot the engineer seemed to be looking towards him"; "and then, about halfways between" where he was caught and the depot, he says, "I saw him turn around and look at me;" and "I was hollering, and making motions with my hands, jerking my leg; at the same time he turned around and looked at me." Notice cannot be imputed upon the fact alone that the engineer was in position to see the plaintiff on the track, but his presence must have been observed under circumstances which clearly impute knowledge of his helpless condition.

This may be shown by circumstantial evidence,—by the "presumptive inference from physical facts,"—which may overcome both the presumption against wrongdoing in the conduct of the trainmen, and their positive testimony that the plaintiff was not discovered until "the engine was within three or four car lengths of him." And upon these premises it is argued that the above version given by the plaintiff, standing alone, and under the conditions in which he was placed, is sufficient, without corroborating circumstances, to raise an issue which must be determined by the jury. To so affirm would, at least, call for the adoption of an extreme view regarding the province of the jury; but decision is not required upon the bald proposition, because it ignores other features of the testimony upon the same side, either conflicting or qualifying, to which just effect must be given, as follows: (1) On cross-examination the plaintiff admitted that he made a statement of the facts, on the day following the injury, in which he said: "I saw an engine with a long string of cars coming towards me, and, when engine was about three car lengths from me, I shouted at engineer, but could not attract his attention. I then tried it by waving a red pocket handkerchief, and this, too, failed." And he then testifies that this is true and correct, except that it should have read "three or four car lengths." Such statement, taken by a representative of the adverse party, is always open to explanation and suspicion, when tendered by way of admission against interest; but here it is distinctly adopted by the plaintiff, and made a part of his testimony. The statement contains no suggestion either that he was caught when the train was near the depot, or before it was within three or four car lengths of him, or that he gave any prior outcry or signal, or saw the engineer looking in his direction. It clearly differs from his narration as given on direct examination, and is either contradictory in those particulars, or makes uncertain whatever of seeming certainty there was in his direct testimony. (2) Two witnesses of the occurrence were produced by plaintiff, Frank J. Ellis and Esther Weilander. They were near the track, but upon opposite sides, the former about 300 feet, and the latter less than 200 feet, from the plaintiff. Both had the plaintiff in clear view, heard his outcry, and observed the approach of the train. Ellis says his attention was first called to the train by plaintiff's "yelling and motioning with his hands"; thinks the engine was then about 100 to 125 feet east of the street crossing, or within 200 feet of the plaintiff. He did not observe from his appearance or cry that plaintiff was caught, and therefore turned away, and did not witness the accident. Esther Weilander was crossing the tracks, in clear view of the cattle guard, but "did not see anybody" there, nor hear any cry, until after she noticed the approach of the train. Then she heard the plaintiff cry out, and noticed he "was caught, and was pulling his foot." Her location of the engine at the moment of this alarm is certain only in placing it within 200 feet or less of the plaintiff; and she says the engine "slowed off," but was not stopped before it struck the man. Both of these witnesses were in a position where they would have observed the plaintiff had he been caught in the cattle guard and making outcry previous to the moment of which they speak; and their

testimony repels any inference of earlier notice which might otherwise appear from the plaintiff's statement. They also forcibly tend to confirm both the testimony and the theory of the defense that the entry by the plaintiff upon the track, his entanglement in the cattle guard, and his outcry were all momentary, and all occurred when the engine was within 200 feet of him. It follows that the proposition of the sufficiency of proof in the testimony of the plaintiff to submit the case to the jury on the question of earlier notice is not well founded.

