other competent proof. To carry a case to the jury, the evidence on the part of the plaintiff must be such as, if believed, would authorize them to find that the injury was occasioned solely by the negligence of the defendant. It is not absolutely essential that the plaintiff should give any affirmative proof touching his own conduct on the occasion of the accident. The character of the defendant's delinquency may be such as to prove, *prima facie*, the whole issue; or the case may be such as to make it necessary for the plaintiff to show by independent evidence that he did not bring the misfortune on himself. No more certain rule can be laid down."

Remarks.—This is a departure from the *Button* case, *supra*, although the circumstances are somewhat similar. Of that case the court say, "we were not sufficiently agreed to make it a lucid precedent." In this case, as in that, the judge charged the jury that the contributory negligence, to exonerate the defendants, must *directly* have aided the result. This charge was here sustained, the court remarking, "as there was no conceivable negligence which could be imputed to the deceased, which would operate remotely, or collaterally, or otherwise than directly, I am of opinion that the jury were not misled;" and in this all the judges but Strong concurred. They endeavor to let down the *Button* case softly, by saying, "the attention of the judge was not specially drawn to the expression, as in the case of *Button*." In this case, too, we see an indorsement of the ideas of the three dissenting judges in the *Steves* case, *supra*, namely, that in some cases the defendant's negligence may be such as to cause the plaintiff's negligence, in which cases the latter is excusable.

Wilds v. *The Hudson River Railroad Co.*, 24 N. Y. 430.—The plaintiff's intestate was killed by defendant's train, while crossing their track with a team. There was evidence that a flagman was waving a flag at the crossing, and that deceased, who was a milkman and familiar with the crossing, was warned by shouts of bystanders, and by one trying to catch and hold his horses, but that he whipped up his horses, which were already going rapidly, and drove on the track, knocking down the flagman. It also appeared by looking, Wilds could have seen the train 650 feet away. A judgment for the plaintiff was set aside.

Remarks.—The opinion was pronounced by Judge Gould, who took the ground that there was ample proof of the negligence of the deceased, and no sufficient proof that the defendant was negligent. Two judges concurred in the result; two others were also for reversal, but on the ground that the deceased was negligent; and one judge dissented, on the ground that although there was no contradiction as to the conduct of the intestate in approaching the crossing, yet the question of his negligence was for the jury. This judge observes, "A question of negligence presents the question, what a person ought or ought not to have done under the circumstances of the case;" and this he says is a question of fact and not of law. Judge Gould says that this "is a stronger case than *Steves'* case, which remains the law of this State."

This case came up again two years later, in 29 N. Y. 315. Judge Hogeboom, on evidence not very materially differing from that on the former trial, feeling himself constrained by the opinion of the Court of Appeals, granted a nonsuit, and this case was sustained by an unanimous court, except that Judge Hogeboom dissenting, observed that a more careful review of the former opinion had satisfied him that he was wrong in his construction of it. He says: "I am inclined to think it more consistent with the theory upon which the right of trial by jury rests, and safer for the general interests of parties, to resolve such doubts in favor of the submission of such questions to the jury than the withdrawal of them from their consideration." In the prevailing opinion, Judge Denio observes, "the uncontradicted evidence was such as not to present anything for the jury to deliberate upon," and the *Steves* case is again approved.

Hance v. *Cayuga & Susquehanna Railroad Company*, 26 N. Y. 428.—The plaintiff's cattle escaped from his lot, and straying upon the defendants' tracks, in consequence of the defendants' negligence in not clearing them from snow, were killed. *Held*, that the plaintiff's negligence contributed, and a judgment for him was set aside. (See, also, *Munger* v. *Tonawanda R. R. Co.*, 4 N. Y. 349. But this is now changed by statute, and negligence cannot now be imputed to a person simply from the fact that his beasts have escaped from a well-fenced