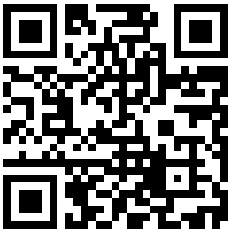

WILLIS' CASES

ON

BAILMENTS AND CARRIERS

A SELECTION OF CASES ON THE LAW OF

BAILMENTS AND CARRIERS

BY
HUGH E. WILLIS

1910
THE UNIVERSITY PRESS
MINNEAPOLIS

CONTENTS

BAILMENTS.

TABLE OF CASES

SELECTED CASES
ON THE
LAW OF BAILMENTS AND CARRIERS

COGGS vs. BERNARD.
(2 Lord Raym. 909.)

In an action upon the case the plaintiff declared, quod cum Bernard the defendant, the tenth of November, 13 Will. III., at, &c., assumpsisset, salvo et secure elevare, Anglice to take up, several hogsheads of brandy then in a certain cellar in D, et salvo et secure deponere, Anglice to lay them down again, in a certain other cellar in Water Lane, the said defendant and his servants and agents tam negligenter et improvide put them down again into the said other cellar, quod, per defectum curæ ipsius the defendant, his servants and agents, one of the casks was staved, and a great quantity of brandy, viz., so many gallons of brandy, was spilt. After not guilty pleaded, and a verdict for the plaintiff, there was a motion in arrest of judgment, for that it was not alleged in the declaration that the defendant was a common porter, nor averred that he had anything for his pains. And the case being thought to be a case of great consequence, it was this day argued seriatim by the whole court.

GOULD, J. I think this is a good declaration. The objection that has been made is, because there is not any consideration laid. But I think it is good either way, and that any man, that undertakes to carry goods, is liable to an action, be he a common carrier, or whatever he is, if through his neglect they are lost or come to any damage: and if a praemium be laid to be given, then it is without question so. The reason of the action is, the particular truth reposed in the defendant, to which he has concurred by his assumption, and in executing which he has miscarried by his neglect. But if a man undertakes to build a house, without anything to be had for his pains, an action will not lie for non-performance, because it is nudum pactum. So is the 3 H. VI. 36. So if goods are deposited with a friend, and are stolen from him, no action will lie. 29 Ass. 28. But there will be a difference in that case upon the evidence, how the matter appears; if they were stolen by reason of a gross neglect in the bailee, the trust will not save him from an action, otherwise if there be no gross neglect. So is Doct. & Stud. 129, upon that difference. The same difference is where he comes to goods by finding. Doct. & Stud., ubi supra, Ow. 141. But if a man takes upon him expressly to do such a fact safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him. If it be only a general bailment, the bailee will not be chargeable, without a gross neglect. So is Keilw. 160, 2 H. VII. 11, 22 Ass. 41; 1 R. 10, Bro. action sur le case, 78. Southcote's case (4 Co. Rep. 83 b) is a hard case indeed, to oblige all men that take goods to keep, to a special acceptance, that they will keep them as safe as they would do their own, which is a thing no man living that is not a lawyer could think of: and indeed it appears by the report of that case in Cro. El. 815, that it was adjudged by two Judges only, viz.: Gawdy and Clench. But in 1 Ventr. 121, there is a breach assigned upon a bond conditioned to give a true account, that the defendant had not accounted for £30, the defendant showed that he locked the money up in his master's warehouse, and it was stole from thence, and that was held to be a good account. But when a man undertakes specially to do such a thing, it is not hard to charge him for his neglect, because he had the goods committed to his custody upon those terms.

POWYS agreed upon the neglect.

POWELL. The doubt is, because it is not mentioned in the declaration that the defendant had anything for his pains, nor that he was a common porter, which of itself imports a hire, and that he is to be paid for his pains. So that the question is, whether an action will lie against a man for doing the office of a friend; when there is not any particular neglect shown? And I hold, an action will lie, as this case is. And in order to make it out I shall first show that there are great authorities for me, and none against me; and then, secondly, I shall show the reason and gist of this action; and then, thirdly, I shall consider Southcote's case.

1. Those authorities in the Register, 110, a. b., of the pipe of wine, and the cure of the horse, are in point, and there can be no answer given them but that they are writs, which are framed short. But a writ upon the case must mention everything that is material in the case, and nothing is to be added to it in the count, but the time and such other circumstances. But even that objection is answered by Rast. Entr. 13, e., where there is a declaration so general. The Year Books are full in this point. 43 Ed. III. 33, a., there is no particular act shown. There indeed the weight is laid more upon the neglect, than the contract. But in 48 Ed. III. 6, and 19 H. VI. 49, there the action is held to lie upon the undertaking, and that without that it would not lie; and therefore the undertaking is held to be the matter traversable, and a writ is quashed for want of laying a place of the undertaking. 2 H. VII. 11; 7 H. IV. 14; these cases are all in point, and the action adjudged to lie upon the undertaking.

2. Now to give the reason of these cases, the gist of these actions is the undertaking. The party's special assumpsit and undertaking obliges him so to do the thing, that the bailor come to no damage by his neglect.

And the bailee in this case shall answer accidents, as if the goods are stolen; but not such accidents and casualties as happen by the act of God, as fire, tempest, &c. So it is 1 Jones, 179, Palm. 548. For the bailee is not bound upon any undertaking, against the act of God. Justice Jones in that case puts the case of 22 Ass. where the ferryman overladed the boat. That is no authority I confess in that case, for the action there is founded upon the ferryman's act, viz., the overlading the boat. But it would not have lain, says he, without that act; because the ferryman, notwithstanding his undertaking, was not bound to answer for storms. But that act would charge him without any undertaking, because it was his own wrong to overlade the boat. But bailees are chargeable in case of other accidents, because they have a remedy against the wrong-doers: as in case the goods are stolen from him, an appeal of robbery will lie, wherein he may recover the goods, which cannot be had against enemies, in case they are plundered by them; and therefore in that case he shall not be answerable. But it is objected, that here is no consideration to ground the action upon. But as to this, the difference is, between being obliged to do the thing, and answering for things which he has taken into his custody upon such an undertaking. An action indeed will not lie for not doing the thing, for want of a sufficient consideration; but yet if the bailee will take the goods into his custody he shall be answerable for them, for the taking the goods into his custody is his own act. And this action is founded upon the warranty, upon which I have been contented to trust you with the goods, which without such warranty I would not have done. And a man may warrant a thing without any consideration. And therefore when I have reposed a trust in you, upon your undertaking, if I suffer, when I have so relied upon you, I shall have my action. Like the case of the Countess of Salop. An action will not lie against a tenant at will generally, if the house be burnt down. But if the action had been founded upon a special undertaking, as that in consideration the lessor would let him live in the house, he promised to deliver up the house to him again in as good repair as it was then, the action would have lain upon that special undertaking. But there the action was laid generally.

3. Southcote's case is a strong authority, and the reason of it comes home to this, because the general bailment is there taken to be an undertaking to deliver the goods at all events, and so the judgment is founded upon the undertaking. But I cannot think that a general bailment is an undertaking to keep the goods safely at all events. That is hard. Coke reports the case upon that reason, but makes a difference, where a man undertakes specially to keep goods as he will keep his own. Let us consider the reason of the case. For nothing is law that is not reason. Upon consideration of the authorities there cited, I find no such difference. In 9 Ed. IV. 40, b., there is such an opinion by Danby. The case in 3 H. VII. 4, was of a special bailment, so that that case cannot go very far in the matter. 6 H. VII. 12, there is such an opinion by the by. And this is all the foundation of Southcote's case. But there are cases there cited, which are stronger against it, as 10 H. VII. 26, 29 Ass. 28, the case of a pawn. My Lord Coke would distinguish that case of a pawn from a bailment, because the pawnee has a special property in the pawn; but that will make no difference, because he has a special property in the thing bailed to him to keep. 8 Ed. II., Fitzh. detinue, 59. the case of goods bailed to a man, locked up in a chest and stolen; and for the reason of that case, sure it would be hard that a man that takes goods into his custody to keep for a friend, purely out of kindness to his friend, should be chargeable at all events. But then it is answered to that, that the bailee might take them specially. There are many lawyers don't know that difference, or however it may be with them half mankind never heard of it. So for these reasons, I think a general bailment is not, nor cannot be taken to be, a special undertaking to keep the goods bailed safely against all events. But if a man does undertake specially to keep goods safely, that is a warranty, and will oblige the bailee to keep them safely against perils, where he has his remedy over, but not against such where he has no remedy over.

HOLT, C. J. The case is shortly this. This defendant undertakes to remove goods from one cellar to another, and there lay them down safely, and he managed them so negligently that for want of care in him some of the goods were spoiled. Upon not guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at Guildhall. There has been a motion in arrest of judgment, that the declaration is insufficient, because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labour. So that the defendant is not chargeable by his trade, and a private person cannot be charged in an action without a reward.

I have had a great consideration of this case, and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question whether this declaration was good. But upon consideration, as this declaration is, I think the action will well lie. In order to show the grounds upon which a man shall be charged with goods put into his custody, I must show the several sorts of bailments. And there are six sorts of bailments. The first sort of bailment is a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a depositum, and it is that sort of bailment which is mentioned in Southcote's case. The second sort is, when goods or chattels that are useful are lent to a friend gratis, to be used by him; and this is called commodatum, because the thing is to be restored in specie.

The third sort is, when goods are left with the bailee to be used by him for hire; this is called locatio et conductio, and the lender is called locator, and the borrower conductor. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin vadium, and in English a pawn or a pledge. The fifth sort is when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is when there is a delivery of goods or chattels to somebody, who is to carry them, or do something about them gratis, without any reward for such his work or carriage, which is this present case. I mention these things, not so much that they are all of them so necessary in order to maintain the proposition which is to be proved, as to clear the reason of the obligation, which is upon persons in cases of trust.

As to the first sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider, 1or what things such a bailee is answerable. He is not answerable, if they are stole without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect. There is I confess a great authority against me, where it is held, that a general delivery will charge the bailee to answer for the goods if they are stolen, unless the goods are specially accepted, to keep them only as you will keep your own. But my Lord Coke has improved the case in his report of it, for he will have it that there is no difference between a special acceptance to keep safely, and an acceptance generally to keep. But there is no reason nor justice in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him. For if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him. But according to this doctrine the bailee must answer for the wrongs of other people, which he is not, nor cannot be, sufficiently armed against. If the law be so, there must be some just and honest reason for it, or else some universal settled rule of law, upon which it is grounded; and therefore it is incumbent upon them that advance this doctrine, to show an undisturbed rule and practice of the law according to this position. But to show that the tenor of the law was always otherwise, I shall give a history of the authorities in the books in this matter, and by them show, that there never was any such resolution given before Southcote's case. The 29 Ass. 28, is the first case in the books upon that learning, and there the opinion is that the bailee is not chargeable, if the goods are stole. As for 8 Edw. II. Fitzh. detinue, 59, where goods were locked in a chest, and left with the bailee, and the owner took away the key, and the goods were stolen, and it was held that the bailee should not answer for the goods. That case they say differs, because the bailor did not trust the bailee with them. But I cannot see the reason of that difference, nor why the bailee should not be charged with goods in a chest, as well as with goods out of a chest. For the bailee has as little power over them, when they are out of a chest, as to any benefit he might have by them, as when they are in a chest; and he has as great power to defend them in one case as in the other. The case of 9 Edw. VI. 4, b., was but a debate at bar. For Danby was but a counsel then; though he had been chief justice in the beginning of Ed. IV. yet he was removed, and restored again upon the restitution of Hen. VI., as appears by Dugdale's Chronica Series. So that what he said cannot be taken to be any authority, for he spoke only for his client; and Genney for his client said the contrary. The case in 3 Hen. VII. 4, is but a sudden opinion and that but by half the court; and yet that is the only ground for this opinion of my Lord Coke, which besides he has improved. But the practice has been always at Guildhall to disallow that to be a sufficient evidence to charge the bailee. And it was practised so before my time, all Chief Justice Pemberton's time, and ever since against the opinion of that case. When I read Southcote's case heretofore, I was not so discerning as my brother Powys tells us he was, to disallow that case at first, and came not to be of this opinion till I had well considered and digested that matter. Though I must confess reason is strong against the case to charge a man for doing such a friendly act for his friend, but so far is the law from being so unreasonable, that such a bailee is the least chargeable for neglect of any. For if he keeps the goods bailed to him but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them, for the keeping them as he keeps his own is an argument of his honesty. A fortiori he shall not be charged, where they are stolen without any neglect in him. Agreeable to this is Bracton, lib. 3, c. 2, 99, b. F. S.: "Apud quem res deponitur, re obligatur, et de ea re, quam accepit, restituenda tenetur, et etiam ad id, si quid in re deposita dolo commiserit; culpae autem nomine non tenetur, scilicet desidiae vel neglinegligentiae, quia qui negligenti amico rem custodiendam tradit, sibi ipsi et propriae fatuitati hoc debet imputare." As suppose the bailee is an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, and by reason thereof the goods happen to be stolen with his own; yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow. So that this sort of bailee is the least responsible for neglects, and under the least

obligation of any one, being bound to no other care of the bailed goods than he takes of his own. This Bracton I have cited, is, I confess, an old author, but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so, as you have it in Justinian's Inst. lib. 3, tit. 15. There the law goes farther, for there it is said, "Ex eo solo tenetur, si quid dolo commiserit: culpae autem nomine, id est, desidiae ac negligentiae, non tenetur. Itaque securus est qui parum diligenter custoditam rem furto amiserit, quia qui negligenti amico rem custodiendam tradit non ei, sed suae facilitati id imputare debet." So that a bailee is not chargeable without an apparent gross neglect. And if there is such a gross neglect, it is looked upon as an evidence of fraud. Nay, suppose the bailee undertakes safely and securely to keep the goods, in express words, yet even that won't charge him with all sorts of neglects. For if such a promise were put into writing, it would not charge so far, even then. Hob. 34, a covenant, that the covenantee shall have, occupy and enjoy certain lands, does not bind against the acts of wrong-doers. 3 Cro. 214 acc., 2 Cro. 425 acc., upon a promise for quiet enjoyment. And if a promise will not charge a man against wrong-doers, when put in writing, it is hard it should do it more so, when spoken. Doct. & Stud. 130, is in point, that though a bailee do promise to redeliver goods safely, yet if he have nothing for the keeping of them, he will not be answerable for the acts of a wrong-doer. So that there is neither sufficient reason nor authority to support the opinion in Southcote's case; if the bailee be guilty of gross negligence he will be chargeable, but not for any ordinary neglect. As to the second sort of bailment, viz., commodatum or lending gratis, the borrower is bound to the strictest care and diligence, to keep the goods so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect he will be answerable; as if a man should lend another a horse, to go westward, or for a month; if the bailee go northward, or keep the horse above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under, and it may be if the horse had been used no otherwise than he was lent, that accident would not have befallen him. This is mentioned in Bracton, ubi supra. His words are: "Is autem cui res aliqua utenda datur, re obligatur, quae commodata est, sed magna differentia est inter mutuum et commodatum; quia is qui rem mutuam accepit ad ipsam restituendam tenetur, vel ejus pretium, si forte incendio, ruina, naufragio, aut latronum vel hostium incursu, consumta fuerit, vel deperdita, subtracta, vel ablata. Et qui rem utendam accepit, non sufficit ad rei custodiam, quod talem diligentiam adhibeat, qualem suis rebus propriis adhibere solet, si alius eam diligentius potuit custodire; ad vim autem majorem, vel casus fortuitos non tenetur quis, nisi culpa sua intervenerit. Ut si rem sibi commodatam domi, secum detulerit cum peregre profectus fuerit, et illam incursu hostium vel praedonum, vel naufragio amiserit non est dubium quin ad rei restitutionem teneatur." I cite this author, though I confess he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is no authority in the law to the contrary. But if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable, because the neglect gave the thieves the occasion to steal the horse. Bracton says the bailee must use the utmost care, but yet he shall not be chargeable, where there is such a force as he cannot resist.

As to the third sort of bailment, scilicet locatio or lending for hire, in this case the bailee is also bound to take the utmost care and to return the goods, when the time of the hiring is expired. And here again I must recur to my old author, fol. 62, b. "Qui pro usu vestimentorum auri vel argenti, vel alterius ornamenti, vel jumenti, mercedem dederit vel promiserit, talis ab eo desideratur custodia; qualem deligentissimus paterfamilias suis rebus adhibet, quam si praestitiret, et rem aliquo casu amiserit, ad rem restituendam non tenebitur. Nec sufficit aliquem talem diligentiam adhibere, qualem suis rebus propriis adhiberet, nisi talem adhibuerit, de qua superius dictum est." From whence it appears, that if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses; and if he uses that, he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the bailee shall not be answerable in this case, if the goods are stolen.

As to the fourth sort of bailment, viz., vadium or a pawn, in this I shall consider two things; first, what property the pawnee has in the pawn or pledge, and secondly, for what neglects he shall make satisfaction. As to the first, he has a special property, for the pawn is a securing to the pawnee that he shall be repaid his debt, and to compel the pawner to pay him. But if the pawn be such as it will be the worse for using, the pawnee cannot use it, as clothes, etc., but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she might use them. But then she must do it at her peril, for whereas, if she keeps them locked up in her cabinet, if her cabinet should be broke open and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answer-

able. And the reason is, because the pawn is in the nature of a deposit, and as such is not liable to be used. And to this effect is Ow. 123. But if the pawn be of such a nature, as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, etc., then the pawnee may use the horse in a reasonable manner, or milk the cow, etc., in recompense for the meat. As to the second point, Bracton, 99, b, gives you the answer: "Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur; et cum hujusmodi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis ei in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactum adhibere, quam si praestiterit, et rem casu amiserit, securus esse possit, nec impedietur creditum petere." In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt. Agreeable to this is 29 Ass. 28, and Southcote's case is. But indeed the reason given in Southcote's case is, because the pawnee has a special property in the pawn. But that is not the reason of the case; and there is another reason given for it in the Book of Assize, which is indeed the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. But indeed if the money for which the goods were pawned, be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrong-doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong must be answerable for them at all events, for the detaining of them by him is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found.

As to the fifth sort of bailment, viz., a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, etc., which case of a master of a ship was first adiudged, 26 Car. 2, in the case of Morse v. Slue, Raym. 220, 1 Vent. 199, 238; ante, p. 244. The law charges this person thus intrusted to carry goods, against all events but acts of God and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point. The second sort are bailees, factors, and such like. And though a bailee is to have a reward for his management, yet he is only to do the best he can. And if he be robbed, etc., it is a good account. And the reason of his being a servant is not the thing; for he is at a distance from his master, and acts at discretion, receiving rents and selling corn, etc. And yet if he receives his master's money, and keeps it locked up with a reasonable care, he shall not be answerable for it though it be stolen. But yet this servant is not a domestic servant, nor under his master's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust, farther than the nature of the thing puts it in his power to perform it. But it is allowed in the other cases, by reason of the necessity of the thing. The same law of a factor.

As to the sixth sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill management the goods are spoiled. Secondly, it is to be understood, that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets, and had pierced the cask of brandy; in this case the defendant had not been answerable for it, because he was to have nothing for his pains. Then the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In Bracton, lib. 3, 100, it is called mandatum. It is an obligation, which arises ex mandato. It is what we call in English an acting by commission. And if a man acts by commission for another gratis, and in the executing his commission behaves himself negligently, he is answerable. Vinnius in his commentaries upon Justinian, lib. 3 tit. 27, 684, defines mandatum to be contractus quo aliquid gratuito gerendum committitur et accipitur. This undertaking obliges the undertaker to a diligent management. Bracton, ubi supra, says, "Contrahitur etiam obligatio non solum scripto et verbis, sed et consensu, sicut in contractibus bonae fidei; ut in emptionibus, venditionibus, locationibus, conductionibus, societatibus, et mandatis." I don't find this word in any other author of our law, besides in this place in Bracton, which

is a full authority, if it be not thought too old. But it is supported by good reason and authority.

The reasons are first, because in the case, a neglect is a deceit to the bailor. For when he intrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action, 1 Roll. Abr. 10, 2, Hen. VII. 11, a strong case to this matter. There the case was an action against a man, who had undertaken to keep an hundred sheep, for letting them be drowned by his own default. And there the reason of the judgment is given, because when the party has taken upon him to keep the sheep, and after suffers them to perish in his default; in as much as he has taken and executed his bargain, and has them in his custody, if after he does not look to them, an action lies. For here is his own act, viz., his agreement and promise, and that, after broke of his side, that shall give a sumcient cause of action.

But secondly it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but nudum pactum. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed if the agreement had been executory, to carry these brandies from the one place to the other such a day, the defendant had not been bound to carry them. But this is a different case, for assumpsit does not only signify a future agreement, but in such a case as this it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing. The 19 Hen. VI. 49, and the other cases cited by my brothers, show that this is the difference. But in the 11 Hen. IV. 33, this difference is clearly put, and that is the only case concerning this matter which has not been cited by my brothers. There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie. But there the question was put to the court what if he had built the house unskilfully, and it is agreed in that case an action would have lain. There has been a question made, if I deliver goods to A. and in consideration thereof he promise to redeliver them, if an action will lie for not redelivering them; and in Yelv. 4, judgment was given that the action would lie. But that judgment was afterwards reversed, and according to that reversal, there was judgment afterwards entered for the defendant in the like case. Yelv. 128. But those cases were grumbled at, and the reversal of that judgment in Yelv. 4 was said by the Judges to be a bad resolution, and the contrary to that reversal was afterwards most solemnly adjudged in 2 Cro. 667, Tr. 21, Jac. I. in the King's Bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a good consideration. And so a bare being trusted with another man's goods must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession. The declaration in the case of Morse v. Slue was drawn by the greatest drawer in England in that time, and in that declaration, as it was always in all such cases, it was thought most prudent to put in, that a reward was to be paid for the carriage. And so it has been usual to put it in the writ, where the suit is by original. I have said thus much in this case, because it is of great consequence that the law should be settled in this point, but I don't know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle. And judgment was given for the plaintiff.

FARROW vs. BRAGG'S ADM'R.

(30 Ala. 261.)

At the trial term of the cause, as appears from the bill of exceptions, "the plaintiff suggested to the court the revocation of the letters of administration which had been granted to John D. Adair, as special administrator of the estate of said Bragg, and the appointment in his stead of one Geo. D. Smith, as administrator in chief; and asked leave to make said Geo. D. Smith the party plaintiff; which motion was granted by the court. He then asked leave to amend his complaint; which was allowed by the court, against the defendant's objection. He thereupon amended his complaint," so as to make it read as follows:

"John D. Adair, special adm'r of the estate of Z. D. Bragg, dec'd.

vs.

Robert B. Farrow.

The plaintiff claims of the defendant $114, due from him by account on the 25th day of December, 1853; also, the sum of $114, for work and labor done by the said Zebulon D. Bragg, in his lifetime, for the defendant at his request, on the 25th December, 1853; also, the sum of $114, for goods, wares, and merchandise, sold by the said Zebulon D. Bragg in his lifetime, to said defendant, on the 25th December, 1853; which said several sums of money, with the interest thereon, are now due. Also, the sum of $114, for work and labor done by the plaintiff, administrator as aforesaid, for the defendant, and at his request, on the

25th December, 1853; which sum of money, with the interest thereon, is now due."

The defendant reserved an exception to the ruling of the court allowing this amendment of the complaint.

"The plaintiff then offered said Adair as a witness, to prove the demand sued for. The defendant objected to his competency as a witness for plaintiff; the court overruled the objection, and permitted the said Adair to testify; and the defendant excepted. There was no proof that the defendant had ever been notified that plaintiff intended to establish the claim by his own oath, or by the oath of said Adair.

"The defendant then pleaded, in short by consent, non assumpsit, and set-off. It appeared by the testimony, that in the early part of the year 1853, and while said Bragg was in life, one Thomas F. Murphy, who was his agent, wishing to get a slave belonging to said Bragg, named Nias, out of the town of Salem, and into the country, on account of the slave's feeble health, and to keep him from getting into difficulties, placed him in the possession of the defendant, who lived in the country, under an understanding and agreement that said defendant was to take care of him, keep him until called for and pay nothing for his hire during the time he might have him; that Bragg himself, some short time afterwards, when informed of what Murphy had done, ratified and confirmed it; that defendant kept the slave until the close of the year, and then sent him to said Adair, who was then the special administrator of said Bragg; that Bragg died in May of that year; that neither he in his lifetime, nor his said special administrator after his death, ever called upon defendant for said slave, or made any demand, except as above stated. It further appeared from the proof, that on the day said special administrator was appointed, (which was at a regular term of the probate court of Russell,) and after his appointment, but before he had given bond and qualified, he agreed to hire to said defendant two other slaves belonging to said estate, named Jack and Ransom, until an administrator in chief should be appointed, (which the parties supposed would be done at the next term of said probate court,) at an annual hire of $8 per month; but that after the next regular term of said probate court, and before an administrator in chief was appointed, said Adair took both of said slaves out of defendant's possession, against his objection.

"The court thereupon charged the jury, that if they believed the evidence, in regard to the manner in which the defendant received and held the slave Nias, the law then made him the bailee of Bragg, and he was not chargeable with hire while said Bragg lived, and did not call for him; but that the bailment terminated upon Bragg's death, and the defendant became liable to pay his administrator reasonable hire, from that day forth until he gave him up, without the administrator calling for the slave, or demanding him from the defendant; and that a demand by the administrator was not necessary to charge the defendant with hire.

