

sub-sec. 10 of same section, in regard to insolvents applying to the court for a discharge. Sec. 11, sub-sec. 1, provides, "that notice of meeting of creditors, and all other notices herein required to be given by advertisement (without special designation of the nature of such notice), shall be so given by publication for two weeks in the *Canada Gazette*."

It is quite clear that the notices referred to above, in which the nature of them is specially designated, are not included among those in which the notice mentioned in this clause is to be given. The clause after the description of the notice continues as follows:—"and in any case the assignee or person giving such notice shall also address notices thereof to all creditors," &c. and shall mail the same with the postage thereon, paid at the time of the insertion of the first advertisement.

Do the words "such notice" refer to the notices excepted by the first part of the clause? and the natural conclusion is, they do. These words seem to me to be used to distinguish one kind of notices from another; and to distinguish notices of meetings, and other notices, from these excepted in this clause, and whose nature is designated by the other clauses of the statute referred to by me. This clause could not have been intended to have been applied to all notices, because the sheriff, who is required by 8th sub-sec. of the 3rd sec. to give notice of a writ of attachment being in his hands, could not by any possibility know who the creditors of the insolvent were, and could not address them by mail.

The same remarks will apply to the 13th sub-sec. of the same section. It will be observed, too, that the necessity of mailing to each creditor, when the notice in the newspaper is only for two weeks, is much greater than when it is for the same number of months. A creditor might probably overlook an advertisement for the shorter period, from absence or otherwise, which would not be so likely in the case of the longer.

I grant the discharge.

UNITED STATES REPORTS.

SUPREME COURT OF MISSOURI.

HANNIBAL AND ST. JOSEPH RAILROAD CO. v. HATTIE HIGGINS, BY ELIZA HIGGINS, HER GUARDIAN.

Prima Facie Presumption of Cause of Injury to Passengers.

The statute of Missouri giving a remedy to the representatives of a passenger killed upon a railway train, goes upon the same principle which before obtained in regard to injuries to passengers, that such injury or death *prima facie* results from want of due care in the company.

Proof of the Cause of the Injury admissible.—This presumption is not conclusive under the statute, but may be rebutted by evidence of the cause of the injury.

Distinction between Employees of the Company and Passengers.—One who had been in the employment of the company as an engineer and brakeman, until his train was discontinued, a few days previous, and who had not been settled with or discharged, although not actually under pay at the time, and who signalled the train to take him up, and who took his seat in the baggage-car with the other employees of the company, and paid no fare and was not expected to, although at the time in pursuit of other employment, cannot be considered a passenger. If he would secure the immunities and rights of a passenger, he should have paid fare and taken a seat in the passenger-car.

Effect of Free Passage or Change of Position upon the Rights of Passengers.—It will not deprive of his remedy a passenger who comes upon the train in that character, and is so

received, that he is allowed, as matter of courtesy, to pass free, or to ride with the employees of the road in a baggage-car. But as a passenger who leaves the passenger-carriage to go upon the platform or into the baggage-cars, unless compelled to do so for want of proper accommodations in the passenger-carriage, or else by the permission of the conductor of the train, must be regarded as depriving himself of the ordinary remedy against the company for injuries received, unless up a proof that his change of position did not conduce to the injury.

Appeal from the Hannibal Court of Common Pleas.

The opinion of the court was delivered by

HOLMES, J.—The plaintiff below, an infant and only child of Thomas G. Higgins, who was killed while riding in a baggage-car on the Hannibal and St. Joseph Railroad, on the 16th day of September, 1861, brings this suit; the widow having failed to sue within six months to recover the \$5090 damages which are given by the second section of the act concerning damages (Rev. Stat. 1855, p. 647), where any passenger shall die from an injury resulting from or occasioned by any defect or insufficiency in any railroad.

The petition is evidently framed upon that act, though the statute is not named or referred to by any express words. It contains two counts: one founded upon the second section, and the other upon the third section of the act.

The verdict was for the plaintiff upon the first count, and for the defendant upon the second count; and the damages were assessed at \$5000. The defendant's motion for a new trial was overruled. The case came up by appeal, and stands here upon the first count only.

The clause of the act on which this first count is founded relates exclusively to passengers, and to the cases of injury and death occasioned by some defect or insufficiency in the railroad. This statute makes the mere fact of an injury and death resulting from a cause of this nature, a *prima facie* case of negligence and liability on the part of the defendant, as a presumption of law. It is not a conclusive presumption, but disputable by proof that such defect or insufficiency was not the result of negligence, nor does it preclude any other defence of a different nature. The act is to be interpreted and construed with reference to the state of the law as it stood before its passage. By the general principles of law, which were applicable to common carriers of passengers and to persons standing in that relation, the fact of an injury to a passenger, occasioned by a defective railroad car or coach or by a defect in any part of the machinery, makes a *prima facie* case of negligence against the defendant sufficient to shift the burden of proof; and by that law carriers of passengers were held responsible for the utmost degree of care and diligence, and were liable for the slightest neglect. This act is evidently based upon the same principles: it is confined by its terms strictly to passengers and to injuries arising from cases of that peculiar nature only; and it must receive a construction in accordance with these principles. Viewed in this light, it is clear that the intent of this clause of the act was to provide greater security for the lives and safety of passengers as such, and to enable the representatives of a deceased passenger to pursue the remedy given by the act; and no other class of persons is intended within its purview.

The first question here presented, is whether the deceased person was a passenger within the