*WILLIAM B. STOKES, Plaintiff in error, *v.* FRANCIS W. SALTONSTALL, Defendant in error.

Negligence.

In an action against the owner of a stage-coach, used for carrying passengers, for an injury sustained by one of the passengers, by the upsetting of the coach, the owner is not liable, unless the injury of which the plaintiff complains was occasioned by the negligence or want of proper skill or care in the driver of the carriage, in which he and his wife were passengers; the facts that the carriage was upset, and the plaintiff's wife injured, are *primâ facie* evidence that there was carelessness, or negligence, or want of skill on the part of the driver, and casts upon the defendant the burden of proving that the accident was not occasioned by the driver's fault.[1]

It being admitted that the carriage was upset, and the plaintiff's wife injured, it is incumbent on the defendant to prove, that the driver was a person of competent skill, of good habits, and in every respect qualified, and suitably prepared for the business in which he was engaged; and that he acted on this occasion with reasonable skill, and with the utmost prudence and caution; and if the disaster in question was occasioned by the least negligence, or want of skill or prudence on his part, then the defendant is liable in the action.[2]

If there was no want of proper skill, or care, or caution on the part of the driver of a stage-coach, and the stage was upset by the act of the plaintiff or his wife, in rashly and improperly springing from it, then the defendant is not liable to an action, but if the want of proper skill or care of the driver placed the passengers in a state of peril, and they had, at that time, a reasonable ground for supposing that the stage would upset, or that the driver was incapable of managing his horses, the plaintiff is entitled to recover; although the jury may believe, from the position in which the stage was placed by the negligence of the driver, the attempt of the plaintiff or his wife to escape may have increased the peril, or even caused the stage to upset; and although they may also find, that the plaintiff and his wife would probably have sustained little or no injury, if they had remained in the stage.[3]

If the driver was a person of competent skill, and in every respect qualified and suitably pre-

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[1] Re-affirmed, in Railroad Co. *v.* Pollard, 22 Wall. 341. The upsetting of a stage is *primâ facie* evidence of negligence; a passenger who has been injured need show nothing more to sustain his action. McKinney *v.* Neil, 1 McLean 540. In Bishop *v.* Stockton, 1 West. L. J. 206, Judge BALDWIN says: "The mere fact of an upset raises a legal presumption of negligence; it supposes a default, and supplies (in legal contemplation) the evidence as such negligence and unskilfulness, as makes the carrier responsible in damages. This presumption may be met and refuted by the circumstances of the case; the presumption is thus destroyed, and the plaintiff must prove such default." And in Tennery *v.* Pippinger, 1 Phila. 543, Judge GIBSON said, "that the mere fact of an injury to a passenger raises a presumption of want of care, and throws on the carrier the burden of disproving it." When a passenger is injured, without negligence on his part, there is a *primâ facie* presumption of negligence, which can only be rebutted by proof of inevitable accident. Sullivan *v.* Philadelphia and Reading Railroad Co., 30 Penn. St. 234.

[2] See Pennsylvania Co. *v.* Roy, 102 U. S. 451, as to the liability of a carrier for an injury to a passenger, and the care and vigilance required of the former.

[3] An instinctive effort to escape a sudden impending danger, resulting from the negligence of another, does not relieve the latter from liability for the consequences. Coulter *v.* Union Express Co., 56 N. Y. 585. So, one who, without negligence, has placed himself in a position of danger, is not responsible for an error of judgment in extricating himself from the peril, so that he exercises it in good faith. Pennsylvania Railroad Co. *v.* Werner, 89 Penn. St. 59. And where one is placed, by negligent acts of another, in such a position, that he is compelled to choose, upon the instant, and in the face of apparently grave and impending peril, between two hazards, and he makes such a choice as a person of ordinary prudence, placed in the same situation, might make, and injury results therefrom, the fact that if he had chosen the other hazard, he would have escaped injury, does not prove contributory negligence. Twomley *v.* Railroad Co., 69 N. Y. 158; Dyer *v.* Erie Railway Co., 71 Id. 228; Voak *v.* Northern Central Railway Co., 75 Id. 320; Brown *v.* French, 14 W. N. C. 412.

pared for the business in which he was engaged, and the accident was occasioned by no fault or want of skill or care on his part, or that of the defendant or his agents, but by physical disability, arising from extreme and unusual cold, which rendered him incapable for the time to do his duty ; then the owner of the stage is not liable to an action for damages, for an injury sustained by a person who was a passenger.

