gence 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 the omission of the defendant to take precautions against the sudden starting of a train of cars, to which no locomotive was attached, but which a violent gale blew along the track. The plaintiff was at the time crossing the track, without any lawful authority, but by virtue of a bare license, which was implied from the fact of the company never having made any objection to persons crossing at that point. If he had been a passenger on his way to the cars, an entirely different question would have been presented, as was conceded by the court. But, being a bare licensee, the court held that the railway company owed him no duty, and was not in fault for omitting to keep watch of the cars, or to have them fastened up. Earl, C. J., was inclined to follow the opinion of Baron Bramwell, who, in *Southcote* v. *Stanley*, (1 H. & N. 247), held that a mere visitor could recover only for some act of positive *misfeasance*, and not for any *nonfeasance*, or simple omission to act. Upon this point the Court of Appeals did not pass; and neither of these cases is a direct judicial authority for the proposition. It having been suggested that a person inviting another upon his land ought to be liable for gross negligence, or, if the phrase is preferred, for a failure to use even slight care for the guest's protection, it has been answered that this would be in effect leaving the whole question to the jury, and would amount to an abdication by the court of its proper province, inasmuch as if the defendant were a corporation the jury would assuredly find a verdict for the plaintiff. But to this we reply, that it ought not to be left to a jury to determine simply whether the defendant has been guilty of gross negligence or not, but that the plaintiff must point out the particular act which the defendant ought to have done, or which he erred in doing. The court should instruct the jury whether the defendant was bound to do or not to do this specific act, and the jury should determine simply whether the defendant did or did not do it. That the rule laid down by Baron Bramwell is an unsatisfactory one, can, we think, be shown by a very simple illustration. If a man should invite a friend to visit him by night, knowing and concealing the fact that a deep ditch lay between the highway and the house, the only bridge over which was a single plank, which might more easily be missed than found, no one would question his liability for an injury suffered by the person thus invited, if the latter should fall into the ditch in the darkness. This would no doubt be considered an act of fraud. But, supposing that the person thus giving an invitation simply failed to mention the fact, and had no fraudulent intent whatever, can it be seriously claimed that he would therefore be exempt

* *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; *Ferd* 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*, 1 E. D. Smith, 36; *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.