"The court further charged the jury, that if they believed the evidence, in regard to the hiring of the other two slaves by the special administrator, after his appointment, but before he gave bond and qualified; and that he took them away contrary to the wishes of the defendant, and before the time agreed upon,—yet, nevertheless, he was entitled to recover of said defendant reasonable hire for them during the time he kept them."

The defendant excepted to these charges; and he now assigns as error all the rulings of the court to which, as above stated, he reserved exceptions.

STONE, J. The precise question presented by the amendment of the complaint in the court below, has not been decided by this court.

In Tate v. Shackelford's Adm'r, 24 Ala. 510, the plaintiff, styling himself administrator in right of his wife of the estate of Geo. W. Hail, deceased, declared on a contract made with himself personally. Shackelford died pending the suit, and the suit was revived in the name of his personal representative. This was excepted to, and assigned as error. This court held, that the words administrator, etc., were descriptive of the person, and that the suit was properly revived. To the same effect is Arrington v. Hair, 19 Ala. 243; Gibson v. Land, 27 Ala. 117.

In the case of Tate v. Shackelford, supra, this court laid down the rule, that "the character in which a party sues must be determined, not from the description of himself which he gives in the caption of the declaration, but from the body of the pleading." That suit was commenced before the Code went into operation, and under the law as it then existed. We are satisfied with the rule expressed, and hold that, in all such cases, the character in which a plaintiff sues must be determined by the cause of action he describes in his declaration, rather than the descriptive words employed in the caption.—See Chapman v. Spence, 22 Ala. 588.

The original complaint which we are considering, discloses the representative character of the plaintiff, both in the caption, and in the body of the complaint. Hence we need not decide whether the same rule prevails now as formerly, or whether the caption, or marginal statement of the parties, is a part of the complaint. We defer its consideration, until it shall come before us.

It is here contended, that the amendment which was allowed in this case, was, in effect, the striking out of a sole party plaintiff, and inserting another. If this be the case, it was unauthorized by the Code, (§ 2403,) as decided by this court in Leaird v. Moore, 27 Ala. 326. Without intending to impair the force of that decision, we think

the policy of our law, as disclosed in the Code, will not justify us in materially extending its principles. One object of the Code certainly was, to discourage technical objections, and to secure a trial on the merits of each controversy.—See §§ 2401-2-3-4-5.

The question here is different from the one presented in Leaird v. Moore. The name of the party plaintiff is not sought to be changed. The object of the amendment was to describe more definitely the character of the claim on which the plaintiff sued. The original complaint claimed as administrator; and under the liberal provisions of the Code above cited, we think the amendment was clearly permissible.

Adair, the special administrator, was, when offered, a competent witness. He had been superseded by the appointment of an administrator in chief; and under the order of the court, such administrator in chief had been substituted as the plaintiff of record. Although the special administrator, while in office, was authorized to sue, (Code, § 1677,) yet his entire authority over the assets of the estate ceased when he was superseded; and it then became his duty to deliver to the rightful administrator, on demand, all the assets of the deceased that were in his hands. He had no right further to maintain the suit.—Code, §§ 1679, 1924. Adair, not being a party to the record when he was offered as a witness, did not come within the provisions of the Code, §§ 2313-14.

In the case of Raiford v. Upson, 29 Ala. 188, we held, that an agreement by which one party received from another a family of slaves, (a part of whom were too small to labor, and others sickly,) to be boarded for their work, would constitute a valid contract of hiring, if entered into in good faith. That case would be an authority for holding in the present suit, that the agreement under which appellant obtained the possession of the slave Nias, amounts to a contract of hiring, if any definite time had been agreed on. The agreement, however, being that Farrow should keep him until called for, and pay nothing for his hire, forbids that we should so hold. A possession, thus acquired, might, in the discretion of the owner, continue for one or for five years, or it might be terminated in one hour. We think this was not a contract, on which either party, before entering upon its performance, could have been sued for its breach. Like all other gratuitous promises, no right of action could arise from its non-observance.—Edwards on Bailments, 120-1; ib. 58.

If the property delivered in this case had been any other species of chattel, all would at once agree that it was that description of bailment called deposit, or depositum.—Edwards on Bailments, 35, 47. We cannot perceive from the terms of the agreement that the bailee stipulated to do more than keep the slave for the use of the bailor. He did not agree, so far as the evidence discloses, to do any act about the slave. True, he impliedly bound himself to feed him; but the same thing would be true if he had received any other animal on deposit.

It may be reasonably implied from the facts in this case that the bailee had the right to use and employ the slave Nias. This view is not at all inconsistent with the character of the bailment as a deposit. Such use is always permissible, where the consent of the depositor is actually given, or can be reasonably presumed from the circumstances.—Edwards on Bailments, 89.

As we have seen, an agreement to make or receive a deposit or mandate is not a contract. It is without consideration. It may be disregarded, or retracted by either party, so long as it remains purely executory. It is a mere power, revocable by either party; and the death of either, before performance is entered upon, operates a revocation.—Edwards on Bailments, 120. The agreement, however, assumes a new character as soon as the deposit or mandate is received. It then ceases to be a mere power, and becomes a contract.—Edwards on Bailments, 58, 109-10.

The slave Nias being placed with appellant as a deposit, and the gratuitous promise being then raised to the dignity of a contract, by part execution, the death of the bailor did not put an end to it, or convert the bailee into a wrong-doer. After demand made, he would have been liable to an action; till then, if the contract be correctly set forth in the bill of exceptions, he was not liable for hire.—Edwards on Bailments, 83.

The charge of the court, in reference to the slaves Jack and Ransom, is equally indefensible. Adair, the special administrator, hired to the appellant, at an agreed price, the slaves last named, until an administrator in chief should be appointed. He violated the contract, by taking away the slaves before the time of hiring expired. This defeats the plaintiff's right of recovery, unless the facts of this case exempt it from the operation of the rule.—Perry v. Hewlett, 5 Porter, 318; Petty v. Gayle, 25 Ala. 472.

It is contended that Adair, the special administrator, had no authority to make the contract he did in reference to the slaves Jack and Ransom; and that therefore the appellant is liable for hire for the time he had their services. The answer to this is, that Adair cannot set up his own want of authority. He instituted the present suit, and it is only continued in the name of the administrator in chief. He is estopped from denying his own authority to make the contract.—Pistole v. Street, 5 Porter, 64; Fambro v. Gantt, 12 Ala. 298; Swink v. Snodgrass, 17 Ala. 653.

Whether the present administrator can maintain an action for the hire of Jack and Ransom, we do not now decide.

There is nothing in the argument, based on the fact that the parties, in making the contract last above considered, supposed

an administrator with general powers would be appointed at the next regular term of the probate court of Russell, and that the appellant was not disturbed in the possession until after the next regular term of the court. The contract was, that Farrow was to have the slaves until after the appointment of an administrator in chief; and his possession was terminated without his consent, before the happening of that event.

The charge of the circuit judge was in conflict with this opinion; and for the errors pointed out, the judgment of the court below is reversed, and the cause remanded.

Rice, C. J., not sitting.

JENNIE V. BUNNELL, APPELLANT, v. ISAAC STERN ET AL., Respondents.

(122 N. Y. 539, 25 N. E. 910.)

Appeal from order of the General Term of the Court of Common Pleas of the city and county of New York, made January 3, 1888, which reversed a judgment of the District Court of said city in favor of plaintiff and ordered a new trial.

The complaint as indorsed upon the summons is as follows, viz.: "Damages by reason of negligence of defendants," but, as elsewhere stated in the appeal book, it was in these words: "Loss of a cloak and other articles left in the care of defendants while the plaintiff was being fitted to a wrap." The answer was a general denial.

The justice, before whom the cause was tried without a jury, rendered a judgment in favor of the plaintiff for $50 and costs. Upon appeal to the General Term, this judgment was at first affirmed, but after a reargument, it was reversed and leave given to appeal to this court.

The facts, so far as material, are stated in the opinion.

VANN, J. The defendants are the proprietors of a retail store on Twenty-third street in the city of New York, which has a department for the sale of ready-made cloaks. On the 19th of April, 1887, the plaintiff went to their store to purchase a wrap, and, entering the cloak department and making known her business, was conducted by one of the saleswomen to a place where there were two chairs near a mirror. She sat down on one of the chairs while the clerk brought her several garments to examine, and, after looking them over for ten or fifteen minutes, she selected one to try on and went to the mirror for that purpose. A large window was open near by, and she complained of the draught, whereupon the clerk conducted her through a passage-way formed by iron frames, on which wraps were hung, to another compartment about twenty-five feet distant, where there was a mirror but no chairs. The clerk carried the new cloak, and stood in front of the mirror waiting for the plaintiff to put it on. The plaintiff carried her own cloak, which she had removed in order to try on the other, to the place where the clerk stood, and laid it on a counter about eight feet from the mirror, directly in front of another clerk who stood behind waiting upon a customer. She did not ask, and was not told, where to put her cloak, but the saleswoman who was waiting upon her, as well as the clerk behind the counter, observed her as she thus laid it down, but neither said anything. There was no other place to put the cloak. The plaintiff, after spending four or five minutes in trying on the garment, said that she would take it, and at once went to get her cloak, but it could not be found, although a careful search was made for it. Only one other customer was in either of the compartments while the plaintiff was in the store.

There was a floor-walker in the cloak department who had the same authority there as one of the defendants. It was his duty to supervise the exhibition of goods by employes; to see that things were in their places; that the clerks attended to their duties; that nothing was taken away without authority, and that customers received proper attention. He saw nothing that transpired on this occasion, as he was in another room, but for what purpose does not appear. Two other floor-walkers were employed on that floor, and there was a detective on duty in the store, but no evidence was given as to their whereabouts when the plaintiff lost her cloak. One of the floor-walkers, when asked what arrangements were made for the protection of cloaks taken off by customers in order to try on others, answered that they "leave their garments on chairs."

The clerk who waited upon the plaintiff testified that customers, under such circumstances, placed their cloaks on chairs and where it was most convenient for them, and that she paid no attention to garments removed in order to try on others.

No notice was given to the plaintiff either directly or indirectly as to where she should put her cloak and no instructions had been given by the defendants to their clerks as to the disposition of garments removed by customers in order to try on those offered for sale. These facts were either expressly sworn to and not denied, or are permissible inferences which the trial justice, sitting without a jury, is presumed to have drawn from the evidence. The question is thus presented whether the defendants owed any duty to the plaintiff, which they omitted to discharge to her injury.

The defendants kept a store and thus invited the public to come there and trade. In one of its departments they kept ready-made cloaks for sale and provided mirrors for the use of customers in trying them on, and clerks to aid in the process. They thus invited each lady who came there to buy a cloak, to remove the one she had on and try on the one that they wished her to purchase, because the invitation to do a given act extends by implication to whatever is known to be necessary in order to

do that act. It is not perceived that under the circumstances disclosed by the evidence, the obligation of the defendant would have been greater or in any respect different if one of their number had met the plaintiff on the street and had not only expressly invited her to come to the store and buy a cloak, but had also requested her to take off her wrap and try on the one that he offered to sell her. The clerk who waited upon her stood in the place of the defendants as long as she was engaged in the line of her duties and no claim is made that she at any time exceeded her authority. Therefore, when she led the way to the second mirror and stood before it holding the new garment in her hands in readiness to help the plaintiff try it on, in legal effect one of the defendants stood there inviting her to try it on, and to lay aside her wrap for that purpose. She accepted the invitation and removed her wrap, but as she could not hold it in her hands while she tried on the other, it was necessary for her to lay it down somewhere. No place was provided for that purpose. There was not even a chair in sight. She was neither notified where to put it, nor informed that she must look out for as it would be at her own risk whatever she did with it. She put it in the only place that was available, unless she threw it on the floor, and as she did so, in contemplation of law, the defendants stood looking at her. Under these circumstances we think that it became their duty to exercise some care for the plaintiff's cloak, because she had laid it aside on their invitation and with their knowledge and, without question or notice from them, had put it in the only place that she could. The consideration for the implied contract imposing that duty resided in the situation of the plaintiff and her property for which the defendants were responsible, and in the chance of selling the garment that she had selected. It is unnecessary for us to define the degree of care required by the circumstances, because no care whatever was exercised by the defendants. While they created the situation that required care, they made no provision for it by furnishing a safe place to deposit the property of customers, or notifying the plaintiff to look out for her cloak herself, or making rules for the government of their employes under such circumstances, or in any other way. Even the chairs on which customers were in the habit of leaving their garments were wholly wanting, and the floor-walker was absent without explanation as to the reason. As the defendants were bound to use ordinary care to keep their premises in a safe condition for the access of business visitors, whether expressly or impliedly invited (Coughtry v. Globe Woolen Co., 56 N. Y. 124, 126; Beck v. Carter, 68 id. 283; Welch v. McAllister, 15 Mo. App. 492; Nave v. Flack, 90 Ind. 205; Pastene v. Adams, 49 Cal. 87; Learoyd v. Godfrey, 138 Mass. 315), so we think they were bound to use some care for the property of the plaintiff, properly brought there and necessarily laid aside by their implied invitation in order to attend to the business in hand. They omitted to do that which "a reasonable man, guided by those considerations that ordinarily regulate the conduct of human affairs" would have done under the same circumstances, and were thus guilty of negligence.

Our attention has been called to no authority directly in point. The cases relied upon by defendants are Carpenter v. Taylor, (1 Hilt. 193); Rea v. Simmons (141 Mass. 561); Whitney v. Pullman Palace Car Co. (9 N. E. Rep. 619).

In Carpenter v. Taylor, the plaintiff entered the saloon of a hotel to get refreshments between twelve and one o'clock at night and when he went out the place was being closed. He left his opera-glass behind, but it did not appear where, and the next morning when he called for it, it could not be found. As it did not appear that the defendant or any of his servants ever received, or even saw the glass, it was properly held that he was not responsible for its loss.

While Rea v. Simmons is somewhat analagous to the case at bar in its facts, the decision seems to have proceeded on a question of practice. The entire opinion consists of ten lines and states that while the case was reported to the court for its opinion upon the question of law involved, no specific questions of law are stated in the report and none appear to have been raised at the trial. It then states that the decision of the trial court upon the facts is conclusive and cites two authorities which hold that the facts found below are not open to review.

In Whitney v. Pullman Palace Car Company, the decision was simply that the plaintiff was guilty of contributory negligence, while the question whether there was any evidence of negligence on the part of the defendant was expressly reserved.

We think that the defendants as voluntary custodians for profit to themselves, were bound to exercise some care over the plaintiff's cloak, and, that on account of their absolute failure in this regard they were properly held liable by the trial court for the damages that she sustained.

The order of the General Term should be reversed and the judgment of the District Court affirmed with costs.

All concur, except Bradley, J., dissenting.

Order reversed and judgment affirmed.

RUTH M. PRESTON vs. JONATHAN C. NEALE.

(12 Gray 222.)

Action of contract on two counts: 1st. For use and occupation of certain rooms; 2d. Upon an account annexed, which included a charge for storage of certain goods.

At the trial in the superior court of Suffolk, before Huntington, J., after the case was opened to the jury, the defendant

moved to strike out the first count, because the plaintiff had filed no bill of particulars. But the judge overruled the motion.

It appeared that both counts were for the same cause of action; that when the defendant quitted the premises hired of the plaintiff, he left there two or three trunks and a stove, which were in the plaintiff's way, and she was obliged to remove them from one place to another, until the time of bringing this action. The defendant offered evidence tending to show a demand upon the plaintiff for said goods, some time after he left the premises, and contended that the plaintiff had no lien for storage, and therefore could not recover for storing the goods, after such demand. But the judge instructed the jury that the plaintiff had a lien upon said goods for storage, and that as the demand had not been accompanied with any offer or tender of payment therefor, she could recover a reasonable compensation for subsequent storage, if the jury found that she had furnished it. The plaintiff did not claim a lien by virtue of any special agreement, or as an innkeeper or keeper of a warehouse. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

METCALF, J. The exception to the judge's refusal to strike out the first count, for want of a bill of particulars, is overruled. The defendant's proper course was either to move the court to order such a bill to be filed, or to demur to the count. St. 1852. c. 312, §§ 4, 21. By going to trial, without objecting to the want of such bill, he waived his right to have it filed.

The exception to the ruling, that the plaintiff had a lien on the trunks and stove left in her house by the defendant, is sustained. It is not shown nor alleged that these things were left in her house with her consent. She therefore became an involuntary depositary of them. And we are of opinion that the law which is applied to cases of deposits by the finding of goods lost on land, and deposits of property made by the force of winds or floods, (which Judge Story terms involuntary deposits,) is to be applied to this case. In those cases the law gives no lien to the depositary for his care and expense in the keeping and preservation of the property. Story on Bailments, §§ 44 a, 83 a, 121 a. 3 Steph. N. P. 2690. Armory v. Flyn, 10 Johns. 102. Yet if the loser offer a certain sum as a reward to him who will restore the property, a lien thereon is thereby created, to the extent of the reward so offered. Wentworth v. Day, 3 Met. 352. Wilson v. Guyton, 8 Gill, 213.

Although, in cases of the deposits above mentioned, the depositaries have no lien on the property, yet we are of opinion that they are legally entitled to compensation for the care and expense of keeping and preserving it. Mr. Dane doubted this. 2 Dane Ab. 270. But in the section last above cited from Story on Bailments, it is said of these deposits, that "the question may arise as to the right of the depositary to be paid his necessary and reasonable expenses for preserving and keeping the property. It is certain that at the common law he has no lien therefor; but the just doctrine seems to be, although perhaps there is no direct and positive adjudication, that the depositary may rightfully claim and recover such expenses in an action." In Nicholson v. Chapman, 2 H. Bl. 258, Chief Justice Eyre said, "a court of justice would go as far as it could go, towards enforcing payment." See also Addison on Con. (2d ed.) 444; 2 Kent Com. (6th ed.) 636; Reeder v. Anderson, 4 Dana, 193; Baker v. Hoag, 3 Barb. 208. There is also an ancient authority on this point, to wit, Doctor and Student, c. 51, where is this passage: "Though a man waive the possession of his goods and saith he forsaketh them, yet by the law of the realm the property remaineth still in him, and he may seize them after when he will. And if any man in the mean time put the goods in safeguard to the use of the owner, I think he doth lawfully, and that he shall be allowed for his reasonable expenses in that behalf, as he shall be of goods found; but he shall have no property in them, no more than in goods found."

In the present case, which we hold to be, in its legal incidents, like deposits by finding, or made by winds or floods, we think the plaintiff is entitled to recover for storage of the trunks and stove, from the time when they were left in her house, until the time when the defendant made a demand on her for them. But as she, having no lien on them, wrongfully withheld them from the defendant, on his demand, she is not entitled to compensation for subsequent storage during such unlawful detention. And as the jury were instructed that the plaintiff was entitled to recover compensation for storage after the demand made of the goods by the defendant, we grant a new trial.

Exceptions sustained.

DURNFORD vs. SEGHERS SYNDICS.
(9 Martin 470.)

Appeal from the court of the first district.

PORTER, J. The plaintiff claims the right of being placed among the privileged creditors of the insolvent, and paid in preference to those merely personal—on the ground that the debt due him, arose from a deposit.

The facts, proved in the case, show that Seghers had been employed as attorney by the plaintiff, to attend to several suits, and collect debts, and that he received a compensation for so doing. In the month of July, 1812, there was a settlement of their accounts, and a check was received by the plaintiff, for the balance due, $5,900.07, which, it would appear from the evidence, he retained in his hands several years, without presenting it for payment. It is the

amount of this check, that is now contended, should be paid as a privileged claim.

This is clearly not a regular deposit, where the depository is obliged to return the identical thing confided to his care. The plaintiff admits that it is not; but insists it is that species of contract known to our law called an irregular deposit, which is made of money, or other things that consist in number, weight and measure, and which are delivered without any restriction on the depository's using them, but merely with the obligation to return the same quantity of the article received.

There is no doubt from the authorities cited in argument, that this definition of an irregular deposit is correct, and that it gives the preference claimed. The only question here is, whether the contract now before the court comes within the definition given?

It is believed that it is of the essence of this contract, whether the deposit be irregular or regular, that it should be entered into without compensation on the part of him who receives the object in his care. Pothier Traité du contrat de Depot, chap. 1, art. 2, sec. 3, no. 13. Febrero, part 1, chap. 4, sec. 3, in the language of our Code, it is essentially gratuitous. Civil Code, 410, art. 4.

It is equally necessary that the will of both parties should concur in the contract, that there should be a delivery of the thing to be deposited, and that the principal object of this delivery, should be the taking care of the thing. Pothier, ibid. chap. 1, art. 2, Civil Code, 410, art. 1 and 2, 412, art. 8.

Applying this law to the case before the court, we find that the debt of $5,900, was the balance of monies coming into the hands of Seghers, as a lawyer collecting various demands of the plaintiff. The account presented by the plaintiff, and annexed to the petition, shows that $1,500 were paid for fees, and other expenses, incident to these services. There is nothing gratuitous in this.

But the plaintiff insists that these payments were made to the insolvent for his services, as a lawyer, prosecuting the claims put into his hands to judgment—that receiving and paying over the money, made no part of his duty, and that, what he did in that respect was entirely gratuitous.

The evidence does not prove this. It shows that the services of the attorney did not end with the judgment; on the contrary, that he acted as the agent of the plaintiff afterwards. The account, already referred to, establishes the fact, that he settled and arranged those judgments by receiving part in cash, and part in other securities, which he paid over. How can it be said, that these services were not included in the sum charged and allowed in the settlement, or that the compensation related alone to obtaining judgment?

But admitting that the evidence did support the plaintiff in the petition, where is the consent of Durnford, that Seghers should be his depository? I cannot discover from the evidence, that he intended the attorney should do any thing more than collect his money, and pay it over, or that he ever contemplated it was to be left in his hands. Pothier, in his treatise already cited, no. 9; states, that to make a contract of deposit, it must appear, "que la principale fin de la tradition soit uniquement que celui a qui la tradition est faite se charge de la garde de cette chose." He puts many cases to illustrate this doctrine, and among others, that taken from the Digest, 16, 3, 1, no. 13; that if one party charges another to receive, and take care of an object, which was in the hands of a third person, that this does not make a contract of deposit; because the principal object of the contract, was not that the thing should be kept, but that it should be taken out of the hands of him who had it in possession. It is not easy to perceive the distinction between that case and the one now before the court, unless it be in circumstances still more adverse to the claim here set up—namely—that the attorney took the money, (as the plaintiff insists) without any particular authority to that effect; and that he received, (as I understand the evidence) a compensation for so doing.

I see nothing in the transaction which distinguishes it from the ordinary case of an agent collecting money on commission, and it is to my mind, a totally different contract from that of one man depositing in the hands of another, an object to be gratuitously kept for his benefit.

I am therefore of opinion, that the judgment of the district court be annulled, avoided and reversed, and that the plaintiff be placed as a simple creditor, on the tableau of distribution of the insolvent estate; that the appellee pay the cost of this appeal, and that the costs in the district court be borne by the appellants.

Martin, J. I concur in the opinion just pronounced.

Mathews, J. I do also.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the plaintiff be placed as a simple creditor on the tableau of distribution of the estate of the insolvent.

BENJAMIN FOSTER AND ANOTHER, EXECUTORS, &c.
versus
THE PRESIDENT, DIRECTORS AND COMPANY OF THE ESSEX BANK.
(17 Mass. 479.)

This action, which was assumpsit for 50,000 dollars had and received by the defendants, to the use of Israel Foster, the plaintiffs' testator, was tried upon the general issue, April term, 1820, at Ipswich, and a special verdict was returned by the jury to the following effect.—That the deceased sent to the Essex bank, by his agent, Bond,

a chest containing a quantity of gold, specified, in the following memorandum, then delivered to said Bond.

"Minute of gold left at Essex bank by Mr. Bond, on account of Capt. Israel Foster, July 8th 1812.

1 bag Spanish No. 1.....	$12,000.00
1 ditto Spanish No. 2.....	6,000.00
1 do. Spanish No. 3.....	12,000.00
1 do. Spanish No. 4.....	6,000.00
1 do. Spanish No. 5.....	6,000.00
	42,000.00
1 bag English & Portugal containing	11,000.00
1 bag containing	174.63
	$53,174.63

The above was weighed in my presence,
Wm. Orne,
Left at Essex bank for safe keeping,
W. Shepard Gray, Cashier."

On the back of the memorandum is the following entry.

"Essex bank, Sept. 10, 1814.—The within mentioned bags of gold were this day removed from the chest which contained them, into new bags, and packed in a keg, which was directed to be sent, with the property of the bank, to Haverhill, at the expense and risk of Mr. Israel Foster.
W. Shepard Gray."

William Orne was then president of the bank, and was present when the gold was weighed. The chest was locked, and said Bond took the key. The bank was not authorized to use this money, or to treat it otherwise than other special deposits. This deposit was kept in the vault of the bank until September 1814. The bank, then apprehending danger from the enemy, removed their own specie to Haverhill; and the persons having special deposits requested the bank in writing to remove their specie, with the property of the bank, at the risk and expense of the depositors. The said Bond procured a cask to repack the gold in, and superintended the repacking of it, and accompanied the officers of the bank on the removal to Haverhill, where it was deposited in a vault, and remained until after the peace. Mr. Foster's gold was then brought back by the bank, and was returned to their vault, with other deposits, and with the specie of the bank, Mr. Foster paying his part of the expense of the removals.

Bond was in the practice of coming, as agent of Foster, to see that his deposit was safe; but it is not known that he ever examined the cask or counted the money. Foster was an aged and infirm man, residing in Marblehead, and never came to the bank himself while his deposit was there. On the 28th of August 1817, he gave an order to the cashier to deliver 200 doubloons of the gold "deposited in the Essex bank for safe keeping on said Foster's account." He afterwards gave several similar orders.