Saltonstall *v.* Stockton, Taney's Dec. 11, affirmed.

Error to the Circuit Court of Maryland. The defendant in error, Francis W. Saltonstall, in September 1836, instituted an action for the recovery of damages against Richard C. Stockton and William B. Stokes, owners of a line of stages for carrying passengers from Baltimore to Wheeling ; Mr. Saltonstall and his wife having, on the 6th day of December 1836, been passengers in the stage, when, by the carelessness, unskilfulness and default of the driver, the stage was upset ; by reason of which Mrs. Saltonstall had her hip fractured, and several other bones of her body broken, and was otherwise greatly cut, bruised and injured, so that her life was endangered.

By an agreement between the counsel for the plaintiff and the defendants, no objection was to be taken to the nonjoinder of other persons as defendants, who were also owners or interested in the line of stages, when the injury complained of in the action occurred ; and the plaintiff might *182] recover in this action any damages which *might be recovered in an action by himself and wife, or by himself alone.

Richard C. Stockton having died after the institution of the suit, it was proceeded in against William B. Stokes, who survived him. The cause was tried before a jury, and a verdict was given for the plaintiff, under the instructions of the court, for $7130. On this verdict, the court gave a judgment for the plaintiff. The counsel for the defendant tendered a bill of exceptions to the opinion of the court ; and he afterwards prosecuted this writ of error.

The bill of exceptions stated, at large, the evidence given on the trial of the cause. The evidence of the witnesses for the plaintiff, taken under a commission to New Orleans, and examined on the trial, stated, that at the last change of horses, before the accident, the passengers generally remarked, that the driver seemed to have drank too much to go on. Mr. Saltonstall, the plaintiff, went to the agent, or the person avowing himself as such, and who was acting in that capacity, and reported to him the observation made by the passengers ; the agent replied, that the driver was all straight, and that the appearance of his being intoxicated was entirely owing to his having driven during the night previous, which had been excessively cold. When the stage arrived at about two miles from Bevansville, the passengers felt the stage strike against a mound or ridge on the right side of the road. Mr. Saltonstall, on observing this, immediately jumped out, as was believed, with the intention of stopping the horses ; Mrs. Saltonstall attempted to follow her husband, but fell to the ground at the very instant the stage upset, and it fell directly on her. The upset took place on Sunday afternoon, the 5th day of December, at about four o'clock in the afternoon ; it was broad daylight. The plaintiff's wife was dreadfully injured ; she was taken up and carried to a log-house in the neighborhood. The injury was occasioned by the falling of the stage on her body.

A witness stated, that the road was perfectly level, and in good travel-

ling order. There had been ice, but it had been so beaten down, that there was only a little remaining on the sides of the road. The centre was free from it. The road was not considered dangerous or difficult. The driver was believed to be intoxicated, and his intoxication was increased by his drinking with a man on the seat alongside of him. This belief was produced by his reckless and irregular manner of driving, which called for repeated remonstrances from the passengers, and which were wholly unattended to; and from his apparently stupid and drunken manner of conduct, after the upset. He was totally unfit for anything; he could not, or would not, answer a question, nor afford the least possible assistance.

The injuries sustained by Mrs. Salstonstall were proved by the surgeons and medical attendants, and they were such as to make it impossible, or too dangerous, to attempt to move her from the log hut, from the time of the accident, the 6th day of December, until *the 18th day of December, when she was carried to Bevansville, where she remained [*183] until the 18th day of May following. In July of the same year, she was in Philadelphia, still in a state of great suffering, and using crutches.

The plaintiff also proved, by Mr. Ludlow, who was a passenger in a stage which arrived after the accident, that the road was perfectly good, and was one on which a stage would not be likely to upset. The witness went to the driver, and had some conversation with him. The defendant's counsel objected to the statements of the driver being admitted in evidence; but the court declared them to be admissible; to which the counsel for the defendant excepted. The plaintiff then further proved by Mr. Ludlow, that he asked the driver how the accident happened, when he stated, he had upset fifty coaches, and he did not believe the woman was as much hurt as she said she was.