2. The second proposition is also untenable. In the estimates made by the bystanders of the distance at a given moment between a moving train and one who is in its pathway, with disaster impending, differences of judgment are probable, and no estimate can be regarded as certain. Their judgment under like circumstances of the exact rate of speed of the train is even more liable to be faulty. But this testimony is singularly free from essential difference respecting the distance of the engine from the plaintiff when he cried out, as the witnesses for plaintiff place the maximum at about 200 feet, while the trainmen state it at about 150 feet. The former estimate the speed of the train at 3 miles per hour, and the latter at 4 to 5 miles. With reference to the distance which a train may run before it can be stopped under conditions stated in this case, the testimony of experts was received; one produced by the plaintiff, and three by the defendant. As the issue involved no question of negligence for imperfect appliances, or their failure in accomplishment, this testimony can only be considered for the purpose of establishing presumptively that there was unreasonable delay in the attempt to stop. All of the experts agree in stating that the distance required is dependent upon numerous conditions, and varies widely; that no fixed rule could be given, nor distance stated with certainty; and that "engines are very queer," and some of the difficulties were inexplicable. Based upon a speed of 3 miles per hour and other conditions stated, the expert introduced for the plaintiff says 100 feet "would be a good fair average," and "a good ordinary stop." The others, assuming a rate of 4 miles, say that 190 to 200 feet would be required. If there could be a presumption of delay founded on the former, it would be overcome by the three opposing opinions. There is, therefore, no evidence disputing or weakening the force of that which is furnished by the engineer, fireman, and brakeman, that every means was applied, and their utmost effort made, immediately on hearing the cry; that the train could not be stopped in time because of conditions named, and particularly the slippery state of the rails, and the impossibility, with the engine running backward, of using sand on one pair of the drivers.

The court was clearly justified in directing a verdict for the defendant, and the judgment is affirmed.

AUSTIN v. HAMILTON COUNTY.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1896.)

No. 172.

1. FINDINGS.
A special finding should not be accompanied by a general finding.

2. MUNICIPAL BONDS—VALIDITY—DECISION OF STATE COURT.
In a suit on municipal bonds, where the special finding merely states that plaintiff held them "before due," and they became due 15 days after a decision of the state court that the act under which they were issued was invalid, it will be presumed that he purchased them during such 15 days, and with knowledge of that decision.

3. SAME—RES JUDICATA.
A decree upholding the validity of municipal bonds, rendered in a suit in which that issue was raised by the pleadings, is conclusive in favor of one who intervened in the suit, alleging the validity of the bonds.

4. SAME.
When, under the issues joined, the validity and force of a statute are necessarily within the scope of inquiry, the decree is conclusive of that question in a subsequent suit between the same parties on the same cause of action.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

Each party to this record prosecutes a writ of error. The action was commenced by Augustus T. Post, since deceased, and is in assumpsit, upon coupons from bonds of Hamilton county, Ill., issued to the St. Louis & Southeastern Railway Company. Upon written waiver of a jury, the issues joined were tried by the court, which made both a special and general finding, and gave judgment in favor of the plaintiff in error for the amount due upon a part, but not all, of the coupons in suit. The declaration avers, in substance, that on June 11, 1869, the defendant, through its county court, authorized thereto by the twentieth section of an act of the Illinois legislature approved March 10, 1869, entitled "An act to incorporate the St. Louis and Southeastern Railroad Company," by an order, a copy of which is made an exhibit, subscribed $200,000 to the capital stock of the railroad company, to be paid in the like amount of bonds of the county, each for $1,000, with 7 per cent. annual interest, payable half-yearly; that on July 1, 1869, the county, through the county court, "made a manual subscription of said amount, in bonds as aforesaid, on said railroad stock books, which was then and there accepted by the said railroad company"; that thereafter, on October 23 and November 28, 1871, by the authority aforesaid, the defendant issued and delivered to the St. Louis & Southeastern Railroad Company its bonds for the amount stated, with interest coupons attached; that afterwards, at divers times, divers persons became owners of the bonds and coupons by intermediate transfers and deliveries from the railroad company, and among them Walter M. Jackson, who in 1881 became the owner and bearer of 105 of the bonds, numbered as stated; that at the January term, 1881, of the court below, in a chancery cause then and there pending, wherein the defendant county was complainant, and Jackson and the other owners of the 200 bonds and coupons were defendants, "litigation was had involving the validity of all of said bonds and coupons, and a decree rendered therein establishing the legality and validity of all of said bonds and coupons," which decree is still in full force, never having been appealed from, nor in any manner annulled or reversed; that thereafter, on January 1, 1884, relying upon that decree, and upon the validity of said bonds and coupons established thereby, the plaintiff purchased from Jackson his bonds, and from other owners and holders bonds numbered 81, 143, 182, 183, 184, and 194, and their coupons, whereby the defendant became liable to pay the sum due thereon to the plaintiff, and by said decree is estopped from interposing any further defense to the cou-