The cask was opened by the cashier or chief clerk, to deliver the doubloons pursuant to the said orders. This was done without the knowledge of any of the directors; unless this knowledge is to be presumed from their general knowledge of the transactions of the bank. No account was taken of them in the books of the bank.

After this deposit was brought back from Haverhill to the bank, there were fraudulently and secretly taken from the cask, by the cashier or by the chief clerk, doubloons to the amount of 32,000 dollars, which they converted to their own use. This was done without the knowledge of any of the directors, or members of the corporation. The cashier and clerk have since absconded, after having also defrauded the bank of the greater part of its capital. Neither of them was at any time a stockholder.

The said Foster's deposit was kept in the vault, in the same manner, and with the same care, as other special deposits, and as the specie of the bank. The cashier and clerk sustained fair reputations, until the time of their absconding: and no other special deposits were fraudulently taken away.

It has always been the practice of the bank, to receive special deposits of money and other valuable things: but there was no by-law or regulation upon this subject; unless it is to be inferred from the practice aforesaid. No statement of special deposits was ever made to the directors by the cashier; but the practice of receiving such deposits was known to the directors. They had no knowledge of this deposit; unless it is to be presumed from the agency of the president and cashier when it was made, and of the cashier in paying the orders above mentioned.

It is not the practice, in this or any other bank, for the directors to inspect or examine special deposits; and it is considered as improper for any officer to do so, without the consent of the depositors.

After the testator's decease, the cashier gave the plaintiffs the following memorandum.—"Amount of gold received at Essex bank of Mr. Foster.

Spanish	42,000.00
Eng. & Port.	11,174.63
	53,174.63
Paid Mr. Foster 501 doubloons	7,625.22
	on hand $45,549.41

Wm. Shepard Gray, Cashier."

Afterwards one of the plaintiffs, in his own name, drew a check for 1000 dollars, which was paid; and he had no other funds in the bank than the said gold. This was done without the knowledge of any of the directors; and no entry was made of it, except the sum in figures in the waste book without any name. A few days after the cashier and clerk absconded, the same plaintiff paid the amount of the said check, and took away the residue of the deposit.

The testator was a stockholder in the bank, from 1795 until his death in 1818.

There was in the bank a book, called

"Special Deposits Essex Bank," in which memoranda were entered of the several special deposits sent to Haverhill, and a few others made since. There was no book of the kind, before the money was sent to Haverhill.

The books of the bank were not regularly posted, for two years and a half previous to the absconding of the cashier and clerk; but during that period there were stated in the ledger false balances of the cash account, of the amount of notes discounted, and of several other accounts; so as to correspond with the statements regularly made to the directors. The accounts of the general deposits were also falsely posted, for a part of this period. The books of the bank, from which the amount of stock and debts might be ascertained, consisted of a waste book, cash blotter, cash book and balance book. This last showed the balances due to the general depositors, and was usually referred to, in order to ascertain what was due to each individual: and it appeared to contain the same information, which might have been obtained from the ledger, if it had been regularly posted. The balance book did not exhibit a fair statement of the deposits.

The cashier gave a bond in the penal sum of ten thousand dollars, for the faithful discharge of his office; which his sureties have since paid.

PARKER, C. J. This is assumpsit, to recover of the defendants the value of certain gold, deposited by the plaintiffs' testator in the bank of which the defendants are the proprietors: and the facts, upon which the action is founded, are established by a special verdict, found by the jury who tried the issue.

Those facts are multifarious, and present several important questions of law, which have been investigated by the counsel with all the research and ability, which novelty in their application to a subject of so general concern as banks seemed to demand. No case has however been produced on either side, so apposite as to relieve the court from an enquiry into the general principles, on which the action is founded: and after all the pains, which other public engagements have allowed us to bestow on this particular case, no authorities have been discovered, having an essential bearing upon it, which had escaped the diligence of the counsel employed in the argument.

The publick importance of the questions has induced us to delay forming a conclusive opinion, while there was any room to suppose we might be mistaken; and doubts, which have, until a late period, prevailed with one or other of us, owing to want of time for examination, rather than to any intrinsic difficulty in the case, have occasioned repeated revisions of the arguments of counsel, and frequent recurrence to the authorities cited. Our minds are now definitely settled; and we hope to be able to show that the result we have come to is supported by the best approved principles of the common law, and conformable to decisions, ancient and modern, in analogous cases. In attempting to do this, we shall consider,

1st. Whether the bank made any contract with the plaintiffs' testator.

2d. What is the nature of that contract.

3rd. Whether it has been violated.

1. On the first point we have had little difficulty. For, notwithstanding the act of incorporation gives no particular authority or power to receive special deposits; and although the verdict finds that there was no regulation or by-law relative to such deposits, or any account of them required to be kept and laid before the directors or the company, or any practice of examining them; yet as it is found that the bank, from the time of its incorporation, has received money and other valuable things in this way; and as the practice was known to the directors, and we think must be presumed to have been known to the company, as far as a corporation can be affected with knowledge; and as the building and vaults of the company were allowed to be used for this purpose, and their officers employed in receiving into custody the things deposited; the corporation must be considered the depositary, and not the cashier or other officer, through whose particular agency commodities may have been received into the bank.

No authorities are necessary to support this position. It rests upon common and familiar principles. The master and owner of a house or warehouse, allowing his servants or clerks to receive for custody the goods of another, and especially if the practice be general and unlimited, as is the case with banks in relation to special deposits, will be considered the bailee of the goods so received, and will incur the duties and liabilities belonging to that relation. Not so, if the servant, secretly and without the knowledge, express or implied, of the master, he not having authorized or submitted to the practice, receives the goods for such purpose: for no man can be made the bailee of another's property, without his consent; and there must be a contract, express or implied, to induce a liability. The knowledge and permission, expressly found or legally to be presumed in this case, establishes a contract between the parties. And this brings us to the consideration of the second point, viz.

2ly. The nature and legal qualities of this contract.—It will not be disputed, that, if it amounts only to a naked bailment, without reward and without any special undertaking, which in the civil and common law is called Depositum, the bailee will be answerable only for gross negligence, which is considered equivalent to a breach of faith: as every one, who receives the goods of another in deposit, impliedly stipulates that he will take some degree of care of it. The degree of care, which is necessary to avoid the imputation of bad faith, is meas-

ured by the carefulness, which the depositary uses towards his own property of a similar kind. For although that may be so slight, as to amount even to carelessness in another; yet the depositor has no reason to expect a change of character, in favour of his particular interest: and it is his own folly to trust one, who is not able, or willing, to superintend with diligence his own concerns.

This principle, although denied by Lord Coke, as in 1 Inst. 89 b, has been received as the law regulating gratuitous bailment, as it is sometimes called, or mere deposit, where there is no advantage but to the depositor, from the luminous opinion of Lord Holt in the celebrated case of Coggs vs. Bernard, down to the profound and brilliant treatise of Sir William Jones, in which, with a wonderful mixture of learned research and classical illustration, he has analysed the complicated contract of bailment; and applied the principles of moral philosophy, the doctrines of the civil law, and the usages of all nations, ancient and modern, to the different branches of this diversified subject, so as to leave little room for speculation, except as to the application of his rules to particular cases, as they arise.

The dictum of lord Coke, that the bare acceptance of goods to keep implies a promise to keep them safely, so that the depositary will be liable for loss by stealth or accident, is entirely exploded; and sir W. Jones insists that such a harsh principle cannot be inferred from Southcote's case, (36) on which lord Coke relied: the judgment in that case, as the modern civilian thinks, being founded upon the particular state of the pleadings, from which it might be inferred, either that there was a special contract to keep safely, or gross negligence in the depositary. But as the judges Gawdy and Clench, who alone decided that cause, said that the plaintiff ought to recover, because it was not a special bailment, by which the defendant accepted to keep them as his own proper goods and not otherwise (37); the inference which lord Coke drew from the decision, that a promise to keep implied a promise to keep safely, even at the peril of thieves, was by no means unwarranted. But the decision, as well as the dictum of lord Coke in his commentary, were fully and explicitly overruled by all the judges, in the case of Coggs vs. Bernard, and upon the most sound principles. It is so considered in Hargarve and Butler's note to Co. Lit. n. 78, and all the cases since have adopted the principle, that a mere depositary, without any special undertaking and without reward, is answerable for the loss of the goods only in case of gross negligence; which, as is every where observed, bears so near a resemblance to fraud, as to be equivalent to it in its effect upon contracts.

Indeed the old doctrine, as stated in Southcote's case and by lord Coke, has been so entirely reversed by the more modern decisions, that, instead of a presumption arising from a mere bailment, that the party undertook to keep safely, and was therefore chargeable, unless he proved a special agreement to keep only as he would his own; the bailor, if he would recover, must, in addition to the mere bailment alleged and proved, prove a special undertaking to keep the goods safely; and even then, according to sir William Jones, the depositary is liable only in case of ordinary neglect, which is such as would not be suffered by men of common prudence and discretion: so that if goods deposited with one who engaged to keep them safely was stolen, without the fault of the bailee, he having taken all reasonable precautions to render them safe, the loss would fall upon the owner, and not the bailee. And sir William Blackstone, in his commentary, recognises the same principle; for he says, "if a friend delivers any thing to his friend to be kept for him, the receiver is bound to restore it on demand: and it was formerly held that in the meantime he was answerable for any damage or loss it might sustain, whether by accident or otherwise: unless he expressly undertook to keep them only with the same care as his own goods, and then he should not be answerable for theft or other accidents. But now the law seems to be settled, that such a general bailment will not charge the bailee with any loss, unless it happens by gross neglect, which is construed to be an evidence of fraud. But if he undertake specially to keep the goods safely and securely, he is bound to answer all perils and damages, that may befall them for want of the same care, with which a prudent man would keep his own." 2 Comm. 453. And this certainly is the more reasonable doctrine; for the common understanding of a promise to keep safely would be, that the party would use due diligence and care to prevent loss or accident: and there is no breach of faith or trust, if, nothwithstanding such care, the goods should be spoiled or purloined. Any thing more than this would amount to an insurance of the goods; which cannot be presumed to be intended, unless there be an express agreement, and an adequate consideration therefor.

The doctrine, as thus settled by reason and authority, is applicable to the case of a simple deposit, in which there is an accommodation to the bailor, and the advantage is to him alone. He shall be the loser, unless the person in whom he confided has shown bad faith, in exposing the goods to hazards, to which he would not expose his own. This would be crassa negligentia, and for this alone is such a depositary liable.

If we proceed one step further in the gradation of liabilities, we shall discover every legal principle, which can by possibility affect this cause, considered as founded on a contract of bailment. It was urged by the plaintiffs' counsel, that this is not a naked bailment, but is accompanied with an

advantage from the use of the property, or the credit derived from the custody of it: and that this ought to be viewed in the light of a reward, so that the case will be brought within the principle of bailment for hire or reward. If it be so, the principle applicable to this species of bailment goes no further than to make the bailee liable in case of ordinary neglect; so that if he shows that he used due care, and nevertheless the goods were stolen, he would be excused. This is the doctrine of sir William Jones, and was the opinion of lord Kenyon in the case of Finnucane vs. Small, cited in the argument; which though a nisi prius decision, is satisfactory evidence of the law, as two very eminent sergeants acquiesced in his opinion.

And this is also reasonable, for one who takes goods into his warehouse, to keep for a stipulated price, does not intend to insure them against fire or thieves. His compensation is only in the nature of rent; or if anything beyond that, only for the vigilance of a man of common prudence. If he locks and fastens the warehouse, as other prudent people do, and thieves break through and steal, he ought not to be accountable: if he leave the door or windows open, he ought to be. The common sense of mankind must acquiesce in these reasonable provisions of the law: and without doubt the common dealings of men are governed by them, as principles of natural justice, without a knowledge of the positive law.

Having thus settled satisfactorily to ourselves the principles, by which our judgment in this action is to be guided; we proceed to a consideration of the facts, in order to ascertain under what species of bailment the plaintiffs' property was committed to the keeping of the defendants. It has been before observed that, as it was received into their building and placed in their vaults by their servants, according to a practice allowed of by them, they must be responsible in some degree; and are bound to restore it, or the value, unless it has been lost by some accident, for which they are not liable by the nature of their contract. We think there is no doubt that on such a deposit an action of trover would lie against the corporation, if they should refuse to deliver the property on demand; and assumpsit might also be maintained, it being settled, by the later authorities that either action may be maintained against an incorporated company, as well as against a natural person; although the doings, on which the action is founded, are not verified by the seal of the corporation. Vide the opinion of Mr. Justice Story in the case of The Bank of Columbia vs. Patterson's adm'r. 7 Cranch 299, in which all the learning upon the subject of corporate liabilities is exhausted.

Looking into the special verdict, we find the money of the plaintiffs' testator, contained in a chest which was locked and the key kept by his agent, was received into the bank by W. S. Gray the cashier, in the presence of W. Orne, who was president of the bank at the time. The money, being gold, was weighed in the presence of the president and cashier, and a memorandum of the different pieces in separate bags taken by the cashier and given to Mr. Bond, the testator's agent, with this writing signed by Mr. Gray as cashier, viz. "left at Essex bank for safe keeping." The verdict finds that the chest, containing the gold, was left at the bank as a special deposit: that the bank was not authorized to use the money, or treat it otherwise than a special deposit: that it was kept in the vault of the bank, until it was removed to Haverhill for better security in time of war, with the consent and at the expense of the owner: that after the danger was over, it was brought back and replaced in the vaults of the bank, with the specie belonging to the bank, and there remained until it was pilfered, as afterwards stated in the verdict. Mr. Bond, the agent of the owner, was in the practice of coming to the bank, to look into the vault to see that the money was safe; but it did not appear that he opened the cask or counted the money. Some of the doubloons were delivered to the agent, on the order of the testator, by the cashier in August 1817; and at other times other doubloons were delivered in the same manner on similar orders. At each of these times the cask was opened by the cashier or chief clerk, to deliver the doubloons, pursuant to orders. This was done without the knowledge of any of the directors. They knew nothing of the delivery of the doubloons, nor was any account taken of them in the books of the bank. It is found that no return or statement of special deposits was ever made to the directors by the cashier; and that such deposits are made and taken away without the particular knowledge of the directors, although they know it is the practice so to receive and take them. The directors knew nothing of the nature or amount of this or any other special deposit, unless such knowledge may be presumed from the agency of the president and cashier in receiving this deposit, or of the cashier when he delivered the doubloons pursuant to orders. And it is found not to be the practice of this or any other bank, for the directors to inspect or examine special deposits; and it is considered improper for any officer to do so, without the consent of the depositor.

Upon this state of facts, we think it most manifest that, as far as the bank was concerned, this was a mere naked bailment, for the accommodation of the depositor, and without any advantage to the bank, which can tend to increase its liability beyond the effect of such a contract. No control whatever of the chest, or of the gold contained in it, was left with the bank or its officers. It would have been a breach of trust to have opened the chest, or to inspect its contents. The owner could at any time have withdrawn it, there being no lien for

any price of its custody; and it was not thought that the bank had authority to remove it to a place of greater safety, without the orders of the owner. If it be possible to constitute a gratuitous bailment, or a simple deposit, this was one; unless the memorandum given by the cashier altered its character, or unless the nature of such a deposit is such as to have given the bank a right to derive profit from it; both of which points have been contended for by the counsel for the plaintiffs.

As to the first of these points, supposing the bank to be answerable for any special undertaking of the cashier, we perceive no evidence of such an undertaking in this case. The writing signed by the cashier is merely a memorandum, signifying that the chest and its contents were left in the bank for safe keeping. It contains no promise, and assumes no risk, other than would be derived from the mere delivery without any writing. Nor does it receive any additional force from the presence of Mr. Orne, and his certificate of the gold having been weighed in his presence. For in this he did not act or sign officially; and if he had assumed to do so, it not being within the scope of his authority, as president, to charge the bank with any special liability, his act could not have bound the corporation, who, according to the practice as found by the jury, take no notice of special deposits. And the same may be said of the memorandum signed by the cashier. For if he had undertaken to make the bank specially answerable for a deposit, contrary to its usage and to the nature of the contract implied by accepting such a deposit, such an undertaking, without previous authority or subsequent assent, would have failed to implicate the bank.

We think also that there is nothing in the nature of such a deposit, or in the usages of banks, or in the act incorporating the bank, from which any qualities can be attached to this bailment, which do not belong to that class of contracts generally, where the advantage is wholly on the side of the depositor.

It was contended that the bank might discount on this property. But if the true nature of a special deposit is understood by us; and we think its character is properly described in the special verdict; we are of opinion this could not be done. For although the bank, by implication, are allowed, in the act of incorporation, to have credit upon the simple amount of all the monies deposited for safe keeping; we are satisfied that the legislature had reference to general deposits only in this provision. It does not appear that this or any other bank ever issued notes upon the credit of special deposits: indeed they could not, as the amount of such deposits, or the value of them, is generally wholly unknown to the directors of the company. The eighth section of the incorporating act, we think, clearly shows that the deposits referred to in the third section are general deposits. For in the eighth section an annual account of the monies deposited is required to be made to the governor and council, in order that it may be ascertained whether there has been an excessive issue of notes. Now of special deposits no such account can be rendered, because none is kept: and we have never heard that any bank has been complained of, as violating its charter, for not rendering an account of such deposits.

We see then no profit to the bank, arising from special deposits, unless it be, as was suggested, that they acquire an increased credit with the community on their account. But any credit founded upon such deposits would be fallacious, since they cannot be meddled with by any officer of the bank, although authorized by a vote of the corporation, without a breach of trust which would subject them to an action. As to the idea suggested, that the business of a bank may be facilitated and increased by the accommodation given to special depositors; the advantage, if any, is too minute and remote to affect their liability.

Such deposits are indeed simply gratuitous on the part of the bank, and the practice of receiving them must have originated in a willingness to accommodate members of the corporation with a place for their treasures, more secure from fire and thieves than their dwelling houses or stores: and this is rendered more probable from the well known fact, that not only money or bullion, but documents, obligations, certificates of public stocks, wills and other valuable papers, are frequently, and in some banks as frequently as money, deposited for safe keeping.

This is wholly different from the deposits contemplated in the act, on which notes may be issued: for they enter into the capital stock, become the property of the bank as much as their other monies, and the bank become debtors to the depositors for the amount.

3ly. The contract in the present case being then only a general bailment, the third question to be discussed is, whether the contract has been executed by the bank. I use the word bank for the corporation, consisting of the president, directors and company, for the sake of brevity.

The rule to be applied to this species of bailment is, as has been stated, that the depositary is answerable, in case of loss, for gross negligence only, or fraud which will make a bailee of any character answerable. Gross negligence certainly cannot be inferred from any thing found by the verdict: for the same care was taken of this as of other deposits, and of the property belonging to the bank itself. The want of books, showing the number and amount of deposits, is not a culpable negligence: for the acceptance of the deposit being voluntary, the bank was not obliged to incur any labour or expense in this respect: and besides, the agent of the depositor required nothing but a memorandum from the cashier; and this was more

than he could have insisted on as a right.

As to the supposed neglect and carelessness of the directors, in not inspecting the cashier's accounts more strictly, so as to have detected his fraudulent management of the books to cover his peculation, this concerned the property of the company, not that of special depositors: and the reputation of the cashier, and general confidence in him, found by the verdict, is a sufficient answer to any charge of negligence in his original appointment or continuance in office.

We have thus prepared the way for the discussion of the great question in the case, and we believe the only one on which doubts could be entertained.—The loss was occasioned by the fraud or felony of two officers of the bank, the cashier and chief clerk. We shall not consider whether the act of taking the money was felonious or only fraudulent; as the distinction is not important in this case; the question being whether there was gross negligence, and that fact may appear by suffering goods to be stolen, as well as if they were taken away by fraud. Fraud on property deposited, committed by the depositary, or his servants acting under his authority, express or implied, relative to the subjectmatter of the fraud, is equivalent to gross negligence, and renders the depositary liable. No fraud is directly imputed to the bank; it being found that the directors, who represent the company, were wholly ignorant of the transactions of the cashier and chief clerk in this respect.

The point then is narrowed to this consideration, whether the corporation, as bailee, is answerable in law for the depredations committed on the testator's property by two of its officers: and here, it being thought there was some discrepancy in the authorities, we have felt ourselves obliged to examine minutely all which have been cited, and all others having a bearing on the question.

It was contended by one of the counsel for the plaintiffs, as a proposition universally true, that the principle is civilly answerable for all frauds done by his agents; and he is supported in the use of this language by a doctrine of lord Kenyon in the case of Doe vs. Martin, and also by Lord Ellenborough in 1 Camp. 127. And yet it must strike the mind of every man of sense, that this universal proposition will admit of, and indeed upon principles of common justice actually requires, considerable qualifications. No one will suppose, if my servant commits a fraud, relative to a subject that does not concern his duty towards me, that I shall be civilly answerable for such fraud. If I send him to market, and he steps into a shop and steals, or upon false pretences cheats the shop keeper of his goods; I think all mankind would agree that I am not answerable for the goods he may thus unlawfully acquire: and yet the proposition, as stated, will embrace a case of this kind. The proposition can be true only when the agent or servant is, while committing the fraud, acting in the business of his principal or master: and this was the state of things in both the cases, which are cited to support the proposition; and they go upon the principle of an implied authority to do the act.

The rule of law is correctly laid down by sir William Blackstone [1 Comm. 429.] viz. "that the master is answerable for the act of his servant, if done by his command, either expressly given or implied." And in another place, "if a servant by his negligence does any damage to a stranger, the master shall answer for his neglect; but the damage must be done while he is actually employed in his master's service; otherwise the servant shall answer for his own misbehavior." [Ibid. 431]. The same rule will apply more strongly to frauds practised by the servant. Christian, in a note to this passage, approves this doctrine, and illustrates it with some observations of his own.

The Supreme Court of the United States recognise the same doctrine in the case of The Mechanics Bank vs. The Bank of Columbia, 5 Wheat. 326, in which it is said that the liability of the principal depends upon the facts, 1. That the act was done in the exercise, and 2. Within the limits, of the powers delegated. Any act, they say, within the scope of the power or confidence reposed in the agent, such as money credited in the books of the teller of a bank, or proved to have been deposited with him although he omits to credit it. And in the case of Ellis vs. Turner, & al. 8 D. & E. 533, lord Kenyon says, "the defendants are responsible for the acts of their servant, in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them: as if he, being master of the defendants' vessel, were to commit an assault upon a third person in the course of his voyage." And upon the same principle it has been holden, that if a servant wilfully drive his master's carriage against the carriage of another, the master is not liable for the damages. [1 East 106.] And the reason is the same; for in such case there is no authority from the master, express or implied; the servant in that act not being in the employment of his master. In the case here referred to the master was not in the carriage at the time: the law would have been the same, if he had been present, and had endeavoured to prevent the act; the presence of the master being only presumptive evidence of authority.

I think it may be inferred from all this, as a general rule, that to make the master liable for any act of fraud or negligence done by his servant, the act must be done in the course of his employment; and that if he steps out of it to do a wrong, either fraudulently or feloniously, towards another, the master is no more answerable than any stranger. The case of innholders, common carriers, and perhaps ship masters or seamen, when goods are embezzled, are excep-

tions to the general rule, founded on public policy.

We are then to enquire whether in this case, when the gold was taken from the cask by the cashier and clerk, they were in the course of their official employment. Their master, the bank, had no right to meddle with the cask or open it; and so could not lawfully communicate any authority: and that they did not in fact give any, is found by the verdict. Nor did they in any manner assent to, or have any knowledge of it. There are no circumstances, then, from which such authority can be implied. The chest or cask, when once placed in the vault, was to remain there until taken away by the owner or ordered away by the bank: either party having a right to discontinue the bailment. It was never opened but by order of the owner, until it was opened by the officers for a fraudulent or felonious purpose. It was no more within the duty of the cashier, than of any other officer or person, to know the contents, or to take any account of them. If the cashier had any official duty to perform relating to the subject, it was merely to close the doors of the vault, when banking hours were over; that this, together with other property there, should be secure from theft. He cannot therefore be considered, in any view, as acting within the scope of his employment, when he committed the villainy: and the bank is no more answerable for this act of his, than they would be, if he had stolen the pocket book of any person, who might have laid it upon the desk, while he was transacting some business at the bank.

If it be asked, for what acts then of a cashier or clerk the bank would be answerable; I should answer, for any which pertain to their official duty; for correct entries in their books, and for a proper account of general deposits; so that, if by any mistake, or by fraud, in these particulars, any person be injured, he would have a remedy. If they should rob the vaults of the property of the bank, the company would necessarily lose; as must have happened in this case to a great amount: and if the bank have become debtors to those who have deposited otherwise than specially, their debts will not be diminished by the fraud; so that in this form they are answerable to depositors: and for the correct conduct of all their servants, in their proper sphere of duty, they are answerable. They may also possibly be answerable for notices to endorsers upon bills and notes left with them for collection, if there should be a failure, by the neglect of any of their servants; because they have undertaken to give the proper notices. But even in that case it may admit of a question, whether they would be liable any further than attornies, who undertake the collection of debts, would be. But they are not answerable for special deposits, stolen by one of their officers, any more than if stolen by a stranger; or any more than the owner of a warehouse would be, who permitted his friend to deposit a bale of goods there for safe keeping, and the goods should be stolen by one of his clerks or servants.