The testimony offered by the defendant, was intended to show the capacity and sobriety of the driver, and that the road was icy, difficult and dangerous; and that the upsetting of the stage might be accounted for by the slippery and icy condition of the road. The evidence for the defendants, it was contended, proved that had the wife of the plaintiff remained in the stage, no injury would have resulted to her. The other passengers were not materially bruised. The defendant also proved, that the coach and harness were properly made, and of sufficient strength; and that the horses were good and steady.

The defendant's counsel prayed the court to instruct the jury in sixteen different prayers. Among those were the following:

1. If the jury shall believe from the evidence in the cause, that the injury to the plaintiff's wife was occasioned solely by the overturning of the coach, and by its falling upon her; and that such overturning was occasioned by the act of the plaintiff and his wife, or either of them, in leaping from, or otherwise in leaving the said coach; and shall further believe, from the evidence in the cause, that at the time of such leaping from, or of such leaving, said coach, there did not exist any certain peril, nor any immediate danger of personal injury, nor any reasonable cause of apprehension of impending danger, by remaining in the coach; then the plaintiff is not entitled to recover upon the issue joined in this case, in respect to the said injury sustained by his wife; even if they also believe from the evidence in the cause, that the driver was guilty of carelessness,

negligence and misconduct, in placing the coach in the particular place and situation in which it was at the time of such leaping from, or leaving, the coach.

2. If the jury shall believe from the evidence in the cause, that the injury to the plaintiff's wife was occasioned solely by the overturning of the coach, and its falling upon her; and that such overturning was occasioned by the act of the plaintiff and his wife, or either of them, in leaping from, or otherwise in leaving, the coach, *and shall further believe from the *184] evidence in the cause, that such leaping from, or such leaving, the coach, was not, under the actual circumstances, an act of prudent precaution for the purpose of self-preservation; nor such an act as a person of ordinary care, prudence or resolution would have adopted, under the actual circumstances, even if they shall believe from the evidence, that such leaping from, or such leaving, said coach, was under the existence and incitement of actual alarm and apprehension of supposed impending danger; then the plaintiff is not entitled to recover upon the issue joined in this cause, in respect of said injury sustained by his said wife.

3. If the jury shall believe from the evidence in the cause, that the injury sustained by the plaintiff's wife was occasioned solely by the overturning of the coach, and by its falling upon her; and that such overturning was occasioned by the act of the plaintiff and his said wife, or by the act of either of them, in leaping from, or otherwise in leaving, said coach; and shall further believe from the evidence in the cause, that such leaping from, or leaving of, said coach was not effected with proper caution and prudence, under the actual circumstances, as well in reference to the situation in which the said plaintiff and his wife (if the overturning was occasioned by the act of both) were placed; or, if such overturning was occasioned only by the act of one, in reference to the situation of such one of them, by whom such overturning was occasioned, was placed; as also in reference to the situation in which said coach was placed in position, with respect to the ground on which it stood, and otherwise, then the plaintiff is not entitled to recover, in respect to said injury to his said wife.

4. If the jury shall believe from the evidence in the cause, that the injury to the plaintiff's wife was occasioned solely by the falling of the coach upon her, and that she was then outside of the coach and on the ground; and shall further believe, that at the time she leapt from, or left, the coach, she knew or believed, that it was overturning, or about to overturn, and leapt from, or left it, for that cause, and that she designedly alighted on the ground, in the direction in which the coach was overturning, or about to overturn; that then, such her act was a rash and imprudent act, and the defendant is not responsible, upon the issue joined in this cause, for the injury which she so sustained; even if the jury shall, at the same time, believe, that such overturning was occasioned by the fault or negligence of the driver.

5. If the jury shall find, from the evidence, that the plaintiff's wife, if she had remained in the coach, would not have been materially injured by the overturning of the same; and shall find from all the evidence in the cause, that a discreet and prudent person, under the circumstances in which she was placed, as disclosed in evidence, would have, and ought to have, remained in the coach; and that she placed herself, imprudently, and indis-

creetly and rashly, *in the way of incurring the actual injury which she sustained, that then the defendant is not liable, upon the issue joined in this case, to answer in damages for such injury.

6. If the jury shall believe from the evidence in the cause, that the plaintiff and his wife, or either of them, by leaping from the coach, or leaving the same, contributed, in fact, to produce the happening of the injury to the plaintiff's wife, which she actually sustained ; and shall further believe, that in so leaping form, or leaving, the said coach, the same was done unnecessarily and indiscreetly, or imprudently or rashly, incautiously or without ordinary care, that then the plaintiff is not entitled to recover in respect of said injury ; even if the jury shall believe that the driver was guilty of gross negligence and misconduct ; and was partly, or even mainly, the cause of the happening of such injury.

