return of the engine, or look to see whether it was coming. The question, then, is, can a jury be permitted to say that his attempt to cross No. 2 was, in view of this state of facts, not an act of negligence, but justifiable as an act of ordinary prudence? The question of negligence is ordinarily one of fact, and, being such, is to be submitted to the jury for their ultimate determination. "The question of negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusion from them; or, in other words, a case should not be withdrawn from the jury unless the conclusion follows, as a matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish." Gardner v. Railroad Co., 150 U. S. 349, 14 Sup. Ct. 140; Elliott v. Railway Co., 150 U. S. 245, 14 Sup. Ct. 85; Railroad Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619; and authorities there cited.

While there is no supremacy in the rights of owners of railroads operated by steam over the rights of individuals who are also lawfully using the same roadway, yet the dangers from this means of transportation are manifest, while its use has become a necessity, and it is therefore simply prudent for the passer-by to exercise the caution which experience has shown to be needful. An ordinary and almost instinctive exercise of that caution is an endeavor to determine by eyesight, rather than by surmise, whether danger is at hand. It has, therefore, become a requirement, as a general rule, that a person of mature years, and in the possession of his faculties, who is about to cross a railroad track over which steam engines are known to be in constant use, must necessarily use the precautions against danger which his eyes and ears and powers of observation provide. This is not a statutory rule, and there are probably cases in which such a compulsory regulation is not applicable, and in which other circumstances exist which control its reasonableness; as, for instance when the injured person, confused by the negligence of the railroad officers, has made a mistake in his means of remedy. Elliott v. Railway Co., supra. It is, however, in ordinary cases, a command of common prudence recognized by reasonable men, is reiterated by courts, and should not be frittered away by juries. The language of the supreme court, especially when directed to the duty of railroad employés to avoid carelessness in the crossing of tracks, has been clear and definite. Upon the general subject of carelessness by a foot passenger when called upon to cross a railroad track, Mr. Justice Field said in Railroad Co. v. Houston, 95 U. S. 697,—a case of injury which resulted in death,—as follows:

"The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employés in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train; and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others."

To the same effect is Schofield v. Railway Co., 114 U. S. 615, 5 Sup. Ct. 1125. The duty of a railroad employé in a railroad yard to be attentive to the probable or usual movements of switching engines which are in constant use is commented upon in Aerkfetz v. Humphreys, 145 U. S. 418, 12 Sup. Ct. 835. That a railroad employé in railroad service is not to assume that the train is not approaching, or that a thing which he wants to do can be done in safety, is sharply considered in the Elliott Case, supra. It is true that, if there are degrees of negligence, the injured man in that case was guilty of more inexplicable negligence than the plaintiff, but it was negligence of the same kind, and the suggestions of Mr. Justice Brewer in delivering the opinion of the court are, therefore, of value:

"It thus appears that the deceased, an experienced railroad man, on a bright morning, and with nothing to obstruct his vision, starts along and across a railroad track, with which he was entirely familiar, with cars approaching, and only 25 or 30 feet away, and, before he gets across that track, is overtaken by those cars and killed. But one explanation of his conduct is possible, and that is that he went upon the track without looking to see whether any train was coming. Such omission has been again and again, both as to travelers on the highway and employés on the road, affirmed to be negligence. The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom. It may be, as is urged, that his motive was to assist in getting the hand car out of the way of the section moving on the siding. But, whatever his motive, the fact remains that he stepped on the track in front of an approaching train without looking, or taking any precautions for his own safety. This is not a case in which one, placed in a position of danger through the negligence of the company, confused by his surroundings, makes, perhaps, a mistake in choice as to the way of escape, and is caught in an accident; for here the deceased was in no danger. He was standing in a place of safety on the south of the main track. He went into a place of danger from a place of safety, and went in without taking the ordinary precautions imperatively required of all who place themselves in a similar position of danger."

These cases, and others in the federal courts (Railway Co. v. Moseley, 6 C. C. A. 641, 57 Fed. 921), emphasize the point that the belief on the part of the injured person that an accident is not going to occur because he does not suppose that a train is at hand, is not an adequate reason for neglect to take the natural means at his command to determine whether an accident is imminent, for the "track is a warning and a place of danger." In this case the accident happened on a fine, clear day, when there were no unusual circumstances to distract the attention of an experienced man, like the plaintiff. He knew the important fact that engine 449 must shortly return on track 2. He had glanced at the switches, and saw, or thought he saw, that the track was closed, walked eastward between the tracks Nos. 2 and 3, and turned to cross No. 2 in the belief or assumption that the engine was not coming, because he had heard no signal of its approach. He crossed when, if he had turned about and looked, he could have seen the approaching engine; and the cause of the injury was his violation of the duty of protecting himself against an obvious danger. The judgment is reversed, with costs, and the cause is remanded to the circuit court for a new trial.

MEDBERRY v. TROUTMAN.

(Circuit Court, D. Kansas, Second Division. June 20, 1899.)

ACTION—LEGAL OR EQUITABLE—SUIT TO CHARGE STOCKHOLDER.

An action brought by a creditor of a corporation, to charge a stockholder with statutory liability for a debt of the corporation, is one at law; and it does not become cognizable in equity by the statement in the complaint of an additional ground for recovery, based on an allegation that defendant received certain property from the corporation, the proceeds of a sale of its property, where it is not alleged that plaintiff has reduced his claim to judgment against either the corporation or the defendant, and the corporation is not made a party, nor shown to have been legally dissolved, without one of which allegations a creditors' bill cannot be maintained in a federal court.[1]

This was a cause removed from the state court, and the question before the court was as to whether it was cognizable in the federal court, as a suit at law or in equity.

J. V. Daugherty and Earl W. Evans, for plaintiff.
T. B. Wall and C. H. Brooks, for defendant.

HOOK, District Judge. This case was removed by the defendant from the district court of Cowley county, Kan., and the question now presented is whether it is an action at law, or whether it falls within the equity jurisdiction of this court. The petition sets forth the following facts: The plaintiff is the owner of certain notes given to the Lombard Investment Company, a corporation organized under the laws of the state of Kansas, and which were secured by mortgages upon real property. The investment company negotiated the securities, and they became the property of the plaintiff. The indorsement upon the notes which was executed by the investment company contained a guaranty of the payment of the interest at maturity, and of the payment of the principal within two years from the time the same became due. The mortgages were foreclosed, the mortgaged property sold, and the proceeds applied towards the payment of the indebtedness, leaving an unpaid balance, for which the plaintiff sues. The defendant was the holder of $4,500 of the capital stock of the investment company, which became insolvent and suspended business for more than one year prior to the institution of the suit. It is further alleged that about August 1, 1890, the investment company, then engaged in the usual and ordinary transaction of its business, determined to wind up its affairs and sell and dispose of all of its property and assets, amounting to $1,250,000, and, pursuant to resolutions adopted at a meeting of the stockholders at which the defendant was present or represented, the company sold, transferred, and turned over to another company, known as the Lombard Investment Company of Missouri, all of the said property and assets, and that as the result of said transaction the defendant received as his part

[1] For liability of stockholders to creditors of corporation, see note to Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co., 23 C. C. A. 315, and note to Scott v. Latimer, 33 C. C. A. 23.