The undertaking of banking corporations, with respect to their officers, is that they shall be skilful and faithful in their employments: they do not warrant their general honesty and uprightness.

And it is the same with individuals. If a friend commit to my care valuable property to keep for him, and it be stolen by my servants, I shall not be answerable for the loss; as was stated by lord Kenyon, in the case of Finnucane vs. Small. This case, before referred to for another purpose, deserves special notice upon this point: for if it be law, it goes the whole length of the case before us, and even beyond it; for the bailee there received a reward for his custody of the goods, which were stolen. The plaintiff was an officer in the army, and being about to leave London, sent his trunk to the defendant's house for safe custody, and was to pay one shilling per week for house room. When he returned he received the trunk, but the contents had been stolen. Lord Kenyon held the defendant not liable, it appearing that he had taken as much care of the trunk, as he had of his own goods; and that if the goods were stolen by the defendant's servants, as was stated to have been the fact by the plaintiff's counsel, it would make no difference. His lordship no doubt considered the hire agreed to be paid, as mere compensation for house room, not as a reward for diligence and care; and therefore did not require of the defendant more care, than he used about his own goods, considering it as a simple deposit only. Whether he was right or not in this, there is no doubt of the correctness of his opinion with respect to the agency of the servants in the theft; for they were not in the course of their duty, when pilfering the trunk of its contents. Garrow and Shepherd, eminent sergeants, and since judges, acquiesced in the opinion.

This case is, in all respects, like the one before us, except that the goods were to be kept for hire; and the difference is altogether in favour of the defendants in the present case.

In answer to this case it was observed by the counsel for the plaintiffs, that the cashier of the bank was trusted, and therefore the doctrine of Lord Kenyon did not apply. But if we are right in the principles before stated, he was not trusted in this business; neither he nor his principal, the bank, having anything to do with the chest or cask, but to give it a place in the vault, and to lock it up, when the hours of business were over: and so the cashier must be considered like the servant in the case cited.

Some stress was laid in the argument, upon the security taken by the bank of the cashier, for the faithful discharge of his duty. But we think it obvious, that nothing was contemplated in the security, but the

official neglects of the cashier. The act of incorporation authorizes the bank to require bonds, in a sum of not less tnan ten thousand dollars: and a bond was taken in that sum only. Now considering this as one of the oldest banking companies in one of the most wealthy towns in the commonwealth; without doubt special deposits of a vast amount were from time to time received into the bank for safe keeping, and a bond for ten thousand dollars could never have been taken, to indemnify against a possible loss of these.

Upon a view therefore of all the points in the case, and after a careful attention to the arguments and authorities, we are satisfied that, upon the special verdict, judgment must be entered for the defendants.

We have to regret that two of our brethren have been so situated, as to be unable to afford us any assistance: one being slightly interested when the action was commenced, and the other having become interested by the death of a relative, since the argument, and before any consultation was had upon the cause. It is a consolation, however, that the rest of us, having examined the cause with great care separately and together, all concur in the opinion which has been given.

This has been said to be a hard case on the part of the plaintiffs, whose testator confided a large amount of property to a place, as he thought, of perfect security, under the management of at least common prudence and skill: and indeed it is a hard case, as all cases are, where property is lost by violence of fraud. But it is not less hard upon many of the members of the corporation, who have by the same wicked conduct, been deprived of their earnings and savings. All that can be done by the court is to lament the common misfortune, and take care not to add injustice to hardship, by relieving one sufferer at the expense of others, unless the principles of law demand such interposition.

Costs for the defendants.

ARMORY vs. DELAMIRIE.

(1 Str. 505.)

In Middlesex coram Pratt C. F.

The plaintiff being a chimney sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled:

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action well lay against the master, who gives a credit to his apprentice, and is answerable for his neglect (1).

3. As to the value of the jewel several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and show it not to be one of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did.

JOHN V. SCHERMER vs. ERNEST NEURATH.

(54 Md. 491.)

Appeal from the Baltimore City Court.

The case is stated in the opinion of the Court.

First Exception.—The plaintiff offered to prove by a competent witness, that within a few days after the robbery of the bonds, the defendant stated to the witness that the stolen bonds belonged to the plaintiff, and that he considered himself responsible to the plaintiff for their loss; that the plaintiff should lose nothing by the theft; that he would pay the interest to him the same as the Government, and if the bonds were not recovered he would pay to the plaintiff the value of the same, if he had to sell his house to do so. To the admissibility of this evidence the defendant objected, and the Court (Garry, J.) sustained the objection. The plaintiff excepted.

Second Exception.—The plaintiff offered fifteen prayers, and the defendant offered seven. The Court rejected all the prayers of the plaintiff, and the sixth and seventh prayers of the defendant. The other prayers of the defendant the Court granted. The plaintiff excepted. The following prayer only, of the defendant, it is deemed proper to insert:

5. If the jury find from the evidence that the defendant converted to his own use, and wrongfully deprived the plaintiff of the use and possession of the bond of the Government of the United States, for the payment of five hundred dollars, mentioned in the first count of the declaration, and if they further find from evidence that thereafter the defendant paid to the plaintiff the par value of the said bond, with all interest due on the said bond to May 19th, 1879, then the measure of the damages which the plaintiff is entitled to recover under the said first count of the declaration for the said bond for five hundred dollars, is the excess of the market price or value of the said bond for five hundred dollars, over and above its par value on the day the defendant converted it to his own use, with interest on such excess, if the jury shall find there was such excess, from the day the defendant converted the said bond for five hundred dollars to his own use to the present time.

A verdict was rendered on the 2nd of

April, 1880, for the plaintiff under the instructions of the Court for $124.55, and judgment was entered thereon, with interest and costs. The plaintiff appealed.

The cause was argued before Bartol, C. J., Bowie, Miller, Alvey, Robinson and Irving, J.

ROBINSON, J., delivered the opinion of the Court.

This is an action by the appellant to recover the value of four United States coupon bonds of the value of $1000 each, and one bond of the value of $500 which were left with the appellee for safe-keeping, and which were afterwards stolen by a female thief, known as Mary Miller.

The evidence shows that after an absence of several years in Europe, the plaintiff returned to Baltimore in October, 1875, and stopped at the house of the defendant, his brother-in-law. He had on his person at the time the bonds in question, enclosed in an envelope, and the envelope in his pocketbook. Being about to retire to his bedroom, he asked the defendant whether he should take the bonds with him, to which the defendant replied "that he thought it would be safer to leave them with him." Whereupon the plaintiff handed the bonds to the defendant, and the latter in the presence of the plaintiff put them in a small wooden box, in which he kept his valuable papers, and locked the box, and put the box in a bureau drawer in his bedroom and locked the drawer.

The defendant's house is at the corner of Park and Fayette Streets, and the first floor on both streets, is occupied by stores and shops, one of which being the defendant's shoe shop.

The second floor was occupied by the defendant and used for a parlor, dining-room and kitchen, and the third story for bedrooms. The main entrance was on Park Street.

The plaintiff remained as a guest in the defendant's house for about two weeks, and, being about to go to North Carolina on a visit, he asked the defendant for his bonds; but, upon the suggestion by the latter that it was safer to let them alone, he consented to let them remain. On the same day he took from defendant a receipt describing the numbers and amounts of each bond, and stating that they were left by plaintiff with defendant for safe-keeping.

After his return from North Carolina, the plaintiff went to defendant's house for the purpose of cutting off the coupons then due. They went up stairs together, and the defendant unlocked the bureau drawer, took out the small box, unlocked it, and handed the bonds to the plaintiff. The coupons were cut off by the latter, and, in his presence the defendant again placed the bonds in the box and locked it, and put the box in the bureau drawer, and then locked the drawer.

The plaintiff continued to reside in Baltimore, but nothing more was said about the bonds, until April following, when it was discovered that they, together with defendant's papers and jewelry, had been stolen.

Mary Miller, the thief, in her testimony, fully explains the manner in which they were stolen. She says: "About ten o'clock in the morning she left the house where she was staying, and walked around the city. About five or six o'clock she passed the house of the defendant, went up stairs, and found the doors up stairs open. Went first into the front room and found the bureau drawers open, then went into the adjoining room and found the second drawer of the bureau in that room locked. She broke the lock and took out the small box, and broke the lock of the box, and took out the plaintiff's bonds and the defendant's papers. She then went into the front room and took three watches and some jewelry, and then left the house without seeing any one."

It appears, also, that some time before the theft by Mary Miller, the defendant, without the knowledge of the plaintiff, deposited the $500 bond with Wilson, Colston & Co., as collateral security for money borrowed. He subsequently, however, paid to the plaintiff $526.25, the amount due on the face of the bond with interest to date.

The declaration contains three counts, one for trover and two for negligence.

In granting the defendant's, and in refusing to grant the plaintiff's prayers, the Court substantially instructed the jury that the plaintiff had offered no evidence legally sufficient to entitle him to recover under either count in the declaration.

After a careful examination of all the evidence offered by the plaintiff, we are obliged to say, that in our judgment it was not legally sufficient to warrant a jury reasonably to find, either that the bonds were lost by the actionable negligence of the defendant or that they had been converted to his own use.

The proof shows that the bonds were left with the defendant for safe-keeping, without any reward or profit, and that he agreed to take care of them solely for the accommodation of the plaintiff; that he put them in a box in which he kept his own valuable papers, and put the box in the bureau drawer in his bed-room, and that both box and drawer were locked; that this was done with the knowledge and consent of the plaintiff, and that they remained there with his consent. Under these circumstances the plaintiff cannot reasonably say, there was any negligence in regard to the place in which the bonds were kept. If this be so, there is no evidence to show that they were subsequently lost by any wrongful act or fault of the defendant. He was not required, of course, to keep the doors of the chamber rooms in the third story locked in the day time, much less could he be required to keep watch against such a bold and daring theft as this.

There is a well recognized distinction in

regard to the care and diligence required of a bailee for hire, and one who undertakes to keep property without reward, and solely for the accommodation of another. In regard to the former, the liability is one founded on contract, and the bailee is obliged to exercise that care and diligence which is ordinarily exercised by persons in regard to the business or thing committed to his care; or as put in some of the cases defining the liability of a paid agent, he is responsible for the consequences of the "want of ordinary diligence," or which is the same thing, for "ordinary negligence."

In the case of a bailee without reward there is no contract, and he is liable only for wrongful conduct, or according to the expression used in many cases, gross negligence.

So long ago as the celebrated case of Coggs vs. Bernard, 2 Lord Raymond, 909, Holt, C. J., held, that a merely gratuitous bailee or other agent was liable only for gross negligence. See also Shiells vs. Blackburne, 1 Hy. Blackistone, 158. The terms "gross and slight negligence," have, it is true, been the subject of some criticism of late, on the ground of not being legal terms, and not importing a precise and definite idea of actionable negligence, for which a bailee may be liable. And in Wilson vs. Brett, 11 Meeson & Welsby, 115, Baron Rolfe said, he "could see no difference between negligence and gross negligence, that it was the same thing with the addition of a vituperative epithet."

But be this as it may, in Maury and Osbourn vs. Coyle, 34 Md., 235, this Court has laid down in explicit terms what seems to us the most satisfactory rule or test, by which the liability of unpaid bailees is to be determined, namely, that he is bound to observe such care in the custody of property committed to his keeping, as persons of ordinary prudence in his situation and business, usually bestow in the custody and keeping of like property belonging to themselves.

Want of ordinary diligence is of course as a general rule a question for the jury.

But where the proof offered by the plaintiff is wholly insufficient to justify a jury reasonably to find the want of such ordinary diligence, it is within the province of the Court to so instruct the jury.

And as we have heretofore said, the proof in this case being legally insufficient to prove actionable negligence on the part of the defendant, the rulings of the Court in this respect must be affirmed.

The only remaining question is whether there is any evidence to support the count in trover? And in support of this count, it was argued that the conversion by the defendant to his own use, of the bond for $500, was in law a conversion of the other four bonds of $1000 each. The argument then goes so far as this, that when a half dozen articles, separate, and independent of each other, are delivered at the same time to a bailee, the conversion of one is the conversion of the whole, and this too, although the bailee was able and willing upon demand to return the other articles or property not taken.

We must confess we do not exactly see upon what principle this contention can be supported. Cases may be supposed, it is true, in which the conversion of part of a thing would be in law the conversion of the whole, provided the part so converted affected the whole. But to say that because the defendant took one bond and converted it to his own use, that this worked a conversion of the remaining bonds, would be to allow a fiction to prevail against the truth.

Nor do we find that any of the cases cited by the plaintiff sustain this position. In Richardson vs. Atkinson, 1 Strange, 576, where part of the liquor was drawn off, it was held to be a conversion of the whole, because the defendant had filled the vessel with water.

But in Philpott vs. Kelly, 3 Ad. & El., 106, where a pipe of wine was left with the bailee for safe-keeping, and he caused part of the wine to be drawn off, and then used part of it after it was bottled, it was expressly held, that this did not constitute a conversion of the whole.

The use of the $500 bond by the defendant was of course a breach of faith, and for its conversion he was unquestionably liable under the count in trover, but the conversion of this bond was neither in law nor in fact a conversion of the other bonds which remained untouched in the place where they were deposited.

The evidence offered in the first bill of exceptions, as to the declarations of the defendant made a few days after the theft, to the effect, that he considered himself responsible to the plaintiff for the loss of the bonds, was also properly rejected. His opinion or belief in regard to his liability did not affect it the one way or the other. Such declarations were inadmissible to prove negligence, because they state no facts from which negligence could properly be inferred.

Finding no error in the rulings below, the judgment will be affirmed.

(Decided 2nd July, 1880.)

Judgment affirmed.

GEORGE W. WHITNEY & WIFE vs. ARTEMAS LEE.

(8 Metc. 91.)

The bill of exceptions, on which this case came before the court, and which was signed by the judge before whom a trial was had in the court of common pleas, was as follows:

"This was an action of assumpsit upon a voluntary undertaking of the defendant, without reward, to secure and take care of a promissory note given by Jonathan Whitney to the female plaintiff while sole. The note aforesaid was placed in the hands of the defendant, for the purpose aforesaid,

and the plaintiffs contended that the defendant was bound to use ordinary care and fidelity in securing and collecting the same. The court instructed the jury that the plaintiffs must prove fraud or gross negligence in the defendant, to entitle them to recover. The verdict was for the defendant, and the plaintiffs excepted to the said instructions."

SHAW, C. J. From the very brief form in which exceptions are drawn in the court of common pleas, it is sometimes difficult to appreciate the precise application of the rule of law stated, to which exception is taken. It presents the common difficulty of expressing legal abstract propositions in language so precise and accurate as to enable the court revising the point to decide with correctness. The theory of the common law is, that in some mode all the facts of the case shall be stated, which may have a bearing upon the question; and then courts are called upon to decide on the principles of law applicable to such combination of facts, and the rights of parties resulting from them. Where, however, points are presented singly for revision, it it only necessary to state so much of the facts as may be sufficient to present that precise question distinctly. The true medium, therefore, in drawing a bill of exceptions, seems to be, to insert all the facts or evidence which are material to the question raised by the exception, without inserting any that are irrelevant.

The present case depends on the rule of law applicable to bailments. The facts, as we understand them, are, that the plaintiffs delivered to the defendant a promissory note, payable to the female plaintiff, whilst sole, upon a voluntary undertaking of the defendant, without reward, to secure and take care of the same. The term to "secure" may be deemed ambiguous, meaning either to obtain security, or to keep securely; but associated with the words "take care of," and being a gratuitous undertaking, we do not understand that the defendant was to take active measures to obtain security, but simply to keep the note carefully and securely, and receive the money due thereon, when offered. This last authority and duty would seem to result from the custody of the note.

Under these circumstances, the court are of the opinion that the instruction of the judge to the jury was right, and that to enable the plaintiffs to recover, they must prove fraud or gross negligence in the bailee. By fraud must be intended any want of good faith, or such utter disregard of the rights of the owners of the note, as indicates bad faith.

The law has endeavored to make a distinction in the degrees of care and diligence to which different bailees are bound; distinguishing between gross negligence, ordinary negligence, and slight negligence; though it is often difficult to mark the line where the one ends and the other begins. And it must be often left to the jury, upon the nature of the subject matter, and the particular circumstances of each case, with suitable remarks by the judge, to say whether the particular case is within the one or the other.

Subject to these remarks upon the application of these distinctions, we think it well settled, that a bailee for safe keeping, without reward, is not responsible for the article deposited, without proof that the loss was occasioned by bad faith, or gross negligence. This rule was settled, on great consideration, and after full deliberation, in Foster v. Essex Bank, 17 Mass. 479; and this supersedes the necessity of any full review of the authorities.

Exceptions overruled.

IRVIN W. SPOONER vs. JOHN L. MATTOON.

(40 Vt. 300.)

(Windsor, Feb. Term, 1868.)

Assumpsit in a special count, and a count for money had and received. Plea, the general issue, and trial by the court by consent of the parties at the May Term, 1866, Barrett, J., presiding. The plaintiff gave evidence tending to support his declaration, and thereby proved that both he and the defendant were soldiers in the 4th Vermont regiment, and in March, 1865, were with the army near Petersburgh, Virginia; that the plaintiff, in the early part of that month, had considerable money, and fearing that it might not be safe in his own custody during the nights, he had, for one or two nights previous to the 4th day of March, delivered it to the defendant privately for safe keeping, and early the following morning had called on the defendant, at the defendant's tent and taken it back. On the night of the 4th day of March, he delivered it in like manner to the defendant for safe keeping, and the defendant received the same for that purpose, and kept it through the night, and immediately after breakfast the next morning, being Sunday, the defendant, as the plaintiff had not come for the money, took it, in the pocket book containing it, which was of unusual large size and length, from the place in which he kept it through the night, and started for the plaintiff's tent, which was ten rods distant from the tent of the defendant, and having no convenient pocket for so large a pocket book, he put it inside of his vest, between that and his shirt, intending, as he himself said, to keep his mind upon it all the way to the plaintiff's tent; that on his way he forgot himself, but when he had got within a rod of the plaintiff's tent, he bethought himself in respect to the pocket book, and put his hand inside of his vest to take it out, so as to have it ready to deliver to the plaintiff as soon as he entered the plaintiff's tent, and it was not there, and as he said, it had slipped out on his way. Immediately search was made for it in the track he had pursued, and in the tent of the defendant, and enquiry was made of

the inmates of the defendant's tent, but it was not found. The defendant said he saw only one man out while he was on his way, and he seemed to be going in the direction of the tents of the 9th New York heavy artillery, and he and the plaintiff went to the tents of that regiment as soon as they could, but could get no clue to that man. The money has become wholly lost to the plaintiff. The plaintiff and the defendaht were acquaintances, and on account of having been wounded, were doing some kind of camp service appropriate for invalids. The defendant received the money as a friend in whom the plaintiff had confidence, and as one not known as likely to be supposed to have any considerable amount of money on hand, and without any compensation being offered, asked, or expected for keeping the same. The defendant testified that after he put the pocket book inside of his vest, as aforesaid, he did nothing for the purpose of holding it there, and pressing it from slipping out; that his vest buttoned around him with ordinary tightness, and that he wore a loose blouse outside, and that the plaintiff did not request him to bring the money to the plaintiff. The foregoing facts are substantially the version given by the defendant. The court did not decide that the defendant had embezzled the plaintiff's money, but put their decision upon the facts above stated, and the evidence tending to show that the defendant lost the pocket book, from which facts and evidence in connection with the absence of any evidence or claim that there was anything to divert or distract the mind of the defendant from the subject of the pocket book, and it appearing that the carrying of it to the plaintiff was the sole purpose for which the defendant was then going to the plaintiff's tent. The court were of opinion that the defendant was not only lacking in exercise of ordinary care, but was chargeable with actual negligence, and particularly in view of the fact that owing to the character of the place in which he put it he regarded it important that he should keep his mind on it all the way. Yet his vest was in fact so loose that it slipped out without his knowing it, and he both forgot himself in respect to it, and failed of taking any means like pressing his arm against it, or something equivalent, to keep it from slipping out. The amount of money entrusted to the defendant, and lost to the plaintiff, was $775.00, and the same was lost on the 5th day of March, 1865. For that sum, with interest, the court rendered judgment for the plaintiff,—to which the defendant excepted.

PROUT, J. The county court, upon the evidence which is detailed in the bill of exceptions, found that the defendant was not only lacking in the exercise of ordinary care with respect to the amount of money the plaintiff seeks to recover in this action, but that he is chargeable with actual negligence, and rendered a judgment for the plaintiff.

The facts showing that the money in the defendant's hands was a simple depositum, or naked deposit, for the sole benefit of the plaintiff, and that it was left with the defendant without any special undertaking on his part, as well as without expectation of reward, the principle applicable to, and which must govern the case, is at once indicated. In a bailment of this nature, the bailee is bound to exercise only slight diligence, and is responsible only for gross neglect. It is said this rule accords with reason as well as abundant authority, as in the case of a bailment of this nature, the accommodation is to the bailor, and the entire advantage to him. Foster et al. vs. Essex Bank, 17 Mass. 479; Story on Bailments, §§ 23, 62; 1 Parsons on Contracts, 570, 571; 2 Kent's Com. 560.

The decision of the county court does not seem to meet the requirement of this principle, but is put upon the distinct ground of a want of ordinary care on the part of the defendant, and that upon the evidence, he is chargeable with actual neglect, without reference to the character and nature of the bailment in question, or the degree of negligence on the part of the defendant necessary to be proved or found in order to charge him. There are different degrees of care and diligence, (which it is unnecessary to define), a neglect or want of which, results in different degrees of negligence, applicable to and growing out of different kinds of bailment, as all the books treating of the subject show. In this case, and with respect to the bailment in question here, the court held that the defendant was bound to exercise ordinary care—a greater degree of diligence than the law required him to exercise—and was chargeable with actual negligence, but which they do not find to be gross.

But looking at the case in the light of the evidence, although it was admissible and proper to be considered as bearing upon the question of slight diligence and gross neglect on the part of the defendant, it does not necessarily amount to, or show that the defendant was in fault as to either, to the extent or degree those terms import. Desirous of relieving himself of the care of the plaintiff's money—the plaintiff not calling for it as accustomed—before he was obliged to leave his tent in the performance of his duties, he started for the tent of the plaintiff, with the intention of returning it to him. For the purpose of not exposing it to view, having no pocket large enough to contain it, he placed it inside and between his shirt and vest, intending to keep it secure by the pressure of his arm upon it. On the way, his attention is diverted,—as he expressed it, he forgets himself with respect to the money, as anyone naturally

might in camp, and when he is in this mental condition, it slips out, and is lost. The county court, upon the proof, expressly exclude the inference that the defendant embezzled it. Upon this evidence, and excluding this inference, we are unwilling to hold that it shows gross negligence on the part of the defendant, as it is equally consistent with an honest intention and effort on his part to return the plaintiff his money.

The judgment of the county court is reversed, and judgment for the defendant.

DOORMAN AGAINST JENKINS.
(2 Ad. & El. 256.)

Assumpsit. The first count of the declaration alleged that, in consideration that the plaintiff, at the request, &c., had delivered to the defendant and placed in his charge and custody a sum of money, to-wit, the sum of 32£. 10s., of the plaintiff, for the purpose, and in order that the defendant might therewith take up and pay for the plaintiff a certain bill of exchange made, &c., when the same should become due and be presented; and in consideration that the defendant then and there had the said moneys in his hands upon the terms and for the purpose aforesaid, the defendant undertook, &c., that he would with the said money take up, &c. Breach, that the defendant did not take up, &c., when the bill was presented for payment. The second count alleged that, in consideration that the plaintiff, at the request, &c., would deliver to the defendant the sum of 32£. 10s. of the plaintiff, provided by him for the purpose of taking up and paying a certain bill of exchange made, &c., (as before), the defendant undertook, &c., that he would take due and proper care of the said sum of money whilst in his hands in the meantime, and until the bill should become due, &c. Averment, that the plaintiff delivered the sum to the defendant for the purpose aforesaid. Breach, that the defendant did not take due and proper care; but, on the contrary took so little and such bad care, that afterwards, to-wit, &c., the said sum became, and was and is wholly lost to the plaintiff. The third count omitted all mention of the bill of exchange, but stated that, in consideration that the plaintiff, at the request, &c., had delivered the sum, &c., to be kept and taken care of by the defendant for the plaintiff, the defendant undertook, &c., to take due and proper care of the sum, &c., whilst under his charge. Breach, that the defendant did not nor would take proper care, &c.; but on the contrary thereof, whilst the same was in his charge, took so little and such bad care thereof, and conducted himself so negligently and improperly in the premises, that, &c., (loss as before). Counts for moneys, &c., and account stated. Plea, the general issue.

On the trial before Denman, C. J., at the London sittings in December, 1833, the plaintiff proved the delivery of the money to the defendant for the purpose of the bill being taken up as alleged in the declaration. The defendant was the proprietor of a coffee-house, and the account which he was proved to have given of the loss was as follows:—That he unfortunately placed the money in his cash-box, which was kept in the tap-room; that the tap room had a bar in it; that it was open on a Sunday, but that the other parts of the premises, which were inhabited by the defendant and his family, were not open on Sunday; and that the cash-box, with the plaintiff's money in it, and also a much larger sum belonging to the defendant, was stolen from the tap-room on a Sunday. The defendant did not pay the bill when presented. The defendant's counsel contended that there was no case to go to the jury, inasmuch as the defendant, being a gratuitous bailee, was liable only for gross negligence; and the loss of his own money, at the same time as the plaintiff's, showed that the loss had not happened for want of such care as he would take of his own property. The Lord Chief Justice refused to nonsuit the plaintiff, but took a note of the objection. The defendant called no witnesses. His lordship told the jury that it did not follow from the defendant's having lost his own money at the same time as the plaintiff's, that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own; and he added, that the fact relied upon was no answer to the action, if they believed that the loss occurred from gross negligence; but his lordship then said that the evidence of gross negligence was not, in his opinion, satisfactory. Verdict for the plaintiff. In Hilary term last, Sir James Scarlett obtained a rule to show cause why the verdict should not be set aside, and a nonsuit be entered, or a new trial be had.