16. That the *primâ facie* evidence of negligence arising from the fact of the upsetting of the coach, and the injury to the plaintiff's wife, is rebutted by the proof of the fact, if the jury so believe from the evidence, that the defendants had a first-rate coach, a competent set of horses, and good and proper harness, and a competent, prudent and careful driver, at the time of the accident ; and that then the burden of proving negligence is thrown upon the plaintiff.

The plaintiff also offered prayers to the court for instructions to the jury. All the prayers offered by the defendant and the plaintiff were rejected by the court, and the court instructed the jury :

1. That the defendant is not liable in this action, unless the jury find that the injury of which the plaintiff complains was occasioned by the negligence or want of proper skill or care in the driver of the carriage, in which he and his wife were passengers ; and the facts that the carriage was upset, and the plaintiff's wife injured, are *primâ facie* evidence that there was carelessness, or negligence, or want of skill, on the part of the driver ; and throws upon the defendant the burden of proving that the accident was not occasioned by the driver's fault.

2. It being admitted, that the carriage was upset, and the plaintiff's wife injured, it was incumbent on the defendant to prove that the driver was a person of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which he was engaged ; and that he acted on this occasion with reasonable skill, and with the utmost prudence and caution ; and if the disaster in question was occasioned by the least negligence, or want of skill, or prudence, on his part, then the defendant is liable in this action.

3. If the jury find, there was no want of proper skill, or care, or caution, on the part of the driver, and that the stage was upset by the act of the plaintiff or his wife, in rashly and improperly springing from it, then the defendant is not liable to this action ; but if the want of proper skill or care of the driver placed the passengers in a state of peril, and they had, at that time, a reasonable ground for *supposing that the stage would upset, or that the driver was incapable of managing his horses, the plaintiff [*186 is entitled to recover ; although the jury may believe, from the position in which the stage was placed by the negligence of the driver, the attempt of the plaintiff or his wife to escape may have increased the peril, or even caused the stage to upset ; and although they may also find, that the plaintiff

and his wife would probably have sustained little or no injury, if they had remained in the stage.

4. If the jury shall find, that the driver was a person of competent skill, and in every respect qualified and suitably prepared for the business in which he was engaged, and that the accident was occasioned by no fault, or want of skill or care on his part, or that of the defendant or his agents, but by physical disability, arising from extreme and unusual cold, which rendered him incapable, for the time, to do his duty ; then the defendant is not liable in this action.

The defendant excepted to the refusal of the prayers offered by him, and to the instructions given by the court to the jury.

The case was submitted to the court, in printed and written arguments, by *Schley*, for the plaintiff in error ; and by *Johnson*, for the defendant.

Schley, for the plaintiff, submitted to the court the following points and authorities :—When Mr. Ludlow was under examination, he stated, that, shortly after the accident happened, he went up to the driver and had some conversation with him. The defendant, by his counsel, objected to the admission in evidence of the statements of the driver ; the court overruled the objection, and the defendant excepted. The plaintiff then proved, by Mr. Ludlow, "that he asked the driver how the accident happened, when he stated, that he had upset fifty coaches, and he did not believe the woman was as much hurt as she said she was." This conversation, it will be observed, took place after the accident had occurred. If it can be considered as the driver's account of the manner in which the accident occurred, it is still but his representation of a past occurrence, and he ought to have been called as a witness to testify. But the statements were not even made in reference to his conduct in the particular transaction, but in relation to what he had done on former occasions ; and when, for aught that appears, he was not in the service of the defendant. If the fact had been established by competent testimony, that this driver had upset fifty coaches, it would have been pregnant evidence, before the jury, of his want of skill as a driver ; and if his statement to Mr. Ludlow was admissible evidence to establish this fact, it tended strongly to prove his want of competent skill. The position assumed by the appellant is, that the declaration of the driver to the witness, "that he had upset fifty coaches," was not admissible and competent evidence for any purpose whatever.

