Baron, in the Court below, when he says, 'There is a certain degree of negligence to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them.'" And in the same case in which Mr Justice Willes expressed the opinion above cited, Montague Smith, J., said, "The use of the term gross negligence is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous bailees, and it is more correct and scientific to define the degrees of care than the degrees of negligence."

After much consideration and examination, we have come to the conclusion that the root of the whole controversy on this point lies in the assumption, on one side, that the meaning of the word negligence is the want of that care which the law requires, and, on the other side, that its meaning is simply the want of *some* care, whether more or less,—whether required by law, or not so required. In short, if "negligence" means in all cases "*culpable* negligence," the controversy is at once decided, and degrees of negligence should no more be heard of. But this would not abrogate the distinction between degrees of *care*; and the argument in favor of drawing such distinctions, and recognizing them in the law, remains unaffected by any thing which the courts have said in respect to degrees of *negligence*. It is not worth while to discuss the question whether negligence must necessarily mean culpable negligence; for that is a question which has no practical application, except where a contract is made stipulating for or against liability for negligence, or where a pleading alleges negligence. It has been generally held in such cases that the word negligence is sufficient to cover all its degrees;* and this ruling may very well stand, without affecting the general question, because it is obvious that in such cases the word negligence is used in the sense of *culpable* negligence. And, with two exceptions, all the cases in which the distinction between degrees of negligence has been mentioned with disapproval have been cases which presented simply this question. The two exceptions referred to were both of them cases in which the judge before whom the cause was tried declined to define gross negligence to the jury, and instructed them particularly what the defendant was bound to do or not to do.† It was contended by the unsuccessful parties in those cases that the judge ought to have left to the jury the question whether or not the defendant had been guilty of *gross* negligence. This the court in *banc* overruled, and, as we think, very properly. If degrees of care and negligence are to be recognized, they must be reduced to some legal definition; and the courts ought not to leave juries to determine the naked question whether a party has or has not been guilty of "gross negligence," any more than they would leave a jury to determine whether an ouster has been committed, or whether a base fee exists, or any other question containing a technical legal phrase. The court should determine, as a question of law, whether the defendant was bound to exercise great or slight care, and should be prepared to instruct the jury as to what circumstances would constitute sufficient care on the part of the defendant. Phrases having a technical meaning in law should never be left to a jury without full explanation.

The distinctions between degrees of care and negligence has been recognized in so many cases, both before and since the decisions and *dicta* which we have mentioned above, that we shall not pretend to state more than a few of them. Thus for example it has been uniformly held that a plaintiff is not debarred from recovering, by reason of his contributory negligence, unless he has failed to take ordinary care for his own protection, and that his failure to use great or unusual care, in other words, his slight negligence, would not affect his right to recover.*

And it is an established rule in Illinois, and some other States, that a plaintiff, who has been guilty of only slight or ordinary negligence, that is, of the want of *ordinary* care only. can recover notwithstanding this, if the defendant has been guilty of gross negligence.†

The necessity of distinguishing between the kinds of care which must be taken by various persons, under different circumstances, is also fully recognized in numerous cases, of which *Nicholson* v. *The Erie Railway Co.* (41 N, Y, 525) is the latest type.* In that case the plaintiff's intestines were injured by reason of

* *Bissell* v. *N. Y. Central Railroad Co.*, 25 N. Y. 442. But the reverse was held in *Illinois Central Railroad Co.* v. *Read*, 37 Ill. 484. See also *American Express Co.* v. *Sands*, 55 Penn. St. 140; *Pennsylvania Railroad Co.* v. *Henderson*, 51 Penn. St. 315.

† *Wilson* v. *Brett*, 11 M. & W. 113; *Grill* v. *General Iron Screw Collier Co.*, Law Rep. 1 C. P. 600.

* *Ernst* v. *Hudson River R. R. Co.*, 35 N. Y. 9, 26; *Beisiegel* v. *N. Y. Central R. R. Co.*, 34 N. Y. 622, 628, 632; *Fero* v. *Buffalo, &c., R. R. Co.*, 22 N. Y. 209; *Cook* v. *N. Y. Central R. R. Co.*, 3 Keyes, 476; *Johnson* v. *Hudson River R. R. Co.*, 6 Duer, 633, 645; affirmed, 20 N. Y. 65; *McGrath* v. *Hudson River R. R. Co.*, 32 Barb. 144; *Willis* v. *Long Island R. R. Co., Id.* 398; *Center* v. *Finney*, 17 Barb. 94; affirmed, 2 Seld. Notes, 44; *Eakin* v. *Brown*, I E. D. Smith, 26; *Beers* v. *Housatonic R. R. Co.*, 19 Conn. 566; *Bequette* v. *People's Transportation Co.*, 2 Oregon, 200; *Newbold* v. *Mead*, 57 Penn. St 487; *Davies* v. *Mann*, 10 M. & W. 546; *Bridge* v. *Grand Junction R. R. Co.*, 3 Id. 244; *Thorogood* v. *Bryan*, 8 C. B. 115; *Clayards* v. *Dethick*, 12 Q. B. 439; *Butterfield* v. *Forrester*, 11 East. 60; *Whirley* v. *Whiteman*, 1 Head, 610; *Munger* v. *Tonawanda R. R. Co.*, 4 N. Y. 349; 5 Denio, 255; *Garmon* v. *Bangor*, 38 Maine, 443; *Owings* v. *Jones*, 9 Md. 108.

† *Kerwacker* v. *Cleveland, &c., R. R. Co.*, 3 Ohio St. 172; *Galena, &c., R. R. Co.* v. *Jacobs*, 20 Ill. 478; *Illinois, &c., R. R. Co.* v. *Goodwin*, 30 Id. 117; *Illinois Cent. R. R. Co.* v. *Middlesworth*, 43 Ill. 64; *Chicago & Alton R. R. Co.* v. *Gretzner*, 46 Ill. 75; *St. Louis, &c. R. R. Co.* v. *Todd*, 36 Ill. 409; *Macon, &c., R. R. Co.* v. *Davis*, 27 Geo. 113; *Augusta, &c., R. R. Co.* v. *McElmurry*, 24 Id. 75; *Hartfield* v. *Roper*, 21 Wend. 615; *per* Harris, J., *Button* v. *Hudson River R. R. Co.*, 18 N. Y. 248; *Rathbun* v. *Payne*, 19 Wend. 399; *per* Johnson C. J., *Chapman* v. *New Haven R. R. Co.*, 19 N. Y. 341; *Chicago, B. & Q. R. R. Co.* v. *Dewey*, 26 Ill. 255; *Stucke* v. *Milwaukee, &c., R. R. Co.*, 9 Wisc. 202; *Whirley* v. *Whiteman*, 1 Head, 110; *Evansville & Crawfordsville R. R. Co.* v. *Lowdermilk*, 15 Ind. 120; *Lafayette, &c., R. R. Co.* v. *Adams*, 26 Ind. 76.

* See also *Hounsell* v. *Smyth*, 7 C. B. (N. S.) 731; *Sweeny* v. *Old Colony R. R. Co.*, 10 Allen, 368.