TAUNTON, J. I have felt some doubt in this case; but, after the best consideration I can give it, I think the rule ought not to be made absolute. The counsel for the plaintiff properly admitted that, as this bailment was for the benefit of the bailor, and no remuneration was given to the bailee, the action would not be maintainable, except in the case of gross negligence. The sole question, therefore, is, whether there was any proof of such negligence. If there was, the application for a nonsuit, at any rate, cannot be granted; and it is almost (though not quite) equally clear that the defendant must be bound by the decision to which the jury has come. A great deal has been said on the point, whether the existence of gross negligence is a question of law or fact. It is not necessary to enter into that as an abstract question. Such a question will always depend upon circumstances. There may be cases where the question of gross negligence is matter of law more than of fact, and others where it is matter of fact more than of law. An action brought against an attorney for

negligence turns upon matter of law rather than fact. It charges the attorney with having undertaken to perform the business properly, and alleges that, from his failure so to do, such and such injuries resulted to the plaintiff. Now, in nineteen cases out of twenty, unless the Court told the jury that the injurious results did, in point of law, follow from the misconduct of the defendant, they would be utterly unable to form a judgment on the matter. Yet, even there, the jury have to determine whether, in point of fact, the defendant has been guilty of that particular misconduct. On the other hand, take the case of an action against a surgeon, for negligence in the treatment of his patient. What law can there possibly be in the question, whether such and such conduct amounts to negligence? That must be determined entirely by the jury. Without, therefore, laying down any abstract rule, we may, I think, with perfect safety, say that, in the present case, the question was entirely for the jury. It is fact, not law. The circumstances are extremely simple. The defendant receives money to be kept for the plaintiff. What care does he exercise? He puts it, together with money of his own (which I think perfectly immaterial), into the till of a public house. We might certainly have had more explicit evidence as to the exact state of the box; in what place it was; and what class of strangers frequented the room. If there was no negligence, if the box was locked up and put in a safe place, and proper care taken of it, these were circumstances which the defendant had the best means of knowing, and, knowing them, he might have exonerated himself. In the absence, therefore, of evidence to that effect, I think that there was a prima facie case of gross negligence, which required an answer on the defendant's part. The phrase, "gross negligence," means nothing more than a great and aggravated degree of negligence, as distinguished from negligence of a lower degree. The case of Shiells vs. Blackburne, 1 H. Bl. 158, created at first some degree of doubt in our minds. It was said that the Court, in that case, treated the matter as a question of law, and set aside the verdict, because the thing charged, the false description of leather in the entry, did not amount to gross negligence; and therefore the jury had mistaken the law. I do not view the case in that light. The jury there found, that in fact the defendant had been guilty of negligence; but the Court thought that they had drawn a wrong conclusion as to that fact. The case, therefore, does not stand against the conclusion to which I have come. It does not appear certainly from the report, how the case was treated at the trial, nor what the Judge said in summing up. But I do not find it laid down, as a rule, that in every case the question of negligence is to be matter of law. The ordinary practice is, to leave it to the jury, whether such negligence has been proved as the plaintiff has charged in his declaration. If the negligence so charged be insufficient to give a right of action, the defendant may move in arrest of judgment.

PATTESON, J. It is agreed on all hands that the defendant is not liable, unless he has been guilty of gross negligence. The difficulty lies in determining what is gross negligence, and whether that is to be decided by the jury or the Court. If the Court is to decide it, and no evidence has been given that satisfies the Court, there ought to have been a nonsuit. If the jury was to decide, I cannot feel a doubt that there was some evidence for them. I agree that the onus probandi was on the plaintiff. It appeared, by the evidence of what the defendant had said, that the money committed to his charge was laid in a box in the taproom, which room was open on a Sunday, though the rest of the premises were not. Under these circumstances, there can be no nonsuit; for there was a sufficient cause to go to the jury. Whether, in the abstract, the question of negligence be for the jury or the Court, I think it unnecessary, as my brother Taunton says, to determine. The present, at all events, was a question of fact, and therefore for the jury. The general question I approach with much diffidence. I do not know anything more difficult, than to say, in mixed questions of law and fact, what is for the Court, and what for the jury. In the present case, the principal doubt in my mind arose from the case of Shiells vs. Blackburne, 1 H. Bl. 158. The facts in that case were not disputed. It appeared that the defendant, being employed (without reward) to send out some dressed leather, entered it at the Custom House, together with some dressed leather of his own, as wrought leather, in consequence of which the whole was seized. Whether that amounted to gross negligence, must have been a question for the jury. The report does not say how they were directed, nor whether the judge told them that, in his opinion, it was gross negligence. At first I conceived that nothing appeared from the report, except that the Court thought it was not a case of gross negligence. But, on looking into the case, I find the Court thought that the jury had found the fact erroneously, and sent the issue to another jury. So that, in the present case, the only remaining question is, whether the judge left the question properly. At first, I understood that the question left had been, whether the defendant had used ordinary and reasonable care, which, although it may be a useful criterion in determining the question whether there has been gross negligence, is certainly not the same question. But it seems that his lordship left it to them to say, whether there had been gross negligence; and that what he had said respecting ordinary care, was merely by way of illustration. We cannot, therefore, dis-

turb the verdict. Whether I should have found the same verdict, is quite immaterial.

WILLIAMS, J. The only question before us is, whether the Judge should have said that the case was not made out on the part of the plaintiff, or should have left it to the jury? If the Judge be obliged to lay down a rule, it is extremely difficult to discover what that rule ought to be. Who can say where "gross negligence" begins? Can it be other than a question of fact? The case was properly left to the jury. The report of Shiells vs. Blackburne, 1 H. Bl. 158, does not state how the case was submitted to the jury. In Reece vs. Righy, 4 B. & Ald. 202, which was an action against an attorney for negligence, Abbott, C. J., left it to the jury to say, whether, under the circumstances, the defendant had used reasonable care and diligence: he did not take it from their cognizance, and pronounce his own opinion; and the verdict was not disturbed. In Moore vs. Mourgue, 2 Cowp. 479, where the defendant was charged with negligence in insuring at a wrong office, Lord Mansfield states his own direction thus:—"My direction to the jury was general; that if they thought there was gross negligence, or the defendant had acted malâ fide, they should find for the plaintiff." In that case, again, we see that the Judge did not take into his own hands, as a question of law, what was gross negligence and what not; and there the Court above would not grant a new trial. On the facts which were before the Judge, in the present case, it would have been impossible for him to pronounce a rule. It is a question of less importance, whether, under the particular circumstances, there was any evidence to go to a jury; but I think there was. Whether there was enough to satisfy their minds properly, is another question: one man's judgment is satisfied with a certain degree of evidence, another's mind with less; but I question if it can be said that the manner in which this money was left in the tap-room, was not loose custody. At all events, there was evidence for a jury.

LORD DENMAN, C. J. It appeared to me that some degree of negligence was clearly proved in the first instance. I thought, and I still think, it impossible for a judge to take upon himself to say whether negligence is gross or not. I agree to all the legal doctrine in Shields vs. Blackburne, 1 H. Bl. 158, which is, that a bailee without reward is not liable to an action without proof of gross negligence. I do not find a word there to the effect that the judge is to say whether, in fact, negligence is gross or not. I certainly did not take the view which the jury did of this case, and I pressed, as strongly as possible my opinion upon them. Whether, if I had heard all they said to each other, and had possessed all their experience, I should have changed my opinion, I cannot say; but certainly the question was for them.

Rule discharged.

KOWING vs. MANLY. (a)

(49 N. Y. 192.)
(Rev'g 57 Barb. 469.)

Action to recover the value of nine United States seventy-thirty bonds of $1,000 each. Defendants as brokers had purchased the bonds for plaintiff, and they were left with them, under written instructions not to deliver the bonds to any person except upon his written order. The bonds were subsequently delivered by defendants to wife of plaintiff upon the presentation of an order purporting to be signed by plaintiff, which order defendants supposed to be genuine. The jury were directed to find a general verdict, and in addition to answer the following questions. They found as follows:

Q. 1. Is the signature to the order for the delivery of the bonds, dated January 6, 1866, the genuine signature of the plaintiff? A. No.

Q. 2. Did the plaintiff deliver the bonds in controversy to the wife of the plaintiff? A. Yes.

Q. 3. Did the plaintiff's wife fraudulently obtain a delivery of the bonds to her? A. Yes.

Judgment for defendant.

RAPALLO, J. The plaintiff having instructed the defendant not to deliver his bonds to any person, except upon his written order, the delivery of them without such order even to the plaintiff's wife did not operate as a discharge of the defendant's obligation to the plaintiff as bailees. 1 Stark. 104.

The inference of authority on the part of the wife to act as agent for the husband, which in some cases may be drawn from circumstances, is negatived in the present instance by the written instructions given by the plaintiff to the defendants.

But independently of any question of agency, it is claimed on the part of the respondents that because at common law the wife's possession of a chattel was deemed the possession of the husband, the delivery of the bonds to the plaintiff's wife was equivalent to a delivery of them to the plaintiff.

At common law a married woman could not own personal property. The title to all chattels owned by her at the time of marriage or acquired by her afterward vested in the husband, and her manual possession of them inured to his benefit. This was the right of the husband, which he could assert. It attached to all property which she rightfully acquired, and to all of which she possessed herself by his authority or with his co-operation. But she had no power to thrust such constructive possession upon him by her own wrong, not sanctioned by him, nor to make him responsible for it against his will and without his knowledge. If she, without his authority, purchased property (not necessaries) he was not responsible for it, though delivered to

her, unless it came to his use, or some assent on his part was shown. Montague v. Benedict, 3 Barn. & Cress. 631; Bentley v. Griffin, 5 Taunt. 356; Metcalfe v. Shaw, 3 Campb. 22; Etherington v. Parrott, 1 Salk. 118.

If the delivery of chattels to the wife was in law a delivery to the husband in all cases, a tradesman need never have been at a loss for a remedy against the husband for goods sold and delivered to his wife, nor put to proof that they came to his use. So of a payment to the wife, of a debt due to the husband. According to the rule as claimed, the delivery of the money to the wife would be a delivery of it to the husband, and he ought not to be permitted to demand payment a second time. But no such effect was given to a payment to the wife. It did not bind the husband unless some authority to her to receive it as his agent appeared. Thrasher v. Tuttle, 22 Me. 335; Offley v. Clay, 2 Man. & Gr. 172.

As the delivery of the property to the wife without the assent of the husband would not create a direct liability from him to the party delivering it, it would seem clear that it would not discharge a previously existing liability from such party to her husband.

The cases cited by the counsel for the respondent in illustration of the proposition that the possession of the wife is the possession of the husband, are all cases in which the possession of the wife was lawful, and the husband or his representatives claimed the benefit of it. Those cases hold that the wife cannot acquire title to chattels by adverse possession as against the husband. Bell v. Bell's Adm'rs, 1 Ala. Sel. Cas. 465. That the title to slaves in possession of the wife under a bequest vests in the husband and survives to him, her possession being his. Machen v. Machen, 15 Ala. 373; Walker v. Fenner, 28 id. 367. So of money in possession of the guardian of the wife. 16 Ala. 343. But in all these cases the wife had acquired a property in the chattels which the law transmitted to the husband. Lord Coke in Co. Litt. 351b. points out this distinction. He says: "As to personal goods there is a diversity worthy of observation between a property in them and a bare possession; and that if personal goods be bailed to a feme, or if she find goods, or if goods come to her hands as executrix to a bailiff, and she taketh a husband, this bare possession is not given to the husband, but the action of detinue must be brought against husband and wife." The husband is, at common law, liable to be sued jointly with his wife for all torts committed by her prior to or during the coverture, and hence where she has wrongfully taken and converted personal property of another, the action must be against both husband and wife, though he be in fact innocent of any wrong, and never received any part of the property. Cro. Car. 254; Cro. Jac. 5 The liability of the husband in such a case does not rest upon the ground that he is in contemplation of law guilty of the taking of conversion, but results from the incapacity of the wife to be sued without her husband. Capel v. Powell, 17 C. B. (N. S.) 744. Where the husband and wife jointly took and converted goods, though both were liable for the wrongful act of taking them, the conversion was the act of the husband only, and was to his use only. Berry v. Nevys, Cro. Jac. 661; Keyworth v. Hill, 3 Barn. & Ald. 685; Bingham Inf. and Cov. 258; Marshe's case, 1 Leon. 312; Rhemes v. Humphreys, Cro. Car. 254. A feme with her husband cannot convert to the use of the wife, but all is done to the use of the husband, Perry v. Diggs, Cro. Car. 494. And it is said in 2 Saunders, 47, s, t, ed. of 1846, that where the wife before coverture had converted goods, if they remained in existence, and the husband refused to give them up on demand, this was a conversion by him for which an action would lie against him alone. But I apprehend it must be understood in this statement that the goods had come under the control of the husband so that he could deliver them. All the authorities cited to show that in actions of trover against husband and wife, the conversion should be alleged to be by the husband, are cases where the husband and wife had jointly committed the wrong, or the property has come to his possession. So much of the cause of action as was founded upon the acquisition of property by the wrong-doer was against the husband alone. He could not convert property to the use of his wife; but she could aid him in taking and enabling him to convert it to his own use. The conversion was by the husband only and only to his use (Cro. Jac. 661; Cro. Car. 254, 494), and the action for the conversion might have been brought against the husband alone. 2 Wms. Saund. 47, s and t. But the action so far as it is founded upon the wrong done to the plaintiff by depriving him of his property, lies against both husband and wife when both are guilty. Therefore trover may be brought against husband and wife where she was concerned. Marshe's case, 1 Lean. 312. The conversion in such case is by the husband alone, but the action lies against both, because both were concerned in the trespass of taking them. Bingham Inf. and Cov. 257, 258. In the earlier cases cited, judgments in action of trover against husband and wife for a joint conversion were reversed, because the declaration averred that the conversion was to their uses, instead of alleging it to the use of the husband; but in the later case of Keyworth v. Hill, 3 Barn. & Ald. 685, a declaration in trover against husband and wife, averring that the defendants converted the property to their own use, was held good after verdict, on the ground that trover would lie for a temporary conversion by the husband and wife, where no property was acquired by the wrong-doer, as where it was destroyed or passed over to another, and of

this the wife might be guilty as well as the husband, and that after verdict it would be intended that the conversion was of that character.

In all these cases, it will be observed the husband was alleged to have participated in the wrongful act. But a married woman might alone be guilty of a conversion, and although the husband was a necessary party to the action, the allegation should be that she converted the property; and in such a case on writ of error in the Exchequer Chamber, a plea that the defendants were not guilty was held, after verdict, to have tendered an immaterial issue, and that the issue should have been only that the wife was not guilty and a repleader was ordered. Coxe v. Cropwell, Cro. Jac. 5; Slater v. Franks, Hobart, 126.

I have found no case in which the husband has been held individually liable as upon a conversion by him to his own use, where the property was wrongfully obtained by the wife, and he was not jointly concerned in the taking, or the goods did not actually come to his use. In the present case there was no evidence showing what became of the bonds after their delivery to the plaintiff's wife, or what disposition she made of them. It was not shown that they continued in her possession, or even that they remained in existence. She may have immediately passed them over to another, in which case there was no conversion to his use. Keyworth v. Hill, 3 B. & Ald. 685; Cro. Jac. 5. No facts were proven upon which, if the bonds had been the property of the defendants, an action for their conversion could have been maintained against the husband alone, under any of the authorities cited.

The ancient rules, to which reference has been made, governing actions for goods wrongfully obtained by a married woman, are founded upon the common-law doctrine that a married woman could not acquire or own personal property. How far they are applicable under the existing laws of this State I have not deemed it necessary to discuss, as I am satisfied that even under the old law the evidence and findings would not establish a conversion of these bonds by the plaintiff, or any liability for them on his part other than that of being joined with his wife in an action for the tort committed by her. It is claimed however on behalf of the respondent, that the husband being liable for the tort committed by his wife in fraudulently obtaining the bonds, he cannot maintain an action founded on such tort.

The unsoundness of this position consists in the assumption that the liability of the husband to be joined with his wife, in an action for her wrong, is equivalent to a guilty participation by him in that wrong, or is founded upon the idea that her act is considered as his. Such is not the nature of his liability. He is not joined as a defendant on the ground that her guilt is imputed to him, but because so long as the marital relation continues the wife is incapable of being sued alone (Capell v. Powell, 17 C. B. [N. S.] 744); and his liability continues only so long as the relation of marriage subsists. Id.

In trover against husband and wife for goods converted by the wife, the reason assigned for holding a plea that the defendants were not guilty to be bad, was that "no tort is supposed in the husband, and the issue should be only that she is not guilty." Coxe v. Cropwell, Cro. Jac. 5; Slater v. Franks, Hobart, 126.

If after the commission of a tort by a married woman she should be divorced or the husband should die, the action could be brought against her alone, and if the death of the husband occurred pending an action against both it would survive against the wife. But if she should die before or pending the action, it would not survive against the husband.

This could not be if her wrong were imputed to him, or he were in law unqualifiedly responsible for it.

But it is further contended that in this case the wife having obtained the bonds from the defendants by a fraud, and they being entitled to maintain an action against both husband and wife for this wrong, the same facts upon which the plaintiff relies to recover here would charge him in that action for the same amount, and that therefore to prevent circuity of action the law will bar a recovery by him.

We do not think that the present case falls within the principle of avoiding circuity of action to which the respondents refer in support of this claim. Where the cumstances are such that the defendant, if compelled to pay the demand of the plaintiff, would immediately be entitled to recover back from him the identical amount, it is well settled that to avoid circuity of action this cross liability will be allowed to operate as a defense. Carr v. Stephens, 9 B. & C. 758; Simpson v. Swan, 3 Campb. 291; Cuckson v. Stones, 1 E. & E. 248; Schloss v. Heriot, 14 C. B. (N. S.) 64.

But this rule can be invoked only when the parties opposed in interest use the same. Walmesley v. Cooper, 11 A. & E. 216. A covenant by the plaintiff not to sue the defendant may be set up in bar of the action, but a covenant by A. not to sue C. cannot be set up in bar of an action by A. and B. against C. A liability of the plaintiff jointly with another cannot be set up as a bar to a claim due him individually, nor can a conditional or defeasible liability bar one which is absolute and unconditional. A liability of one in a representative capacity cannot be set up against a demand belonging to him in his own right. To bring the case within the common-law rule, the liability of each party must be the equivalent of that of the other. 15 C. B. 62; 16 C. B. (N. S.) 829; 2 Hurlst. & Norm. 793; 11 Exch. 831; Beecham v. Smith, E., B. & E. 442.

It is very clear that in this case the liability

of the plaintiff is very different in its nature and extent from that of the defendants. Their liability to him is absolute and unconditional. Should they die it would survive against their personal representatives. Should the plaintiff die it would survive in favor of his, but his cross liability would not survive against his representatives. The liability of the defendants is to the plaintiff alone. That of the plaintiff is only that of being joined with his wife as defendant, and this only so long as the marital relations continue. He can in no event be sued alone. If the wife has any separate estate, or should acquire one with the proceeds of the bonds, the judgment might be enforced against such estate, to the discharge of the husband's. In case of his wife dying or being divorced, before judgment, the plaintiff's liability to the defendants would cease while that of the defendants to the plaintiff would continue. To allow this defense would be equivalent to enforcing a right of action against the husband alone for a tort committed wholly by the wife, which cannot be done.

We think that the evidence offered to prove that the order produced by the defendants was not in a simulated handwriting was properly rejected. The plaintiff had not introduced any evidence to show that it was in a simulated handwriting, but had testified to the fact that it was not written by him. It was incumbent upon the defendants to prove that the order was in the handwriting of the plaintiff; and we do not think that as the evidence stood, the opinion of an expert, that the signature was not in a simulated hand, was competent for the purpose of establishing that it was the plaintiff's. In the cases cited (3 Barb. Ch. 325, and 17 Pick. 490), for the purpose of proving that a mark or signature was not genuine, evidence of experts was admitted to show that the writing was simulated. The only case cited in which evidence was admitted to show that the writing was not simulated is that of People v. Hewitt, 2 Park. Cr. 20, where on the trial of an indictment for forgery the prisoner was allowed to prove by an expert that the signature was not in a simulated hand. Whatever effect might be given to such evidence in a criminal trial for counterfeiting or forgery, as to which we express no opinion, we do not think it competent for the purpose of proving the genuineness of a signature against a party sought to be charged thereby.

The judgment appealed from should be reversed and judgment entered for the plaintiff on the verdict, with costs.

All concur. Judgment accordingly.

EDMUND RICHARDSON vs. MALACHIA J. FUTRELL.

(42 Miss. 525.)

Error to the Circuit Court of Hinds county. Hon. John Watts, judge.

Futrell sued Richardson in an action of assumpsit. The declaration contains two counts; the first is on a receipt in the words and figures following:

"$6850. Yazoo County, Miss., January 23, 1863.

"Received by M. J. Futrell, six thousand eight hundred and fifty dollars, to be invested for him in negroes as my judgment may direct, and to be accounted for by me.

"E. Richardson."

—and alleges that Richardson did not invest the money, and has failed to account for it. The second count is for work and labor, and for money lent to the amount of $6850.

Defendant pleaded non assumpsit and payment, with special notice that proof would be introduced that the money received by Richardson was "Confederate money"; that part of it was invested in slaves for plaintiff, and the remainder kept by Richardson for plaintiff at his request, and which defendant was always ready and willing to pay over and account for, when called upon.

On the trial, Richardson's signature to the receipt was proved, and the receipt read in evidence. Futrell, the plaintiff, testified that in January, 1863, defendant was indebted to him in a large sum of money, for services as overseer's wages, from 1st of January, 1858, to January, 1863, and for money lent to him in 1859; that on the 23d of January, 1863, defendant paid him $1000 for his services as overseer in 1862, leaving a balance then due, principal and interest, of $6850, of which $2800 was for borrowed money, and the balance for overseer's wages; that said sum was due in gold or its equivalent; that on or about the 23d of January, 1863, defendant came to his plantation in Yazoo county, on which plaintiff was overseer, and proposed to pay him the amount he owed him in Confederate money, but plaintiff, not having much confidence in it, was unwilling to receive it, but after some conversation with defendant, who seemed anxious about it, and stated to plaintiff that it could be judiciously and safely invested in slaves, plaintiff agreed to give up to defendant the note against him which plaintiff held for the amount due, and to take the receipt (above mentioned), and did so; that no Confederate money or other money was actually paid by defendant to plaintiff at the time, nor did Richardson offer to pay any or count any, nor did plaintiff see any in defendant's possession, although he stated he had it, and was ready and anxious to pay; that some time after this, defendant informed him that he had bought some slaves from Watkins, which plaintiff could have, if he liked them, not stating that they had been bought for plaintiff. Plaintiff declined taking them. Some time afterwards, defendant informed plaintiff that he had bought a woman and children from Mrs. Bradford, in Alabama, for $2500; that the woman would soon be confined, and as soon

as she was able to travel, she and the children would be sent to Mississippi, and that plaintiff could have them; did not say that they were bought for plaintff, or that the title to them was taken in plaintiff's name; plaintiff agreed to take them when delivered to him, if he liked them, but they were never delivered; also told defendant about same time, June or July, 1863, he wished him to make no more purchases or investments in slaves for him, and to keep his money. About this time plaintiff entered the Confederate army, and remained in service until after the surrender; never received any money from defendant, nor called on him for any; that in the spring of 1865, defendant paid plaintiff's wife $400 in Confederate money, which he is willing should be credited on his claim. Defendant, in 1865, advanced plaintiff $100 in greenbacks: it was not a loan, but was to be taken out of his wages for the year 1866, he then being overseer for defendant. Plaintiff never called on defendant for a settlement or payment of the amount due by the receipt, till the spring of 1867, or fall of 1866. No conversation had ever occurred between them about it till that time. Defendant never informed witness (plaintiff) that he could not invest the money, and never offered to return it before the close of the war, or account for it; never informed plaintiff that Confederate money was depreciating; nor did he, plaintiff, give him instructions how to invest it, or call on him for it, before the close of the war.

Defendant proved by Watkins, that defendant, Richardson, purchased of him, for Futrell five slaves for $5800, and took bill of sale to the slaves in Futrell's name; that defendant also purchased of Mrs. Bradford a family of negroes, for plaintiff, Futrell; that plaintiff told him he was not pleased with the first purchase, and that Richardson had taken them off his hands, and that he was much obliged to him for it.

Mrs. Bradford proved the sale of a family of negroes by her to E. Richardson, defendant, at $2500; that Richardson told her at the time the negroes were for Futrell; that the negroes were valuable, and were worth the money.