*187] *The defendant's first prayer is based on the hypothesis that the jury would find, from the evidence, that the immediate and proximate cause of the overturning of the coach was the act of the plaintiff or his wife, or both, in leaping from or leaving the coach ; and that, at the time of leaping from or leaving said coach, there did not exist any certain peril, nor any immediate danger, nor any reasonable apprehension of impending danger, by remaining in the coach. This prayer was framed with reference to the instruction of Lord Ellenborough, in *Jones* v. *Boyce*, 1 Stark. 403 ; and the language of the prayer was adopted from the language of his lordship. It concedes, that the defendant is liable for the negligence of the driver ; it further concedes, that even if the proximate cause of the injury was the act of the plaintiff or his wife, or both, the defendant was still liable, if there was want of skill, or if there was

negligence or misconduct on the part of the driver; provided that such want of skill, or negligence, or misconduct of the driver, produced a state of case which placed the plaintiff and his wife, or either of them, in a situation of certain peril or immediate danger, or as was sufficient to create a reasonable apprehension of impending danger. But the prayer assumes the law to be, that in case the act of the party injured was the proximate cause of the injury, the defendant is not liable, merely because there was default on the part of his driver, unless that default conduced to produce the injury; that is, unless there was a natural and reasonable connection between the default of the driver, as the cause, and the injury, as the consequence; and that natural and reasonable connection is assumed to be such as Lord Ellenborough has defined in the case above cited. In Story's Commentaries on the Law of Bailments, 377, the learned commentator, citing the case from Starkie, says, "And the liability of the coach proprietors will be the same, although the injury to the passenger is caused by his own act, as by leaping from the coach, if there is real danger, and it arises from the careless conduct of the driver."

The 2d, 3d, 4th and 5th prayers were all framed with reference to the language of the instruction in the case of *Jones* v. *Boyce*. It will be observed, that the several prayers were not intended to deny, *in toto*, the plaintiff's right of action, but were limited to the particular injury incurred by the plaintiff's wife, by reason of the imprudence, carelessness, unreasonable alarm, or rashness of the plaintiff or his wife, imputed by the hypothesis of each respective prayer. On the subject of reasonable apprehension of impending danger, some analogy may be found in the chapter "On Cruelty," in Poynter on Marriage and Divorce; and in the quotations from distinguished writers on the civil law, which will be found in the notes to that chapter.

The 6th prayer asserts, as a proposition of law, that if the plaintiff or his wife, or either of them, contributed, in fact, to produce *the [*188] injury, by leaping from the coach, unnecessarily or rashly, incautiously, or without ordinary care, that then the plaintiff is not entitled to recover in respect of said injury. The position is, that in case of mixed fault, the action will not lie; that the law will not speculate whether the fault of the defendant alone, without the concurrence of the fault of the plaintiff, would or would not have resulted in injury to the plaintiff; but that it is an answer to the action, in respect of any injury sustained, if it appears that the plaintiff aided in producing such injury. He must be himself blameless, before he can impute blame to another. In cases of collision, it has been frequently so adjudged. *Butterfield* v. *Forrester*, 11 East 60; *Flower* v. *Adam*, 2 Taunt. 314; *Pluckwell* v. *Wilson*, 5 Carr. & Payne 375; *Luxford* v. *Large*, Ibid. 421; *Williams* v. *Holland*, 6 Ibid. 23; *Turley* v. *Thomas*, 8 Ibid. 104; *Woolf* v. *Beard*, Ibid. 373; *Bridge* v. *Grand Junction Railway Co.*, 3 Mees. & Wels. 244; *Vanderplank* v. *Miller*, Moo. & Malk. 169; *Harlow* v. *Humiston*, 6 Cow. 191; *Smith* v. *Smith*, 2 Pick. 621; *Lane* v. *Crombie*, 12 Ibid. 177.

Now, this case, it is true, was not a case of collision. But in the cases cited, the gist of the action was negligence, and so it is in this. The case of *Jones* v. *Boyce* was a case of a coach proprietor. It is true, that the passenger carrier is bound "for the utmost care and diligence of very cau-

tious persons." Story's Law of Bailments 379. But if any injury is produced by the concurrent fault of both parties, by what legal alchymy can we analyze the result, for the purposes of discovering how much of the injury was produced by the fault of the defendant or his agent, and how much by the fault of the plaintiff; or, whether, in fact, the injury would have resulted at all, but for the fault of the plaintiff? The defendant is liable in damages, for the consequences of the driver's negligence or want of skill; but unless the effect can be apportioned, he may be made liable for what was really a consequence of the plaintiff's own fault; and how can it be apportioned? In the case of *Hill* v. *Warren*, 2 Stark. 377, where there was negligence in the agents of both parties, in taking down a party-wall, it was ruled, that "it was not competent to the plaintiff to attach that blame to the defendant which was the common blame of both."

