

until it was too late for him to have stepped aside. This was error. Whether or not the plaintiff was in fact actually aware of the train's approach was an issue of fact which should have been submitted to the jury.

The jury were also instructed that what happened prior to the time the fireman discovered the plaintiff's presence was immaterial, thus excluding from their consideration the fact that the statutory crossing whistle for the Bridge street crossing was sounded, that the bell was set in motion and the train's speed decreased before the plaintiff came into view. This evidence has some bearing upon the issue of the plaintiff's actual knowledge of the oncoming train and should have been submitted on that issue.

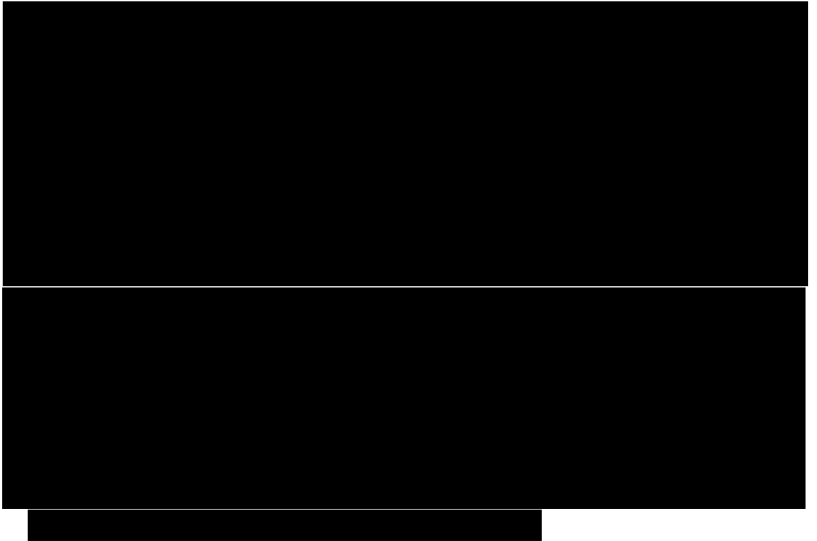
In view of the discussion relative to the defendant's motions the other exceptions to the charge are not likely to arise at the next trial and do not here require mention.

New trial.

All concurred.

Sullivan, }
June 5, 1934. }

ZENON WOJCIECHOWSKI, & a. v. STANLEY WILTOWSKI, & a.



Barton & Andler (Mr. Andler orally), for the plaintiffs.

Henry N. Hurd (by brief and orally), for the defendants.

Per Curiam. The surrender came too late. The statutory limitation is imperative, and has been so declared in decisions which have been accepted without question for nearly a hundred years. *Scovell v. Holbrook*, 22 N. H. 269; *Symonds v. Carleton*, 43 N. H. 444, and cases cited; *Head v. Clarke*, 45 N. H. 287.

The measure of damages is fixed by statute. The plaintiff in a suit upon such a bond is to recover "his just debt or damages and costs thereof, with ten per cent interest from the time of the arrest, with costs." P. L., c. 347, s. 9.

Case discharged.