Defendant testified: That Futrell had been in his employment as overseer; that he settled with him every year, and gave note for any balance due him. On January 1st, 1862, he had a settlement, and owed plaintiff $7,108.31, for which he gave his note. In the latter part of 1862, after getting plaintiff to agree to take Confederate money for his debt, defendant sold his cotton for Confederate money, and in January, 1863, went to his plantation to pay off plaintiff, taking the necessary amount of money with him; plaintiff seemed loth to receive it; as he had entered the army, he said he did not know what he could do with it; made no objection to it on the ground that it was Confederate money; that he, defendant, counted out the money, and believes it was in plaintiff's presence; paid plaintiff $1000; retained balance on the agreement to invest the same in negroes for plaintiff, and executed receipt herein mentioned, whereupon plaintiff delivered up defendant's note for $7,108.31; that he did buy negroes from Watkins, under this agreement, for plaintiff, who, being dissatisfied with them, defendant kept them himself; that he afterwards bought from Mrs. Bradford a negro woman and children, of which he notified plaintiff; that plaintiff did not object to this purchase, but directed defendant to make no more investments for him, but to keep the money till he called for it, or directed him what to do with it. This, defendant did, always having on hand money to pay up, subject to plaintiff's order. Defendant further stated, that the negroes were bought from Mrs. Bradford, in Huntsville, Alabama; that at the time they could not be moved, for the reasons that the woman was in the family way, and would soon be confined; that they were to be sent to plaintiff as soon thereafter as practicable, of all which he told plaintiff fully; that not long afterwards, the Federal army occupied North Alabama, after which it was impracticable to get them to plaintiff's possession. Defendant further testified, that plaintiff never called on him for the money, nor directed him what to do with it; that at the request of plaintiff's wife he paid her $400 in April, 1865, in Confederate money; that he did not invest any more of plaintiff's money, but kept it on hand ready for plaintiff when called for; cannot say that he kept the identical bills, but the same kind of money, and in amount always on hand sufficient to pay plaintiff. After the war, he retained plaintiff as his overseer in 1865, at which time plaintiff set up no claim against him; asked defendant to lend him $100, which he did; this was afterwards repaid, by allowing him that amount as a credit on settlement for his wages for 1865. Sometime in the latter part of 1866, or early in 1867, plaintiff first suggested that defendant owed him anything, which defendant then promptly denied.

This is substantially the testimony in the case.

The following charges were asked in behalf of plaintiff, viz:

1. If the jury believe from the evidence that defendant was indebted to plaintiff in the sum of $6850 for overseer's wages, and loaned money, in January, 1863, and that no part of the same has been paid, except $400, they should find the balance for the plaintiff, with interest from the date of the settlement until the present.

2. If the jury believe from the evidence that by the terms of the settlement made between plaintiff and defendant in January, 1863, the defendant agreed to invest the sum, he was found to be indebted to plaintiff in negroes, and that by the terms of that agreement defendant was to exercise his discretion as to the purchases; still the

defendant was bound to exercise that discretion in good faith, and to exercise care and prudence in the matter, and consult the real interest of plaintiff; and if the jury believe from the evidence, that defendant did make a partial purchase of negroes for plaintiff under such agreement; yet if defendant managed the matter in so negligent a manner as that plaintiff realized no advantage from the purchase, defendant is not entitled to charge plaintiff with the amount of such purchase.

3. An agent who undertakes to invest funds for a party in negroes is held to good faith and ordinary diligence, such as a prudent man would use in his own affairs; and it is the duty of such agent to take titles to the property, and deliver the same to his principal, and also to deliver the property purchased, or give notice of the purchase, and information as to where the property is.

4. Confederate money never was a legal tender. If such funds were counted out and offered to a creditor, he was not bound to receive them.

5. If one to whom money is due, payable in dollars and cents, without designating any particular currency, should without consideration, subsequently agree to receive depreciated currency in payment, he is not bound to receive such funds when tendered.

6. An agent who receives money for investment for another, failing to make the investment, is bound to account for the money; and if the particular funds are going down in the market, and likely to become worthless, the agent is bound to return, or offer to return, the funds to his principal. The agent is bound to use such diligence in that matter as a prudent person would use in his own affairs.

7. If the jury believe from the evidence, that defendant received from plaintiff $6850 in Confederate money, to be invested for plaintiff in slaves; that defendant only invested $2500 of the funds; that he kept the remainder of the funds on hand during the war, without investing them, unless he was so directed by his principal not to invest, there being an opportunity of doing so; that plaintiff saw that the funds were continually depreciating, and likely to become worthless by the failure of the Confederate cause; and that during all this time did not return the funds to plaintiff, or offer to do so—then defendant failed to exercise the diligence and good faith required of him by law, and plaintiff should not be charged by the jury with the amount of money not invested.

8. The purchase of slaves from Watkins is not, under the pleadings and admissions in this cause, to be considered by the jury in reduction of the demand sued for.

9. If the jury believe from the evidence, that the receipt of defendant was given to evidence the ascertained pre-existing indebtedness to Futrell, and did not represent, by the intention and contemplation of the parties, confederate money, then the jury should not put the same on the basis of Confederate money.

10. If the jury believe from the evidence that the receipt given by Richardson did not represent Confederate money, then defendant cannot claim to be exonerated, because all the Confederate money he had perished in his hands.

All of which were given, except the last two.

The following charges were asked by defendant, viz:

1. If the jury believe from the evidence in this cause, that defendant was indebted to the plaintiff on January 23, 1863, for overseer's wages and money loaned, and that the defendant gave him a note in payment of the same, plaintiff cannot recover on the open account sued on in this action.

2. If the jury believe that defendant offered to pay to the plaintiff the debt he owed him, and was ready to pay it in Confederate money, and that the plaintiff agreed so to receive it, and thereupon gave up to defendant his note, and that defendant retained the money in accordance with the wishes of plaintiff to invest for him in the manner specified in the receipt, then plaintiff cannot recover upon the note or upon the open account, but only for a failure to invest the money, or account for it, as agreed upon in the receipt.

3. In order to constitute a payment by Richardson, it was not necessary that the money should actually have passed from Richardson's hands to Futrell's; but it would amount to a payment if Richardson was ready and offered to pay, and Futrell agreed to take it, and, in accordance with the wishes of Futrell, Richardson retained the money to invest for Futrell in the manner specified in the receipt filed with the declaration.

4. If Richardson invested a part of the money belonging to plaintiff in slaves for plaintiff, as specified in the receipt, and was at all times ready to account for and pay over to plaintiff the remainder in the kind of funds he had belonging to plaintiff, then plaintiff cannot recover of defendant, although the slaves so purchased may have afterwards been set free, or the Confederate money have become worthless.

5. It was not necessary that Richardson should have kept the specific notes belonging to Futrell separate and apart from his own; but it was sufficient compliance with his receipt if he at all times kept on hand a sufficient sum of the same kind of money to pay over to Futrell, or to invest for him.

All of which were given, except the fifth.

The jury found in favor of plaintiff $5,207.41 damages.

SHACKELFORD, C. J., delivered the opinion of the court.

This is an action of assumpsit in the First District Circuit Court of Hinds county, founded upon the following receipt or instrument of writing:

"Yazoo County, January 23, 1863.

"Received of M. J. Futrell, six thousand eight hundred and fifty dollars, to be invested for him in negroes, as my judgment may direct, and to be accounted for by me.

"E. Richardson."

There was also a second count in the declaration, for work and labor as overseer, and the money counts.

An account for overseer's wages before January, 1863, for $4050, also for money collected of Mrs. Robinson in February, 1859, amounting to $2800.

Defendant pleaded "non assumpsit" and "payment," with special notice that "proof would be given that the money received by Richardson was" Confederate money; "that part of it was invested in slaves for plaintiff Futrell, and the remainder kept by Richardson for plaintiff at his request, and which defendant was always ready and willing to pay over and account for, when called upon by Futrell."

Issues were made and the case submitted to a jury, and verdict rendered for defendant in error for the sum of $5,207.41, and judgment rendered thereon.

Plaintiff in error moved the court for a new trial. The motion was overruled, and exceptions taken to the ruling of the court. All the proof in the case, instructions given and refused, are embraced in the bill of exceptions, and the plaintiff brings the case here by writ of error.

We shall consider and determine the first, second, and third assignments together.

The first is, that the court erred in refusing the motion for a new trial.

Second, that the court erred in giving the first, second, third, fourth, fifth, sixth, seventh, and eighth instructions asked for by the plaintiff below.

Third, that the court erred in refusing the instructions asked by defendant below.

The disposition of the points raised by the second and third assignments of error will decide the first assignment of error.

The first instruction objected to it is as follows: "If the jury believe from the evidence that the defendant was indebted to plaintiff in the sum of $6850 for overseer's wages and loaned money in January, 1863, and that no part of same has been paid, except $400, they should find the balance for the plaintiff, with interest from the date of the settlement until the present."

This instruction would have been correct if there had been no controversy in relation to the indebtedness and kind of indebtedness, whether it was upon the receipt or instrument of writing filed, or upon the open account.

It will be seen from the proof in the case, that the note of plaintiff in error to Futrell, due on the first day of January, A. D. 1863, was given up to the plaintiff in error in the settlement between Richardson and Futrell on the 23d day of January, A. D. 1863, at which time the plaintiff in error paid Futrell the sum of $1000 for his wages as overseer for and on Richardson's plantation for the year 1862; that on that settlement the "receipt" sued on in this action was given to Futrell.

This instruction, as given, seems to direct the jury to disregard the receipt for the money, and to find upon the open account filed with the second count in the declaration.

It directs them to find for the plaintiff below if there was no payment to Futrell; virtually excluding from the jury all the evidence on the trial, introduced by plaintiff in error to show why there was no payment by Richardson to Futrell of the money mentioned in the receipt of Richardson.

The jury were, under this instruction, to consider the character of the indebtedness the same after Futrell had given up to Richardson his note due the 1st of January, 1863, as it was before the surrender of this note and the taking of the receipt by Futrell on the 23d of January, 1863, for $6850, by which he undertook to invest the money therein mentioned in negroes for Futrell.

It was calculated to mislead the jury, and may have done so. In view of the testimony in the case, the giving of this instruction was erroneous.

The next instruction objected to is the second, which is in these words: "If the jury believe from the evidence, that by the statements made between plaintiff and defendant in January, 1863, the defendant agreed to invest the sum, he was found to be indebted to plaintiff in negroes, and that by the terms of that agreement, defendant was to exercise that discretion in good faith, and to exercise care and prudence in the matter, and consult the real interest of plaintiff; and if the jury believe from the evidence, that defendant did make a partial purchase of negroes for plaintiff under such agreement, yet, if defendant managed the matter in so negligent a manner as that plaintiff realized no advantage from the purchase, the defendant is not entitled to charge plaintiff with the amount of such purchase."

The receipt of Ricardson to Futrell for the money to be invested in negroes for Futrell, creates a case of bailment known as a mandate, which is defined to be "a contract by which a lawful business is committed to the management of another, and by him undertaken to be performed without reward." Story on Bailments, ch. 3, § 137, pp. 130 et sequitur. According to the general principles regulating contracts of this kind, "a mandatary, as the contract is wholly gratuitous, and for the benefit of the mandator, is bound only to slight diligence, and of course is responsible only for gross neglect. This is the doctrine of the com-

mon law universally applied to mandates." Id. ch. 3, § 174, pp. 167-8.

The court below seems to have lost sight of the doctrine of mandatary bailments just adverted to, in suffering this instruction to go to the jury without specifying the kind of negligence the plaintiff in error should be made liable for.

The instruction is too broad. It was in evidence before the jury that the plaintiff in error had made two purchases for the defendant in error. One he had declined to take; the other he was certainly notified of: by his own admission it is proven that he was in possession of all the information that Richardson had. He was advised of the purchase soon after it was made, also the reasons why the negroes were not delivered or brought to defendant in error: this last fact was communicated to him at the time he informed Richardson to purchase no more negroes.

Then there was also a question of acquiescence to be considered by the jury: certainly Richardson could not be responsible for the invasions of the Federal armies into the district of country where the negroes purchased of Mrs. Bradford were.

Richardson could be held responsible, with as much propriety, for the loss of these negroes, had he transported them immediately to Mississippi from Alabama to his plantation, where the family of defendant in error was living during the war, and though no actual delivery by Richardson had been made to Futrell, and while there on his plantation, the federal forces had captured them, or prevented their removal.

Without any proof of the repudiation of this purchase, the jury were authorized to find against the plaintiff in error, and hold him responsible for his outlay for the negroes purchased from Mrs. Bradford. There was no proof of such negligence in this second purchase warranting such a broad and unqualified direction to the jury to find against the plaintiff in error.

It is in direct conflict with the well-settled doctrine governing this kind of bailment, and it was error to give the instruction without modification.

The third and fourth instructions given and objected by plaintiff in error contain mere abstract principles of law, and should have been refused, as they are not made applicable to any supposed state of facts appearing in the case, being therefore irrelevant, and calculated to embarrass or mislead the jury.

The next instruction objected to and given for the defendant in error is the sixth, which is as follows: "An agent who receives money for investment for another, failing to make the investment, is bound to account for the money; and if the particular funds are going down in the market, and likely to become worthless, the agent is bound to return, or offer to return, the funds to his principal. The agent is bound to use such diligence in that matter as a prudent person would use in his own affairs."

After the defendant in error instructed plaintiff in error not to invest any more of his money in negroes, the plaintiff in error was no longer Futrell's agent to invest the money so held by him; but held it as a deposit, subject to the order and control of Futrell.

The character of the bailment having been thus changed by the order not to invest, etc., Richardson became a mere depositary of the funds uninvested of Futrell.

Judge Story defines this kind of bailment to be "a bailment of goods to be kept by the bailee without reward, and delivered according to the object or purpose of the original trust." Story on Bailment, § 41, ch. 3, p. 41.

The duties of a depositary are, that he shall keep it with reasonable care, and that he shall, upon request, return it to the depositor, or otherwise deliver, according to the original trust. Story on Bailments, ch. 2, § 61. "Such bailee is only liable to slight diligence, and therefore not answerable, except for gross neglect." Ib. ch. 2, § 62. And he must take reasonable care of the deposit.

These rules are well settled in this character of bailments.

The plaintiff in error, after the notice from Futrell in June, 1863, was directed not to make any more investments in slaves, but to keep the money. Richardson's testimony about the notice differs from Futrell's in this, that Richardson "was to keep it for him until he called for it, or directed him what to do with it." This statement, in addition to what Futrell said relative to this order, does not affect the responsibility of Richardson to Futrell. There can be no question as to the legal effect of the order. The fund was certainly as much under the control of Futrell after he gave Richardson notice not to invest any more of it in negroes, as if he had instructed Richardson "to keep it until he called for it, or instructed him what to do with it." Richardson's version of the order.

If the money in the hands of Richardson, belonging to Futrell, was notes of the Confederate States, or Confederate money, there being testimony in the case that it was Confederate money, Richardson was not under any obligation to return, or offer to return the funds in his hands to Futrell, because the "particular funds were going down in the market, and likely to become worthless."

It is shown by the testimony in the case, that both parties were residents of the State of Mississippi, one of the States constituting the "so-called Confederacy," and each party had the same opportunities and facilities to find out the depreciation of the Confederate notes. Richardson was not bound to use any other diligence than to safely keep the funds in his hands; and if the defendant in error neglected to instruct the

plaintiff in error what to do with the funds, he must bear the loss caused by the depreciation of the kind of funds alleged to have been deposited by Futrell in the hands of Richardson.

There being no evidence that Richardson gave notice to the defendant in error that the Confederate money was depreciating, or that he offered to return the same, the jury were, under this instruction, bound to find for Futrell, if they believed the funds were Confederate money. It is clear that this instruction is in conflict with these views of the law, and could hardly have failed to mislead the jury in their consideration of the evidence before them, relative to the deposit of the funds in Richardson's hands. For these reasons we think the instruction should not have been given.

The next instruction excepted to and given for the defendant in error is the seventh, which is in these words: "If the jury believe from the evidence that defendant received from plaintiff $6850 in Confederate money, to be invested for plaintiff in slaves; that the defendant only invested $2500 of the funds; that he kept the remainder of the funds on hand during the war, without investing, unless he was so directed by his principal not to invest, there being an opportunity of doing so; that plaintiff saw that the funds were continually depreciating, and likely to become worthless by the failure of the Confederate cause; and that, during all this time, defendant did not return the funds to plaintiff, or offer to do so—then defendant failed to exercise the diligence and good faith required of him by law, and plaintiff should not be charged by the jury with the amount of money not invested."

This instruction directs the jury to hold the plaintiff in error responsible for not doing that which he was prohibited from doing by the notice from Futrell to Richardson in June, 1863. He had no power given him to invest the money, and any investment of the funds by Richardson would have been on his own responsibility, and in violation of the instructions of Futrell. Although Richardson knew the funds in his hands were depreciating, he was not bound, for the reasons we have stated before, to give the defendant in error notice of such depreciation.

The statement in this instruction, that "the defendant failed to exercise the diligence and good faith required of him by law," for not returning the money, etc., was placing by the court a responsibility upon the plaintiff in error unwarranted by the facts of the case or by the law applicable to them. This was a direction, in other words, to find a verdict for the defendant in error for the balance, after deducting the $2500 invested in slaves, left in Richardson's hands.

For these reasons the instruction should not have been given.

It is insisted by counsel for plaintiff in error, that the fifth instruction asked for Richardson, and refused, should have been given. It is in these words: "It was not necessary that Richardson should have kept the specific notes belonging to Futrell separate and apart from his own; but it was a compliance with his receipt, if he at all times kept on hand a sufficient sum of the same kind of money to pay over to plaintiff, or invest for him."

There was no special deposit of any particular Confederate notes made by Futrell; the testimony touching this point shows that there was only a general deposit of the money; that Richardson at all times had a sufficiency of Confederate notes on hand to pay the amount received, whenever demanded: this was all he could be required to do.

It should have been given by the court, and it was error to refuse it.

We deem it unnecessary to express any opinion on the other grounds insisted upon for a new trial, or upon the position assumed by counsel for the defendant in error, that "the verdict is manifestly correct, and sustained by the evidence." It might prejudice the case, as a new trial will be awarded. We should not say anything that might have a tendency to prevent a fair and impartial consideration, by the jury, of the evidence on the next trial.

For the errors before stated, the judgment will be reversed, the verdict set aside, and the cause remanded for a new trial.

JAMES MONTGOMERY, ADMINISTRATOR, de bonis non, of REUBEN B. DAVIES, DECEASED, PLAINTIFF IN ERROR, VS. JOHN EVANS, DEFENDANT IN ERROR.

(8 Ga. 178.)

Assumpsit, etc., in Crawford Superior Court. Tried before Judge Floyd, August Term, 1849.

This was an action brought by John Evans against Montgomery, as the administrator of Reuben B. Davies, to recover one hundred and fifty-seven dollars, deposited by Elijah Evans, as alleged, with the intestate during his life, for the use of John Evans.

The plaintiff first proved by John Evans, Sr. that he was present when the money was deposited for John Evans, who was then in Mississippi. Plaintiff then offered the testimony of Elijah Evans, taken by commission, who swore that he, as the agent of John Evans, deposited the money with Davies, for Evans.

Defendant's counsel objected to this evidence, on the ground, that as agent, he was liable for the money to John Evans, and "was interested in shifting the burden from himself, and placing it on defendant."

The Court overruled the objection—and this is the first decision complained of.

The defendant then objected to the following interrogatory, as being leading and irrelevant:

"Look at the annexed account, and say if it was made out by you—and if yea, how

came you to make out your account, and prove it in your own name? Were you, or not, acting as the agent of John Evans—and were you not told that the account should be made out in that way—and was it not so done through mistake?"

The account referred to was made out for the same money, as due to Elijah Evans.

In answer to this interrogatory, the witness stated that he made out the account thus by the advice of defendant.

The Court overruled this objection—and this decision is alleged as error.

Other evidence was introduced, to prove the same facts, as already stated.

Defendant then moved to dismiss the case, on the ground, that no demand was proven to have been made on the intestate or his representative. Elijah Evans, the witness, had demanded the money as his own—at least, he had sworn to it in an account, as due to himself, and ordered suit if not paid; and said suit was brought, and then dismissed by plaintiff. The Court overruled this motion, and defendant excepted.

The Court charged the jury, that it was necessary for plaintiff to prove a demand, in order to recover; and they might look into the testimony to ascertain if this fact was proven—to which charge, defendant excepted, on the ground, that no such evidence had been before the jury.

The defendant moved for a new trial, on the several grounds of error alleged; and farther, because the verdict was contrary to the evidence. The Court overruled this motion, and defendant excepted.

And on these several exceptions, error is assigned.

By the Court.—Nisbet, J. delivering the opinion.

1. The counsel for the defendant moved on the trial, that the plaintiff be non-suited, because there is no allegation in the declaration, that a demand had been made on the defendant's intestate or his representatives, after his death, of the money sued for. Whether such averment was necessary, depends upon the question, whether the defendant is liable without such demand. If he is not—if the demand is a condition precedent to his liability—I apprehend it will be conceded that the averment was indispensable. To determine this question, we must look to the character of the deposit out of which the action grew. By two of the witnesses, it is proven that Elijah Evans, as the agent of John Evans, delivered to R. B. Davies, in his lifetime, from $150 to $160, for John Evans. The testimony most favorable to the plaintiff, is that of the witness, Montgomery; and I take his evidence as determining the character of the transaction. He swears that "Elijah Evans deposited with Davies between $150 and $160 of money belonging to John Evans, and requested him to pay the same to John Evans, upon his, John Evans', return home, which Davies agreed to do." At the time of this deposit, John Evans was absent, on a visit to the State of Mississippi. This action is brought by John Evans, against the administrator of R. B. Davies, who died shortly after the deposit, for the money. The delivery of this money by John Evans, through Elijah Evans, his agent, to Davies, was, to our apprehension, a bailment, under the class deposit. A deposit is defined to be "a bailment of goods, to be kept by the bailee without reward, and delivered according to the object or purpose of the original trust." Story on Bailment, §§ 41, 42. The delivery, in this case, if not a deposit, must belong to the class mandate; at least, if not a deposit, I do not see that it assimilates at all to any bailment, but that of mandate. If not a mandate, it must, then, be a deposit; but it is not a mandate—therefore, it is a deposit. Without the aid, however, of a syllogism, I think it is demonstrable that this is a deposit. A mandate "is a bailment of goods, without reward, to be carried from place to place, or to have some act performed about them." Story on Bailment, § 5. The difference between a deposit and a mandate, according to Sir William Jones, is, that the latter lies in feasance, and the former in custody. Jones on Bailm. 53. That is to say, the depository is charged with keeping the goods only, and the mandatory with doing something with or about them. Mr. Story, holding that custody involves feasance, and feasance custody, excepts to Sir Wm. Jones' distinction, and says, "the true distinction between them is, that in case of a deposit, the principal object of the parties is the custody of the thing, and the service and labor are merely accessorial. In the case of a mandate, the service and labor are the principal objects of the parties, and the thing is merely accessorial." Story on Bailm. § 140. The American jurist, I think, has the advantage of the British scholar, in fulness. The object of a mandate is, that the thing bailed may be transported from point to point, or that something be done about it. The object of a deposit is, that the thing be kept, simply. Without elaborating these distinctions, it is already seen, that this is a deposit. This money, delivered to Davies, was not to be carried anywhere, nor was anything to be done concerning it. By the evidence, the money was deposited with Davies, with a request to pay it to John Evans, upon his return home; which he agreed to do. It was a contract of deposit. There was a delivery, an undertaking to keep it until Evans returned home, and then to pay it to him. It would be a very unreasonable construction of the undertaking to pay it to Evans when he returned home, that it involves the obligation to carry it to him—to make a tender of it—in order to protect Davies from liability to suit. Davies had no interest in the matter; the custody of the money was assumed for Evans' benefit; and at the moment Evans did arrive, the money was then in Davies' hands, as his depository. Before he returned, no one had a right to

demand it. When he returned, Davies held to him the relation of depository. Suppose there had been nothing said about paying the money to Evans when he returned, but the deposit had been simply for Evans, when he returns—the obligations of Davies would then have been just what they now are. He would have been bound to pay it to him upon demand—that is just his obligation now. Mr. Davies, then, was a depository; that is his legal character; a deposit is the legal character of the transaction. What, then, under the law, are his obligations? They are two. First—it was his duty to keep the money with reasonable care. Nothing need be said about this obligation, for it is not sought to charge him for want of care. Second—it was his duty, on request, to deliver it, according to the trust. His obligation, by the terms of the trust, was to pay it, that is, deliver it, to Evans, upon his return. He was bound to deliver it on request; and upon refusal so to do, and not until then, has he violated his contract; and not until then was he liable to be sued for it. Such is the law which governs this species of bailment. If the request was preliminary—a condition precedent to liability—it was indispensable to aver it, and also indispensable to prove it. The exception to the declaration was well taken, and the plaintiff ought to have been non-suited.

As to the necessity of request, see Story on Bailm. §§ 61, 107. Brown vs. Cook, 9 Johns. R. 361. Hofmer vs. Clarke, 2 Greenleaf's R. 308. 1 Dane's Abr. ch. 17, art. 1, 2. 2 Black. Com. 452. Pothier's Traite, de Depot, n. 22. As to the necessity of averring and proving a request, see Com. Dig. Pleader, c. 69. 1 Saunders R. 33, n. 2. 5 B. & Ald. 712. 1 D. & R. 361, S. C. 1 Taunt. 572.

2. The presiding Judge instructed the jury, that it was necessary to prove the request in this case. He must, therefore, have believed that it was sufficiently averred. In looking into the declaration, I find no averment but the usual formal averment—"although often requested." Where request is a condition, as in this case, precedent to liability, that is not sufficient. The request must be so set forth, as that the Court may judge whether it is sufficient, according to the contract. Hardw. 38. Skin. 39. Saund. on Plead. and Ev. 1 vol. 131. 1 Chitty Plead. 244, '5. 1 Greenl. Ev. § 51. It must be stated, with time and place, and by and upon whom made. 3 Bulst. 298. Wallis vs. Scott, 2 Stra. 88. Back vs. Owen, 5 T. R. 409. Com. Dig. D. Plead. c. 69.