The 16th prayer assumes, that it is incumbent on the plaintiff to prove negligence. It concedes, that proof of the facts of the overturning of the coach and the injury are *primâ facie* evidence of negligence, and throws upon the defendant the *onus* of proving, not that the accident was not occasioned by the driver's fault, as ruled by the court in their final instructions, but that the coachman was a person of competent skill in his business, that the coach was properly made, the horses steady, &c. Story's Law of Bailments 375, and the cases there cited. The injury may have been the result of inevitable accident, arising from the state of the road, or from the physical inability *of the driver, caused by extreme and unusual cold; [*189] or it may have been occasioned by the fault of the plaintiff, or by the fault of the driver, or by mixed fault. The plaintiff, it is insisted, is bound to prove negligence, however slight, in order to maintain the action. Now, if the event itself is to be evidence of negligence, it would be right to vary the rule, and say that the defendant was bound to prove that there was no negligence. In the cases cited in the court below, the breaking down resulted from some supposed negligence in preparation; but when it is satisfactorily shown, that the driver is a person of competent skill, that the horses and coach, &c., were properly provided, it is shown, that there was no want of due preparation for the journey. If, in travelling on a level road, a wheel comes off, or an axle-tree snaps, it is strong *primâ facie* evidence of negligence in preparation; but mere proof of the breaking down, without showing the proximate cause of breaking down (as the coming off of the wheel, or the snapping of the axle-tree), is not *primâ facie* evidence of negligence. In our case, the mere overturning is ruled to be evidence of negligence, but the proximate cause of the overturning is not established. It was an open question, upon the evidence. Upon this distinction, it is conceived, that the instruction is not warranted by the cases; and that the burden of showing "that the accident was not occasioned by the driver's fault," was improperly thrown upon the defendant; and that it was, at least, rebutted by the hypothesis assumed in the 16th prayer. See *Lane* v. *Crombie*, 12 Pick. 177, and the cases cited *per curiam*.

Johnson, for the defendant.—The exception to the statement of the answer of the driver to Mr. Ludlow, was made before the evidence was given. The exception should have pointed out the part of the evidence which was objectionable, and not having done this, it must be overruled. This is a familiar

rule. But the evidence was proper. It cannot be denied, that the reckless and heartless declarations of the driver to Mr. Ludlow, with his other conduct, as proved by other witnesses, made while Mrs. Saltonstall was suffering the most severe agony, were proper testimony to go to the jury in aggravation of the damages.

The following propositions are sustained by authorities. 1. For the sufficiency of the stage coach, with reference to defects visible, or not visible, under ordinary examination, the carrier is responsible. 1 Carr. & Payne 414. *Sharp* v. *Gray*, 9 Bing. 457. 2. The breaking down, and consequently, the upsetting of the stage-coach, unexplained, is *primâ facie* evidence of negligence. *Christie* v. *Griggs*, 2 Camp. 79. 3. When there is danger in any particular part of the route, it is the duty of the driver of the stage to state its full extent to the passengers. *Dudley* v. *Smith*, 1 Camp. 167. 4. If a passenger is, by the negligence or want of skill of the *driver, or by the insufficiency of the carriage, in such a state of peril, as to render an effort to escape from it an act of prudence, and if, in escaping, he is injured, the owner of the stage is responsible. *Jones* v. *Boyce*, 1 Stark. 393. [*190

BARBOUR, Justice, delivered the opinion of the court.—This is a writ of error to a judgment of the circuit court of the United States for the fourth circuit and district of Maryland. It was an action on the case, brought by the defendant in error, against the plaintiff in error, and Richard C. Stockton, to recover damages for an injury sustained by his wife, by the up-setting of a stage-coach in which she was a passenger, and of which said Stockton and Stokes were the proprietors. The suit was brought in the name of Saltonstall alone ; but there is in the record an agreement, signed by the counsel of the parties, stipulating, amongst other things, that the plaintiff might recover in it, any damages which might be recovered in an action by himself and wife, or by himself and wife, or by himself alone.