3. Elijah Evans was called to prove the deposit of the money with Davies, and the terms and circumstances of the deposit. His testimony was excepted to, upon the ground of interest, and the exception overruled; and that is assigned for error. The witness was called to establish the liability of the defendant—to prove the payment, by him, of a sum of money belonging to the plaintiff, to the defendant's intestate. In the absence of all such proof, the agent (the witness) would be himself liable to the plaintiff, his principal, for the money of his principal. He is called to fix a liability upon another, which, if established, would discharge himself. He is, therefore, interested. If there is a recovery for the plaintiff, I see no reason why that recovery could not be pleaded in bar of an action against him, for the same money. This point is fully settled in Nisbet vs. Lawson, 1 Kelly R. 282.

4. The presiding Judge, as before stated, instructed the jury that a request was necessary to be proven, and that they might look into the testimony to ascertain if it was proven, and if they were satisfied that a demand was proven to have been made by Elijah Evans upon Wm. L. Johnson, the former administrator upon Davies' estate, then they would find for the plaintiff—and if not, they would find for the defendant.

Exception is taken to this charge, as being made in relation to a demand, about which there was no testimony. I have looked carefully into the evidence, and find no testimony whatever in relation to a demand by the plaintiff. This being true, it was error to instruct the jury to look into the evidence, and if they found the demand proven, to find for the plaintiff, and if not, for the defendant. It has been, over and over again, decided by this Court, that it is error to instruct the jury in reference to a matter of fact, about which there is no evidence. The language of the Judge is, that if they believed that a demand was made by Elijah Evans, they should find for the plaintiff. This was wrong, in any view of it. If he intended to be understood to instruct them, that if a demand was made by Elijah Evans, as the agent of John Evans, they should find for the plaintiff, he ought to have so expressed himself; but he does not. From what he does say, the jury could have believed nothing else, but that he meant, that a demand by Elijah Evans, in his own right, would be sufficient to authorize the plaintiff to recover. If he is to be understood as assuming that the agency of Elijah Evans, in making a demand, was proven, the charge is equally erroneous; because there is not a particle of evidence to prove that agency. The agency of Elijah Evans, in making the deposit, is proven; but so far from his agency in making a demand being proven, or there being any testimony to prove it, the reverse is true. The demand which was made, and the only demand about which there is any evidence, was made by Elijah Evans, in his own right. He presented to Davies' administrator the account, made out in his own name—swore to it—and suit was actually brought upon it, in his name. All the evidence, in addition, as to demand, was irregularly admitted, because there was no demand averred.

Upon these grounds, let the judgment of the Court below be reversed.

MARINER vs. SMITH.
(5 Heisk. 203.)

Appeal in Error from Circuit Court at Covington. G. W. Reeves, J.

FREEMAN, J., delivered the opinion of the Court.

This suit is brought to recover from plaintiff in error the value of $900 in gold, or said sum, as there are several counts in the declaration, deposited by Smith with the firm of Mariner & Curtis, in the city of Memphis, in August, 1866. Suit was commenced against the other member of the firm, Curtis, but no process served on him, and suit dismissed as to him.

The material facts on which the questions presented in this record are raised, are substantially as follows:

The said firm was a house in the city of Memphis engaged in the boot and shoe business. Smith was in Memphis in August, 1866; went to the house of the firm, and deposited with their clerk and book-keeper, Wright, $900 in gold, which was counted by Wright, and put into the safe, as we assume, in the presence of Smith. The next day witness, Sherrod, saw Mariner, at the request of Smith, and instructed him, for the plaintiff below, to sell the gold if the premium rose to 50 per cent. If it did not, to keep it until Smith returned from Mississippi, where he was going, and return it to Smith. Mariner made no objection to the deposit, and promised to sell the gold on the terms indicated, but expressed his doubts as to the premium rising to the sum required.

The money was stolen from the safe, and, on return of Smith, in eight or ten days, he applied for it, and learned of its loss. Mariner stated to Smith at the same time that he had never seen the gold, and supposed their porter had stolen it. It seems at the same time this money was stolen, other moneys were taken belonging to a Miss Curtis, a sister of Curtis the member of the firm. Mariner stated also that he had arrested the porter for the supposed theft, but he had been discharged for the want of proof. He had also employed detectives to endeavor to discover the thief, but they had failed to do so. There were, perhaps, other moneys of the firm taken from the safe at the same time. The proof shows, too, that the firm kept their valuable papers, as well as money, in the safe, and gave the usual care and attention of business men to the safety of their money and papers.

The case must turn here on the charge of the Circuit Judge. The questions presented for his decision involved the liability of a bailee without reward, for simple mandatary, and of a bailee for reward; and whether in this case there was a contract for hire, either express or implied, and if so, what was the amount of diligence required of such bailees.

He stated to the jury, that if the bailment was a mere deposit, without reward, the defendant would only be bound to ordinary diligence, and in case of loss by theft or otherwise, would not be liable. He then adds, "the law of bailments without reward holds the bailee bound to such diligence as a prudent man would exercise in his own affairs." This was all very well; but he continues, "if the nature of the bailment was of such character as to require extraordinary care and responsibility on the part of the bailee, the law will imply reward;" and winds up the sentence by saying, that "if this was a bailment for a fee or reward, express or implied, the defendant would be bound for ordinary negligence or apparent negligence, and plaintiff would be entitled to recover."

We know of no rule of law on the subject of bailments which would hold a party liable for mere apparent neglect. Certainly, in every class of bailments, the negligence required to fix liability, whether the law in the particular case holds the party responsible for slight or gross negligence, must be real, actual failure to perform the duties imposed on the bailee by the contract into which he has entered; and mere apparent negligence, which was not real, would not fix responsibility upon him.

The undertaking of a mandatary, or bailee without compensation, is sometimes laid down to be a trust, which imposes upon the bailee fidelity in its execution as a trustee. We think it is better defined by the simple idea of a contract, by which the party undertakes to do what is agreed between himself and the bailor, and that the liabilities of the bailee and rights of the bailor grow fairly out of the elements that make up that contract, to be ascertained by the express terms of the contract, as explained by all the surrounding and attending facts and circumstances of the case. As in this case, if it be assumed that the undertaking of the parties to keep the gold, and invest or return it, was without reward, then the terms of the contract, as defined by this undertaking and its attendant circumstances, would have been, that as it was placed in his safe with his own money and papers, that it should be kept in that place of deposit, and such care taken of it as would or ought to be given by an ordinarily prudent man of the deposits of like character placed in the same place of deposit. As a matter of course, the amount of care and precaution to be taken of the deposit, must necessarily be largely influenced by the greater or less value of the article deposited, and such naturally would be the understanding of the parties at the time, and would be an element of the contract as made, founded on such understanding.

This idea is sustained by opinion of McKinney, J. in case of Colyar, trustee, v. Taylor, 1 Col., 378. He says: "The degree of care required of a mandatary, is essentially dependent upon the circumstances of the case. The general principle governing his liability is indeed the same in all cases, but its application is materially affected and varied by the circumstances of each particular case. The bailor's trusting him with the

goods, is a sufficient consideration to require of him careful management. We hold, therefore, the sound principle in such cases to be, that the liability of bailee without reward, is to be determined by a performance bona fide of the fairly understood terms of the contract, ascertained by the express contract, explained by the surrounding and attendant circumstances, or of the failure to perform the terms of said contract, as it was understood by the parties at the time.

It is sometimes said, rather loosely, that such bailee is only responsible for gross negligence. This we think, as remarked by Rolfe R. in case of Wilson v. Brett, 11 Meeson & Welsby, 113, cited in Smith's L. Cases, vol. 1, 421, is "nothing more than negligence with the addition of a vituperative epithet."

Any neglect of the fairly understood terms of the contract, as above explained, by which the deposit was lost, would subject the bailee to liability for the injury resulting from such neglect, whether it might be characterized by the term gross, or a less forcible word. Yet it must be neglect to perform the stipulations and undertaking of his contract, that shall create this liability. We think a very sound and correct view of the liability of such bailee, or persons to whom goods are delivered without reward, is given in Smith's L. Cases, "that the legal ground of such liability when goods are delivered, for injury or loss to the goods, is pretty much the same as that of one to whom they are not delivered, but from whose negligence or carelessness injury has ensued to them, or loss been sustained by the owner." The gist of the plaintiff's right of recovery in all such cases, is violation of contract, and injury to the bailor, resulting from such violation.

His Honor the Circuit Judge charged the jury, that if the nature of the bailment was of such a character as to require extraordinary care and responsibility on the part of the bailee, the law will imply reward, etc. We think this was not a correct statement of the law in reference to the facts of the case. The law might or might not imply a reward under the circumstances indicated. It would depend upon the fact whether the jury could gather from the surrounding facts and circumstances that it was so understood by the parties; for if the bailee received the deposit, however valuable, or however much care and responsibility might be involved in its proper keeping, yet if he undertook to keep it gratuitously, or the jury can fairly see that such was the intention and understanding of the parties at the time of making the contract, or of the bailment, then the law would not, against such intention or understanding, imply a right to reward for the service. The law will never imply a liability under a contract against and opposed to the agreement of the parties, nor turn that into a debt which was intended to be gratuity.

We will not undertake to analyze this involved and most unsatisfactory charge, in order by construction to arrive at what we suppose to have been the meaning of the Court, or the understanding of the jury as to what the meaning was. We think that it is so contradictory, and in the matters we have indicated, erroneous, that it is due to a fair administration of the law that another trial be had, before a jury, when the law can be given to them clearly, to guide them in their investigation of the facts of the case, out of which the rights of the one party and the liabilities of the other must arise.

Reverse the judgment and remand the case.

HARTER vs. BLANCHARD.
(64 Barb. 617.)

Appeal by the defendant from a judgment entered upon the report of a referee.

By the Court, E. DARWIN SMITH, J.

This action is brought to recover for the keeping and care bestowed by the plaintiff upon the defendant's horse. From the report of the referee and the evidence adduced before him, it appears that the defendant, being a resident of Saratoga, and the owner of said horse, in the fall of 1870, entrusted the same to one William P. Tanner, residing at Frankfort, in Herkimer county, to be kept at pasture, without any charge to be made therefor. That said Tanner kept said horse on his farm, and occasionally rode him, and took him to exhibit him at the Herkimer county agricultural fair in November of that year, on which occasion he took him to the village of Herkimer, and placed him in the hotel barn of one Tower, where he remained during the day, and was left in the evening, tied with a halter, in a stall in said barn. That on the next morning the said horse was found in the stable where he had been left the previous evening, with one of his fore legs broken. That thereupon the plaintiff was sent for by said Tanner, and employed by him to take care of said horse and attempt to cure him, and it was arranged between the plaintiff and said Tanner that the said horse should be removed to the plaintiff's barn, and that he should take charge of him at that place, and he did so. This action is brought for work and services by the plaintiff, which the referee finds was reasonably worth $1 per day, for which sum, with some deductions for the use of said horse by the plaintiff, judgment was directed by the said referee.

From these facts, it appears that the said Tanner was the naked bailee of said horse, without reward or consideration. As such bailee, he was bound to exercise slight care, and was responsible only for gross negligence. (Story on Bailm. §§ 62, 65, 66.) When the horse broke his leg, the owner—the defendant—being at a distance, the said Tanner was doubtless bound, in the exercise of ordinary care, to provide for his keeping, care and cure, as he would if the horse had been his own, and would have been guilty of gross neglect if he had omitted to make such provision.

This contract with the plaintiff was a proper and reasonable one, under the circumstances. This is not questioned. The plaintiff, as I gather from the evidence, was a farrier, and a fit and proper person, and had proper accommodations for the charge of said horse. As a bailee in possession of the horse, the said Tanner had an implied authority to contract in behalf of the defendant for such care and keeping of horse. He could no longer be pastured, and an exigency had arisen, when, to preserve his life and restore, if possible, his broken leg, such an arrangement as Tanner made with the plaintiff, became necessary; and I have no doubt he had full authority to bind the defendant by the contract then made, until at least, the defendant could be informed of the accident to his horse, and could have time and opportunity to make other provision for his custody, care and keeping. The defendant, it appears, was soon apprised of the accident to his horse, and that the same was in the possession of the plaintiff for care and keeping, and did not disaffirm such contract, or make other provision for the charge and custody of such horse.

It springs from the very relation of bailor and bailee that the latter necessarily has authority to contract for and bind the bailor in such cases, for the preservation and care of the property in his possession, and particularly with live animals injured as in this case, as much so as the master of a vessel has power to bind the owner for repairs arising from injury or casualty at sea. Contracts so made are clearly binding upon the principal or bailee. (Story on Bailm. §§ 198, 199. 1 Pothier 167.) And this is so, even though the bailee may also be liable in such case upon a particular contract. It seems to me, quite clear that the defendant was primarily liable for the care and keeping of the horse, upon the facts found by the referee, upon the original contract; and that he should be held liable as upon an affirmation of Tanner's contract, when he learned of it, and did not disaffirm it by notice to the plaintiff directly, and distinctly reclaim his horse, or make other provision for its care; and that the plaintiff's rights in this connection are not affected by the relations between Tanner and the defendant; nor by the consideration that Tanner was guilty of such negligence in the use or abuse of the horse, as to be responsible to the defendant for the injury sustained by him. The plaintiff had nothing to do with that question.

The decision of the referee upon the whole issue, I think, was right, and the judgment should be affirmed.

D. THORNE AND W. THORNE against DEAS.
(4 Johns. 84.)

This was an action on the case, for a nonfeasance, in not causing insurance to be made on a certain vessel, called the Sea Nymph, on a voyage from New York to Camden, in North Carolina.

The plaintiffs were copartners in trade, and joint owners of one moiety of a brig called the Sea Nymph, and the defendant was sole owner of the other moiety of the same vessel. The brig sailed in ballast, the 1st December, 1804, on a voyage to Camden, in North Carolina, with William Thorne, one of the plaintiffs, on board, and was to proceed from that place to Europe or the West Indies. The plaintiffs and defendant were interested in the voyage, in proportion to their respective interests in the vessel. On the day the vessel sailed, a conversation took place between William Thorne, one of the plaintiffs, and the defendant, relative to the insurance of the vessel, in which W. Thorne requested the defendant that insurance might be made; to which the defendant replied, "that he (Thorne) might make himself perfectly easy on the subject, for that the same should be done." About ten days after the departure of the vessel on her voyage, the defendant said to Daniel Thorne, one of the plaintiffs, "Well, we have saved the insurance on the brig." D. Thorne asked, "How so? or whether the defendant had heard of her arrival?" To which the defendant answered, "No; but that, from the winds, he presumed that she had arrived, and that he had not yet effected any insurance." On this, D. Thorne expressed his surprise, and observed, "that he supposed that the insurance had been effected immediately, by the defendant, according to his promise, otherwise, he would have had it done himself, and that, if the defendant would not have the insurance immediately made, he would have it effected." The defendant replied, that "he (D. Thorne) might make himself easy, for he would that day apply to the insurance offices, and have it done."

The vessel was wrecked on the 21st December, on the coast of North Carolina. No insurance had been effected. No abandonment was made to the defendant by the plaintiffs.

The defendant moved for a nonsuit on the ground that the promise was without consideration and void; and that, if the promise was binding, the plaintiffs could not recover, without a previous abandonment to the defendant. These points were reserved by the judge.

A verdict was taken for the plaintiffs, for one half of the cost of the vessel, with interest, subject to the opinion of the court on the points reserved.

KENT, Ch. J., delivered the opinion of the court. The chief objection raised to the right of recovery in this case, is the want of a consideration for the promise. The offer, on the part of the defendant, to cause insurance to be effected, was perfectly voluntary. Will, then, an action lie, when one party intrusts the performance of a business to another, who undertakes to do it gratuitously, and wholly omits to do it? If the party who makes this engagement,

enters upon the execution of the business, and does it amiss, through the want of due care, by which damage ensues to the other party, an action will lie for this misfeasance. But the defendant never entered upon the execution of his undertaking, and the action is brought for the nonfeasance. Sir William Jones, in his "Essay on the Law of Bailments," considers this species of undertaking to be as extensively binding in the English law, as the contract of mandatum, in the Roman law; and that an action will lie for damage occasioned by the non-performance of a promise to become a mandatary, though the promise be purely gratuitous. This treatise stands high with the profession, as a learned and classical performance, and I regret, that, on this point, I find so much reason to question its accuracy. I have carefully examined all the authorities to which he refers. He has not produced a single adjudged case; but only some dicta (and those equivocal) from the Year Books, in support of his opinion; and was it not for the weight which the authority of so respectable a name imposes, I should have supposed the question too well settled to admit of an argument. (a)

A short review of the leading cases will show, that, by the common law, a mandatary, or one who undertakes to do an act for another, without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it, and does it amiss. In other words, he is responsible for a misfeasance, but not for a nonfeasance, even though special damages are averred. Those who are conversant with the doctrine of mandatum in the civil law, and have perceived the equity which supports it, and the good faith which it enforces, may, perhaps, feel a portion of regret, that Sir William Jones was not successful in his attempt to ingraft this doctrine, in all its extent, into the English law. I have no doubt of the perfect justice of the Roman rule, on the ground, that good faith ought to be observed, because the employer, placing reliance upon that good faith in the mandatary, was thereby prevented from doing the act himself, or employing another to do it. This is the reason which is given in the Institutes for the rule: Mandatum non suscipere cuilibet liberum est; susceptum autem consummandum est, aut quam primum renunciandum, ut per semetipsum aut per alium, eandem rem mandator exequatur. (Inst. lib. 3. 27. 11.) But there are many rights of moral obligation which civil laws do not enforce, and are, therefore, left to the conscience of the individual, as rights of imperfect obligation; and the promise before us seems to have been so left by the common law, which we cannot alter, and which we are bound to pronounce.

The earliest case on this subject, is that of Watson v. Brinth. (Year Book, 2 Hen. IV. 3 b.) in which it appears that the defendant promised to repair certain houses of the plaintiff, and had neglected to do it, to his damage. The plaintiff was nonsuited, because he had shown no covenant; and Brincheley said, that if the plaintiff had counted that the thing had been commenced, and afterwards, by negligence, nothing done, it had been otherwise. Here the court, at once, took the distinction between nonfeasance and misfeasance. No consideration was stated, and the court required a covenant to bind the party.

In the next case, (11 Hen. IV. 33 a.) an action was brought against a carpenter, stating that he had undertaken to build a house for the plaintiff, within a certain time, and had not done it. The plaintiff was also nonsuited, because the undertaking was not binding without a specialty; but, says the case, if he had undertaken to build the house, and had done it illy or negligently, an action would have lain, without deed. Brooke, (Action sur le Case, pl. 40.) in citing the above case, says, that "it seems to be good law to this day; wherefore the action upon the case which shall be brought upon the assumption, must state that for such a sum of money to him paid, etc., and that in the above case, it is assumed, that there was no sum of money, therefore it was a nudum pactum."

The case of 3 Hen. VI. 36 b. is one referred to, in the Essay on Bailments, as containing the opinion of some of the judges, that such an action as the present could be maintained. It was an action against Watkins, a mill-wright, for not building a mill according to promise. There was no decision upon the question, and in the long conversation between the counsel and the court, there was some difference of opinion on the point. The counsel for the defendant contended, that a consideration ought to have been stated; and of the three judges who expressed any opinion, one concurred with the counsel for the defendant, and another (Babington, Ch. J.) was in favor of the action, but he said nothing expressly about the point of consideration, and the third (Cokain, J.) said, it appeared to him that the plaintiff had so declared, for it shall not be intended that the defendant would build the mill for nothing. So far is this case from giving countenance to the present action, that Brooke (Action sur le Case, pl. 7. and Contract, pl. 6.) considered it as containing the opinion of the court, that the plaintiffs ought to have set forth what the miller was to have for his labor, for otherwise, it was a nude pact; and in Coggs v. Bernard, Mr. Justice Gould gave the same exposition of the case.

The general question whether assumpsit would lie for a nonfeasance, agitated the courts in a variety of cases, afterwards, down to the time of Hen. VII. (1 Hen. VI. 18 b. pl. 58. 19 Hen. VI. 49 a. pl. 5. 20 Hen. VI. 34 a. pl. 4. 2 Hen. VII. 11. pl. 9. 21 Hen. VII. 41 a. pl. 66.) There was no dispute or doubt, but that an action upon the case lay for a misfeasance in the breach of a trust undertaken voluntarily. The

point in controversy was, whether an action upon the case lay for a nonfeasance, or non-performance of an agreement, and whether there was any remedy where the party had not secured himself by a covenant or specialty. But none of these cases, nor, as far as I can discover, do any of the dicta of the judges in them, go so far as to say, that an assumpsit would lie for the non-performance of a promise, without stating a consideration for the promise. And when, at last, an action upon the case for the non-performance of an undertaking came to be established, the necessity of showing a consideration was explicitly avowed.

Sir William Jones says, that "a case in Brooke, made complete from the Year Book to which he refers, seems directly in point." The case referred to is 21 Hen. VII. 41. and it is given as a loose note of the reporter. The chief justice is there made to say, that if one agree with me to build a house by such a day, and he does not build it, I have an action on the case for this nonfeasance, equally as if he had done it amiss. Nothing is here said about a consideration; but in the next instance which the judge gives of a nonfeasance for which an action on the case lies, he states a consideration paid. This case, however, is better reported in Keilway, 78. pl. 5., and this last report must have been overlooked by the author of the "Essay." Frowicke, Ch. J., there says, "that if I covenant with a carpenter to build a house, and pay him 20l. to build the house by a certain day, and he does not do it, I have a good action upon the case, by reason of the payment of my money; and without payment of the money in this case, no remedy. And yet, if he make the house in a bad manner, an action upon the case lies; and so for the nonfeasance, if the money be paid, action upon the case lies."

There is, then, no just reason to infer, from the ancient authorities, that such a promise as the one before us is good, without showing a consideration. The whole current of the decisions runs the other way, and, from the time of Henry VII. to this time, the same law has been uniformly maintained.

The doctrine on this subject, in the Essay on Bailments, is true, in reference to the civil law, but is totally unfounded in reference to the English law; and to those who have attentively examined the head of Mandates, in that Essay, I hazard nothing in asserting, that that part of the treatise appears to be hastily and loosely written. It does not discriminate well between the cases; it is not very profound in research, and is destitute of true legal precision.

But the counsel for the plaintiffs contended, that if the general rule of the common law was against the action, this was a commercial question, arising on a subject of insurance, as to which, a different rule had been adopted. The case of Wilkinson v. Coverdale, (1 Esp. Rep. 75.) was upon a promise to cause a house to be insured, and Lord Kenyon held, that the defendant was answerable only upon the ground that he had proceeded to execute the trust, and had done it negligently. The distinction, therefore, if any exists, must be confined to cases of marine insurance. In Smith v. Lascelles, (2 Term Rep. 188.) Mr. Justice Buller said it was settled law, that there were three cases in which a merchant, in England, was bound to insure for his correspondent abroad.

1. Where the merchant abroad has effects in the hands of his correspondent in England, and he orders him to insure.

2. Where he has no effects, but, from the course of dealing between them, the one has been used to send orders for insurance, and the other to obey them.

3. Where the merchant abroad sends bills of lading to his correspondent in England, and engrafts on them an order to insure, as the implied condition of acceptance, and the other accepts.

The case itself, which gave rise to these observations, and the two cases referred to in the note to the report, were all instances of misfeasance, in proceeding to execute the trust, and in not executing it well. But I shall not question the application of this rule, as stated by Buller, to cases of nonfeasance, for so it seems to have been applied in Webster v. De Tastet. (7 Term Rep. 157.) They have, however, no application to the present case. The defendant here was not a factor or agent to the plaintiffs, within the purview of the law-merchant. There is no color for such a suggestion. A factor, or commercial agent, is employed by merchants to transact business abroad, and for which he is entitled to a commission or allowance. (Malyne, 81. Beawes, 44.) In every instance given, of the responsibility of an agent for not insuring, the agent answered to the definition given of a factor, who transacted business for his principal, who was absent, or resided abroad; and there were special circumstances in each of these cases, from which the agent was to be charged; but none of those circumstances exist in this case. If the defendant had been a broker, whose business it was to procure insurances for others, upon a regular commission, the case might, possibly, have been different. I mean not to say, that a factor or commercial agent cannot exist, if he and his principal reside together at the same time, in the same place; but there is nothing here from which to infer that the defendant was a factor, unless it be the business he assumed to perform, viz. to procure the insurance of a vessel, and that fact alone will not make him a factor. Every person who undertakes to do any specific act, relating to any subject of a commercial nature, would equally become, quoad hoc, a factor; a proposition too extravagant to be maintained. It is very clear, from this case, that the defendant undertook to have the insurance effected, as a voluntary and gratuitous

act, without the least idea of entitling himself to a commission for doing it. He had an equal interest in the vessel with the plaintiffs, and what he undertook to do was as much for his own benefit as theirs. It might as well be said, that whenever one partner promises his copartner to do any particular act for the common benefit, he becomes, in that instance, a factor to his copartner, and entitled to a commission. The plaintiffs have, then, failed in their attempt to bring this case within the range of the decisions, or within any principle which gives an action against a commercial agent, who neglects to insure for his correspondent. Upon the whole view of the case, therefore, we are of opinion, that the defendant is entitled to judgment.

Judgment for the defendant.