The declaration alleges, that the injury complained of, was caused by the negligence and want of skill of the driver, then in the employment of the said Stockton & Stokes, and engaged in driving their coach, in which the plaintiff's wife was a passenger at the time she received the injury. In the progress of the case, Stockton, one of the defendants, died, and his death having been suggested upon the record, the case proceeded against Stokes. He pleaded the general issue of "not guilty," on which issue was joined.

At the trial, the defendant took a bill of exceptions to the ruling of the court ; from which it appears, that he asked the court to give to the jury sixteen several instructions, and the plaintiff asked of the court two instructions ; all of which, as well those asked by the defendant, as by the plaintiff, the court refused. But the court did give the jury the four following instructions, to wit :

1. That the defendant is not liable in this action, unless the jury find that the injury of which the plaintiff complains was occasioned by the negligence or want of proper skill or care in the driver of the carriage, in which he and his wife were passengers ; and the facts that the carriage was upset, and the plaintiff's wife injured, are *primâ facie* evidence that there was carelessness, or negligence, or want of skill, on the part of the

driver, and throws upon the defendant the burden of proving that the accident was not occasioned by the driver's fault.

2. It being admitted, that the carriage was upset, and the plaintiff's wife injured, it is incumbent on the defendant, to prove that the driver was a person of competent skill, of good habits, and in every respect qualified, and suitably prepared for the business in which he was engaged ; and that he acted, on this occasion, with reasonable skill, and with the utmost prudence and caution ; and if the disaster in question was occasioned by the least negligence, or want of skill, or prudence, on his part, then the defendant is liable in this action.

*191] *3. If the jury find there was no want of proper skill, or care or caution, on the part of the driver, and that the stage was upset by the act of the plaintiff or his wife, in rashly and improperly springing from it, then the defendant is not liable to this action ; but if the want of proper skill or care of the driver placed the passengers in a state of peril, and they had, at that time, a reasonable ground for supposing that the stage would upset, or that the driver was incapable of managing his horses, the plaintiff is entitled to recover ; although the jury may believe, from the position in which the stage was placed by the negligence of the driver, the attempt of the plaintiff or his wife to escape, may have increased the peril, or even caused the stage to upset ; and although they may also find, that the plaintiff and his wife would probably have sustained little or no injury if they had remained in the stage.

4. If the jury shall find, that the driver was a person of competent skill, and in every respect qualified and suitably prepared for the business in which he was engaged, and that the accident was occasioned by no fault or want of skill or care, on his part, or that of the defendant or his agents, but by physical disability arising from extreme and unusual cold, which rendered him incapable for the time to do his duty ; then the defendant is not liable in this action.

Under these instructions, the plaintiff obtained a verdict for $7130, for which the court rendered a judgment in his favor ; and from that judgment, this writ of error is taken.

We consider it altogether unnecessary to notice any of the instructions asked for by the defendant, and which the court refused to give, because those which they did give, cover the whole ground ; and therefore, it depends upon their correctness, whether the judgment is to be affirmed or not. We think, that the court laid down the law correctly in each and all of these instructions. It is certainly a sound principle, that a contract to carry passengers differs from a contract to carry goods. For the goods, the carrier is answerable, at all events, except the act of God and the public enemy. But although he does not warrant the safety of the passengers, at all events, yet his undertaking and liability as to them, go to this extent : that he, or his agent, if, as in this case, he acts by agent, shall possess competent skill ; and that so far as human care and foresight can go, he will transport them safely. The principle is in substance thus laid down in the case of *Christie* v. *Griggs*, 2 Camp. 79. So it is also, in the case of *Aston* v. *Heaven*, 2 Esp. 533, where it is said, that coach-owners are not liable for injuries happening to passengers, from accident or misfortune, where there has been no negligence or default in the driver ; that the action stands on the ground of

negligence, but that a driver is answerable for the smallest negligence. The principle is thus laid down in 2 Kent's Com. 466: "The proprietors of a stage-coach do not warrant the safety of *passengers, in the character of common carriers; and they are not responsible for mere accidents [*192 to the persons of the passengers, but only for the want of due care." What the author understood to be due care, will appear from this consideration, that in support of his proposition, he refers to the two cases which we have just cited.

In Story on Bailments, many cases are collected together upon this subject in pages 376–7, as illustrative of the principle, which is, by that author, laid down in these words: "If he (that is, the driver) is guilty of any rashness, negligence or misconduct, or is unskilful, or deviates from the acknowledged custom of the road, the proprietors will be responsible for any injuries resulting from his acts. Thus, if the driver drives with reins so loose that he cannot govern his horses, the proprietors of the coach will be answerable. So, if there is danger in a part of the road, or in a particular passage, and he omits to give due warning to the passengers. So, if he takes the wrong side of the road, and an accident happens from want of proper room. So, if, by any incaution, he comes in collision with another carriage." To which we will add the further example; wherever there is rapid driving, which, under the circumstances of the case, amounts to rashness. In short, says the author, he must, in all cases, exercise a sound and reasonable discretion in travelling on the road, to avoid dangers and difficulties; and if he omits it, his principals are liable.

The only case which is recollected to have come before this court on this subject, is that of *Boyce* v. *Anderson*, 2 Pet. 150. That was an action brought by the owner of slaves, against the proprietor of a steamboat, on the Mississippi, to recover damages for the loss of the slaves, alleged to have been caused by the negligence or mismanagement of the master and commandant of the boat. The court distinguished slaves, being human beings, from goods; and held, that the doctrine as to the liability of common carriers for mere goods, did not apply to them, but that in respect of them, the carrier was liable only for ordinary neglect. The court seem to have considered that case as being a sort of intermediate one between goods and passengers. We think, therefore, that anything said in that case, in the reasoning of the court, must be confined in its application to that case; and does not affect the principle which we have before laid down. That principle, in our opinion, fully justifies the first and second instructions given by the court; except that part of those instructions which relates to the *onus probandi;* and although we think this portion of the instructions as well founded in justice and law, as the other, yet it rests upon a different ground. The first part has relation to the liability of the defendant, the second, to the question, on whom devolves the burden of proof. If the question were one of the first impression, we should, upon the reason and justice of the case, adopt the principle laid down by the circuit court. But although there is no case which could have the weight of authority in this court, we are not without a decision in relation to it. The very point was decided in [*193 *2 Camp. 80; where it is said by MANSFIELD, Chief Justice, that he thought the plaintiff had made a *primâ facie* case, by proving his going on the coach, the accident, and the damage he had suffered.

It is objected, however, in the printed argument which has been laid before us, that although the facts of the overturning of the coach, and the injury sustained, are *primâ facie* evidence of negligence, they did not throw upon the defendant the burden of proving that such overturning and injury were not occasioned by the driver's default, but only that the coachman was a person of competent skill in his business ; that the coach was properly made, the horses steady, &c. Now, taking that portion of the first and second instructions which relates to the burden of proof together, we understand them as substantially amounting to what the objection itself seems to concede to be a proper ruling, and what we consider to be the law. For although, in the first, it is said, that these facts threw upon the defendant the burden of proving that the accident was not occasioned by the driver's fault ; yet, in the second, it is declared, that it was incumbent on the defendant, in order to meet the plaintiff's *primâ facie* case, to prove that the driver was a person of competent skill, of good habits, and in every respect qualified, and suitably prepared, for the business in which he was engaged ; and that he acted on the occasion with reasonable skill, and with the utmost prudence and caution.

This affirmative evidence, then, was pointed out by the court as the means of proving what was in terms stated in the form of a negative proposition before, that is, that the accident was not occasioned by the driver's fault. The third instruction also announces a principle, which we think stands supported by the soundest reason ; and we should, therefore, adopt it as being correct, if it were altogether a new question. But this, too, is in accordance with the doctrine of Lord Ellenborough, in 1 Stark. 493, in which he says, that to enable the plaintiff to sustain the action, it is not necessary that he should have been thrown off the coach ; it is sufficient if he were placed, by the misconduct of the defendant, in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain, at certain peril ; if that position was occasioned by the fault of the defendant, the action may be supported. On the other hand, if the plaintiff's act resulted from a rash apprehension of danger, which did not exist, and the injury which he sustained is to be attributed to rashness and imprudence, he is not entitled to recover. The instruction which we are now considering is framed in the spirit of the principle which we have just stated, and we think it wholly unexceptionable.

The fourth instruction which was given to the jury was in favor of the defendant, now plaintiff in error, and therefore, need not be *considered. Upon the whole, we think that there is no error in the judgment. It is, therefore, affirmed, with costs.

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This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Maryland, and was argued by counsel : On consideration whereof, it is ordered and adjudged by this court, that the judgment of the circuit court in this cause be and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.