FREDERICK A. TRACY et al. vs. JOSHUA B. WOOD.

(3 Mason 132; Fed. Cas. No. 14,130.)

Assumpsit for negligence in losing 764½ doubloons, entrusted to the defendant to be carried from New York to Boston, as a gratuitous bailee. The gold was put up in two distinct bags, one within the other, and at the trial, upon the general issue it appeared that the defendant, who was a money broker, brought them on board of the steamboat bound from New York to Providence; that in the morning while the steamboat lay at New York, and a short time before sailing, one of the bags was discovered to be lost, and that the other bag was left by the defendant on a table in his valise in the cabin, for a few moments only, while he went on deck to send information of the supposed loss to the plaintiffs, there being then a large number of passengers on board, and the loss being publicly known among them. On the defendant's return the second bag was also missing, and after every search no trace of the manner of the loss could be ascertained. The valise containing both bags was brought on board by the defendant on the preceding evening, and put by him in a berth in the forward cabin. He left it there all night, having gone in the evening to the theatre, and on his return having slept in the middle cabin. The defendant had his own money to a considerable amount in the same valise. There was evidence to show that he made inquiries on board, if the valise would be safe, and that he was informed, that if it contained articles of value, it had better be put into the custody of the captain's clerk in the bar, under lock and key. There were many other circumstances in the case. The argument at the trial turned wholly on the question of gross negligence, and all the facts were fully commented on by counsel. But as the case is intended only to present the discussion on the question of law, it is not thought necessary to recapitulate them.

STORY, J. After summing up the facts, said, I agree to the law as laid down at the bar, that in cases of bailees without reward, they are liable only for gross negligence. Such are depositaries, or persons receiving deposits without reward for their care; and mandataries, or persons receiving goods to carry from one place to another without reward. The latter is the predicament of the defendant. He undertook to carry the gold in question for the plaintiff, gratuitously, from New York to Providence, and he is not responsible unless he has been guilty of gross negligence. Nothing in this case arises out of the personal character of the defendant, as broker. He is not shown to be either more or less negligent than brokers generally are; nor if he was, is that fact brought home to the knowledge of the plaintiffs. They confided the money to him as a broker of ordinary diligence and care, having no other knowledge of him; and, therefore, no question arises as to what would have been the case, if the plaintiffs had known him to be a very careless or a very attentive man. The language of the books, as to what constitutes gross negligence, or not, is sometimes loose and inaccurate from the general manner in which propositions are stated. When it is said, that gross negligence is equivalent to fraud, it is not meant, that it cannot exist without fraud. There may be very gross negligence in cases where there is no pretence that the party has been guilty of fraud; though certainly such negligence is often presumptive of fraud. In determining what is gross negligence, we must take into consideration what is the nature of the thing bailed. If it be of little value, less care is required, than if it be of great value. If a bag of apples were left in a street for a short time, without a person to guard it, it would certainly not be more than ordinary neglect. But if the bag were of jewels or gold, such conduct would be gross negligence. In short, care and diligence are to be proportional to the value of the goods, the temptation and facility of stealing them, and the danger of losing them. So Sir William Jones lays down the law. "Diamonds, gold, and precious trinkets," says he, "ought from their nature to be kept with peculiar care, under lock and key; it would, therefore, be gross negligence in a depositary to leave such deposit in an open antichamber; and ordinary neglect, at least, to let them remain on the table, where they might possibly tempt his servants." So in Smith vs. Horne, (2 Moore's R. 18,) it was held to be gross negligence in the case of a carrier, under the usual notice of not being responsible for goods above £5 in value, to send goods in a cart with one man, when two were usually sent to see to the delivery of them. So in Booth vs. Wilson, (1 Barn. & Ald. 59,) it was held gross negligence in a gratuitous bailee to put a horse into a dangerous pasture. In Batson vs. Donovan, (4 Barn. & Ald. 21,) the general doctrine was admitted in the fullest terms. It appears to me, that the true way of considering cases of this nature, is, to consider whether the party has omitted that care which bailees, without hire,

or mandataries of ordinary prudence usually take of property of this nature. If he has, then it constitutes a case of gross negligence. The question is not whether he has omitted that care, which very prudent persons usually take of their own property, for the omission of that would be but slight negligence; nor whether he has omitted that care which prudent persons ordinarily take of their own property, for that would be but ordinary negligence. But whether there be a want of that care, which men of common sense, however inattentive, usually take, or ought to be presumed to take of their property, for that is gross negligence. The contract of bailees without reward is not merely for good faith, but for such care as persons of common prudence in their situation usually bestow upon such property. If they omit such care, it is gross negligence.

The present is a case of mandatory of money. Such property is by all persons, negligent as well as prudent, guarded with much greater care, than common property. The defendant is a broker, accustomed to the use and transportation of money, and it must be presumed he is a person of ordinary diligence. He kept his own money in the same valise; and took no better care of it than of the plaintiffs. Still if the jury are of opinion, that he omitted to take that reasonable care of the gold which bailees without reward in his situation usually take, or which he himself usually took of such property, under such circumstances, he has been guilty of gross negligence.

Verdict for the plaintiffs for $5,700, the amount of one bag of the gold; for the defendant as to the other bag.

COLYAR, TRUSTEE, &c., vs. TAYLOR.
(1 Cold. 372.)

This case was tried before Judge Andrew J. Marchbanks, at the July Term of the Circuit Court. Judgment in favor of the defendant. The plaintiff appealed

McKINNEY, J., delivered the opinion of the Court.

This was an action in the case brought by Colyar against Taylor, to subject the latter to the loss of fifteen hundred dollars, money of the plaintiffs, which came, at his request, into the possession of the defendant, in pursuance of his previous gratuitous undertaking to the plaintiff, to receive the money at Nashville, for the plaintiff, and deliver it to him at Winchester—at which place both parties resided.

Judgment was for the defendant; to reverse which, an appeal in error was prosecuted to this Court.

The error assigned, is upon the instructions of the Court to the jury.

The statement of a mere outline of the case, without going into the particulars of the proof, will be sufficient for the understanding of the question submitted for our determination.

The defendant, after receiving the money, (which was in bank notes,) took it with him, in his pocket, to the public "Fair-ground," in the vicinity of Nashville, where were assembled a large crowd of persons. In the evening, the defendant applied to J. H. Estill, of Winchester, who intended returning home that night, to take charge of the money for the plaintiff; stating, that he, defendant, would not return for a day or two. Estill consented to do so, and thereupon the defendant took him aside, a few steps from the crowd of persons on the Fair-ground, and handed the money to him. Estill placed the money in his pocket book, which he deposited in the pocket of his pantaloons. Shortly afterwards, Estill got upon the train, not far distant from the Fair-ground. The cars were thronged with passengers, so much so, that Estill had to make his way through the crowd, from the second to the farther end of the fourth car, before he found a seat. Soon after taking his seat, he discovered that his pocket had been picked. The train was stopped, and he got off; and after walking back about a mile, he found his pocket book lying in the track of the road, rifled of its contents.

His Honor, among other things, instructed the jury, in substance, that if the defendant received the money, to be carried gratuitously to the plaintiff, and, without any authority from the plaintiff to intrust the money to Estill, the defendant delivered it to him to be carried to the plaintiff, and it was afterwards lost by the negligence of Estill, that, of itself, in the absence of negligence on the part of the defendant, would not make him responsible for the loss; * * * that the defendant would not be responsible for the loss, unless he was guilty of gross negligence; * * * that if Estill "was a suitable person to confide such a trust in," the defendant could not be responsible to plaintiff for the loss of the money.

It is insisted for the plaintiff in error, that this instruction is erroneous; and such is our opinion. We are aware of no sound principle or authority, by which a bailee of any sort, may, as a general rule, take it upon himself to part with the possession of the property bailed to him, without authority to do so from the bailor. A bailment creates a trust. And though it is true, that the responsibility of a mandatory, or bailee without compensation, is, in most respects, of a lower degree than that of other bailees, still his engagement places him in the relation of a trustee, so far as to exact of him, fidelity in the execution of the trust assumed upon himself; and also to bring him within the scope of the general principle, applicable to all trustees, that the office or duties of his trust cannot be delegated by him to another, without authority. The performance of the trust is a matter of personal confidence, which it is a breach of trust in the trustee to make over to a stranger; and the original trustee will continue responsible for all the

acts of the person so substituted: Hill on Trustees, (ed. of 1854,) 248, 791.

Upon this principle, it seems to us, that the unauthorized delivery of the thing bailed, by the mandatory, to a stranger, would make him responsible for the loss, on the ground of the violation of his trust.

But, again: Such a delivery of the property to a third person, is treated as a conversion. In some cases the bailor has an election, to sue on the bailee's implied contract, or to waive the contract and resort to case, or trover, according to the nature of the injury: Edwards on Bailments, 116. Trover will not lie on the ground of negligence on the part of the bailee. This action proceeds upon the ground of his wrongful assumption of the right of property, by delivering it to a third person, without authority. This amounts to a conversion: 24 Mend., 169; 9 Johns. Rep., 361; Edwards on Bailment, 114. Accordingly, in Syed vs. Hay, 4 Term Rep., 260, it is held that if a mandatory, intrusted with the goods of another, puts them into the hands of a third person, contrary to orders, it is a conversion. And it is plain, that a delivery of the goods to a third person, without any authority to do so, is the same, in principle, as a delivery contrary to orders.

So, it is held, that even where the bailor has re-possessed himself of the thing bailed, the action may be maintained for the breach of trust, which is a conversion: 2 Esp. N. P., 190, 191; 1 Cowan's Rep. 240; Edwards on Bailment, 129. And in Stuart vs. Frazier, 5 Ala. Rep., 114, it was held, that, on a deposit or bailment of money, to be kept without recompense, if the bailee, without authority, attempt to transmit the money to the bailor, at a distant point, by mail, or private conveyance, and the money is lost, he is responsible. Though, in general, this would not be the case in respect to money received for the use of another, and transmitted to him by the usual conveyance: Edwards on Bailment, 73.

These cases, and others of similar import to be found in the books, whatever may be the form of action, all proceed upon the doctrine that the engagement of the mandatory is of the nature of a trust, in the execution of which strict fidelity is required of him: Ibid, 105. Hence, as we have seen, if he parts with the possession of the thing bailed, to a stranger, without authority, it is a violation of his trust, for which he will be liable. So, if a specific direction accompanies the bailment, it must be complied with strictly, and any substantial deviation therefrom, will, in general, render the bailee liable.

In Story on Bailments, sec. 188, it is laid down, as the rule, that a mandatory, or bailee without compensation, is responsible, only, for gross negligence, "applies solely to cases, where the mandatory is in the actual performance of some act or duty entrusted to him, in regard to the property. For, if he violates his trust by a misuser of the property, or does any other act inconsistent with his contract, or in fraud of it, he will be clearly liable for all losses and injuries resulting therefrom."

Now, it is obvious, that the delivery of the thing bailed—especially a large sum of money—by the bailee, to a third person, without authority, is not an "act or duty entrusted to him in regard to it"; but a manifest violation of the trust, wholly inconsistent with his implied undertaking to the bailor, and in fraud of it.

And the author adds, in the same section, that "in cases of misuser, especially such misuser as amounts to evidence of a conversion, it is, perhaps, strictly true, that any subsequent loss and injury, whether it be by accident or otherwise, will be at the risk of the mandatory."

Upon the foregoing authorities, it follows, that the defendant is liable on the ground of a conversion of the money.

In the next place, we are at a loss to see how the defendant can escape liability on the ground of gross negligence.

The phrase "gross negligence," used in the books to define the degree of negligence for which a mandatory is responsible, is so vague in itself, so inapt to convey any precise idea, and so difficult of application to the circumstances of particular cases, that some confusion has been produced in the cases upon this subject, from its use; and the same remark is true, as respects the phrase, "slight diligence."

Diligence is a relative term; and what would amount to the requisite diligence at one time, in one situation, and under one set of circumstances, might not amount to it in another: 2 Kent's Com., 561.

The degree of care required of a mandatory, is essentially dependent upon the circumstances of the case. The general principle governing his liability, is, indeed, the same in all cases, but its application is materially effected, and varied by the circumstances of each particular case. The bailor's trusting the bailee with the goods, is a sufficient consideration to oblige him to a careful management: Edwards on Bailments, 94; and imposes upon him a duty to exert himself in the proportion to the exigence of the case: Ibid., 106. In Nelson vs. Macintosh, 1 Starkie's N. P., 188. Ld. Ellenborough held, that though a person does not carry for hire, yet he is bound to take proper and prudent care of that which is committed to him.

The duty of a person employed without remuneration, is to act faithfully and honestly, and not to be guilty of any gross, or corrupt neglect in the discharge of that which he undertakes to do: Darnal vs. Howard, 4 Bound Cres., 345.

It is not always enough that the mandatory takes the same care of the goods entrusted to him, that he does of his own, if that fall short of what is required. In Tracy vs. Wood, 3 Mason's Rep., the mandatory was held liable where he had taken the same care of the bailor's money, as of

his own; or more properly, where he had been guilty of equal negligence with regard to both.

The correctness of the general principle, that a mere mandatory is liable only for "gross negligence," is not to be questioned, when properly understood. Hence, if the goods be wrested from him by robbery, or taken by theft, or destroyed by fire or violence, without gross neglect on his part, he will not be liable.

But, it must be kept in view, that this general principle, that a mandatory is only liable for gross neglect, implies strict fidelity on his part, and the exercise of such care and prudence, as, with reference to the particular subject of the bailment, and the circumstances of the particular case, may be requisite for the performance of his undertaking.

Mr. Story says (Sec. 186), that the degree of care which a mandatory may be required to exert, must be materially effected by the nature and value of the goods, and their liability to loss or injury. That care and diligence, which would be sufficient as to goods of small value, or of slight temptation, might be wholly unfit for goods of great value, and very liable to loss and injury.

In the former case, the same acts might be deemed slight neglect only, which, in respect to the latter, might justly be deemed gross neglect., Perhaps, he adds, the best general test is, to consider, whether the mandatory has omitted that care, which bailees, without hire, or other mandatories of common prudence, are accustomed to take, of property of the like description. Story on Bailment, sec. 186. And in section 15, the author says: the bailee ought to proportion his care to the injury or loss which is likely to be sustained by any improvidence on his part.

Applying these principles to the facts of the present case, it seems to us, that the conduct of the defendant in withdrawing the money from the Bank, and taking it with him to a place, known to be generally frequented by swindlers and pickpockets, and there, in public, within a few steps of the promiscuous crowd, attempting to count the money before delivering it to Estill, evinced such a degree of heedless incaution, and disregard of common prudence, as may justly be considered as amounting to the grossest negligence.

The case under consideration, does not require that we should notice the question, whether a delivery of the property to a stranger, might not be excused or justified, upon the ground of an implied authority, to be gathered from all the circumstances of the case: or upon the ground of an apparent, or actual necessity for so doing. We, therefore, intimate no opinion upon these questions.

The point, as to the delivery of the subject of the bailment, to a stranger, was involved in the case of Kirtland vs. Montgomery, 1 Swan, 452. But, the question was not examined in that case, nor was it expressly decided; though it is true, the casual observations and intimations thrown out in that case, tend to a different conclusion from that to which we have arrived in the present case. And by that case, his Honor was influenced in his charge, perhaps, contrary to his own view of the law.

It will be observed, that we have abstained from any notice of the facts of the case, prior to the defendant's actual reception of the money at Nashville; inasmuch as the portion of the charge submitted for our consideration, and the discussion upon it, presented no question upon the other facts.

Judgment reversed.

MARTHA BOOTH, PLAINTIFF IN ERROR, vs. RICHMOND TERRELL, DEFENDANT IN ERROR.

(16 Ga. 20.)

Trover, in Newton Superior Court. Tried before Judge Starke, March Term, 1854.

This was an action of trover brought by John P. Booth and his wife, Martha Booth, against Richmond Terrell, for the recovery of eight negro slaves, to-wit: Letty and seven children, named in the declaration. Pending the action John P. Booth died, and the same proceeded in the name of the wife.

The defendant pleaded the general issue and the Statute of Limitations.

On the trial, plaintiff proved by two witnesses, that in the year 1820, in Jefferson County, Richard Hodges, the father of Mrs. Booth, loaned Letty, the negro woman sued for, to Richmond Terrell and his wife, for and during the life-time of the latter, with the understanding, that at the death of Mrs. Terrell, the said girl, Letty should be returned to his daughter, Martha Hodges, the plaintiff in the action.

Plaintiff also read in evidence the will of Richard Hodges, the 2d item of which read as follows: "I give and bequeath to my daughter, Martha Hodges, eleven negroes, named as follows: Mary and her four children, (naming them and others,) and Letty; the last named in the possession of Mrs. Terrell, and to remain so during Mrs. Terrell's natural life; then to become the property of my daughter, Martha Hodges." The plaintiff also proved the death of Mrs. Terrell, the conversion and value of the negroes and closed.

The defendant introduced testimony, which it is unnecessary to set out here.

The Court charged the Jury, "that a loan of a slave by one person to another, for the life of the person to whom the property was loaned, or for the life of his wife, by a parol agreement that the slave should be returned to the owner or his heirs, at the death of such person, vested an absolute title to the slave, in the person to whom it was loaned. And if the Jury believed that Richard Hodges was the owner

of the negro girl Letty, and that he loaned her to the defendant or his wife upon a parol contract, that she was to be returned to him or his heirs, after the death of defendant's wife, that the defendant thereby acquired an absolute fee simple title to the negro, and the plaintiff could not recover; but the Jury ought to find a verdict for the defendant."

To which charge of the Court, counsel for plaintiff excepted and has brought up the same for review.

By the Court.—LUMPKIN, J., delivering the opinion.

This is an action of trover by Martha Booth against Richmond Terrell, for eight negroes. The plaintiff relies on the following title, namely: that her father, Richard Hodges, intermarried with Louisa Terrell, the daughter of the defendant; and by said marriage, acquired the title to Letty, who, together with her children, constitute the property in dispute. That Mrs. Hodges died some short time after her intermarriage with plaintiff's father; and that thereupon, Richmond Hodges loaned to his mother-in-law, Mrs. Terrell, wife of the defendant, and at her special request, and by the consent and approval of the defendant, the girl Letty, to be held and enjoyed by her as a loan, during her life-time; and at her death, one of the witnesses swears, the negro was to be returned to plaintiff, who is the daughter of Richard Hodges by a former wife. The other witness testifies to the same contract, in substance, except that he states the girl was to be returned to Richard Hodges or his heirs. Richard Hodges died in 1824; and by his will, bequeathed Letty to his daughter, the plaintiff in this action.

The Court charged the Jury that the loan of a slave by one person to another, for the life of the borrower, by a parol agreement that the slave should be returned to the lender or his heirs, at the death of the borrower, vested an absolute title to the slave in the borrower.

This charge is excepted to, and the only question to be determined is, did the Court submit the Law of the case correctly, upon the facts proven?

Counsel for the defendant below and in error, insist that the charge of the Court is sustained by the decision of this Court in Bryan vs. Duncan (11 Ga. R. 67.) And also by the doctrine ruled first by this Court in Kirkpatrick vs. Davidson (2 Kelly's R. 301,) and repeatedly recognized since, that a remainder in slaves cannot be created by parol.

1. The point decided in Bryan vs. Duncan was, that in a will, the word lend was sometimes construed to be equivalent to give. And in support of this principle, Hinson and Wife vs. Pickett and Myers, adm'r. vs. Pickett (1 Hill's Ch. R. 35,) was relied on.

2. But what was the reason given in both of these cases, for holding that in those wills the word lend meant gift? It was because "the testator evinced a clear intention to part with the entire dominion over the property bequeathed. After his death, the property never could have reverted to his executors. A final disposition of it is made by the testator." Such is the language of this Court in Bryan vs. Duncan.

And in the case in Hill, Judge O'Neall says: "the term lend, when used in a bequest, is generally equivalent to give. In some special cases, it has its appropriate meaning: as in Baker vs. Baker and Red, decided by this Court in December, 1831. But in such cases, there is something which shows that the testator did not intend the legal estate to pass to the legatee. In the will under consideration, the testator has not manifested any such intention; he uses the word to pass from him the entire property in the chattel; and it is worthy of remark, that he uses the word, (lend) not in relation to the life-estate, which he had created, as he supposed, for his daughter, but also to the absolute estate in remainder, which he also supposed he had created in favor of her children.

3. The testator parts with the entire dominion in the property; and it is absurd to say, that an estate which can never revert, can be a loan, which implies that the use of the thing is parted with for a limited time, or for a special purpose, and the right of property remains in the lender. It is therefore clear, that the word lend, in this will, must be considered as synonymous with give."

The cause of the defendant cannot derive much aid from these precedents. First, this is not a will, but a gift, inter vivos; and secondly, so far from the lender's manifesting any intention to part with the title to this property, it is stipulated, expressly, that it shall be returned to him or his heirs, at the death of Mrs. Terrell.

4. Is this an attempt by Richard Hodges, to create, by parol, a remainder, in personal property? What is a remainder? The remnant of an estate, limited to arise immediately on the determination of a precedent particular estate. Read the testimony of Sarah Smith and George C. Hodges, and I am quite sure that it never would occur to any legal mind that Richard Hodges, by the loan which he made of Letty to Mrs. Terrell, for life, intended to create a new estate in this negro, in himself, at the death of his mother-in-law. And this he would do, in legal contemplation, provided it were a remainder. One of the rules regulating remainders is, that they must pass out of the grantor, at the time the particular estate is created. And yet, Mr. Terrell, the defendant, declared, at the time that Hodges parted with the girl, that he had no claim on her, and that his wife only wanted her as a loan; and that he would return her at the old lady's death.

5. It has never been decided by this Court, that a reversion, in personal property, could not be created by parol; although, from the use of that word, in the first opinion delivered upon this subject, (Kirk-

patrick vs. Davidson, p. 302,) incautiously perhaps, it may be inferred that the Judge who wrote it out, supposed, at the time, that the rule applied to reversions as well as remainders. Be this as it may, we are clear that this is neither a remainder or reversion.

6. We have attempted to show that this is no remainder. Is it technically a reversion? What is a reversion? It is the return of an estate to the grantor and his heirs, after the grant is over. But here no estate, as we shall presently see, ever was granted; but a mere gratuitous permission to Mrs. Terrell to use the servant for a specified time—Hodges still continuing to be the owner of the slave, to all intents and purposes.

7. This, then, is neither more nor less than a loan—a contract of every-day occurrence, especially between fathers-in-law and sons-in-law. In this particular instance, however, owing to the peculiar circumstances of the case, the relative position of the parties to the transaction, happens to be reversed. The son-in-law is the lender, and the father-in-law, or his wife, the borrower.

Chancellor Kent defines a loan to be a bailment of an article for a certain time, to be used by the borrower, without paying for the use. (2 Kent's Com. Lecture 40, p. 573, 4th Edition.) And this language is copied, almost verbatim, from Sir William Jones. See Treatise on Bailments, pp. 118, 217. Ayliffe says, "it is a grant of something, made in a gratuitous manner, for some certain use and for a certain term of time, expressed or implied, to the end that the same species should be again returned or restored again to us; and not another species of the same kind or nature, and this in as good plight as it was delivered." (Pandects, B. 4, tit. 16, p. 516.)

8. The obligation of the borrower is, to take proper care of the thing borrowed—to use it according to the intention of the lender—to restore it at the proper time, and to restore it in a proper condition. (Story on Bailments, §§ 232, 254, 255.)

9. Not only is the borrower to make a return of the thing, at the time, and in the place, and in the manner contemplated by the contract, but he must make a like return of all the increments and offspring of the thing lent. (Ib. § 257.)

10. The continuance of the loan rests upon the good pleasure and good faith of the lender, and is therefore strictly precarious. A loan being strictly gratuitous, the lender may terminate it whenever he pleases. (Story on Bail. § 277. Viner's Ab. Bailment D. Bacon's Abr. Bailment D. 9 Cowen, 687. 9 East. 49. 1 Dane's Ab. Ch. 17, Art. 4, § 10. 2 Leon. R. 30, 89. Dyer, 48 b. Cro. Jac. 687. 2 Roll. R. 460. 1 Str. R. 165. Shepherd's Epitome—Countermand.)

11. The thing loaned is to be restored to the lender, unless it has been agreed that the restitution shall be to some other person. If the lender be dead, it is to be restored to his personal representative, if known. (Story on Bail. § 262.)

12. During the period of the loan, the lender still retains the sole proprietary interest, and nothing passes to the borrower but a mere right of possession and user of the thing, during the continuance of the bailment:

13. So that an action for a trespass or conversion, will lie in favor of the lender against a stranger, who has obtained a wrongful possession or has made a wrongful conversion of the thing loaned. (11 Johns. 285. 7 Cowen, 753. 9 Ib. 687. 2 Saunders, by Williams, 47, b. Bacon's Abr. Trespass C. 2. Ib. Trover C. 1 T. R. 480. 2 Camp. 464. 8 Johns. 432. 13 Johns. 141. 2 Kent's Com. Lect. 40, p. 574, 4th Edition.)

The foregoing propositions, fully warranted as they are by adjudicated cases, demonstrate, so clearly, the nature of this transaction, to-wit: that it is neither a remainder nor a reversion, but a loan, for a definite period, with the express understanding, that at the death of Mrs. Terrell, the woman, and of course her offispring, born during the lifetime of Mrs. Terrell, should be returned to Richard Hodges, if living; or if dead, to his daughter Martha, or his heirs: I say, that this so unmistakably, is the legal character of this contract, that we are unwilling to elaborate it further.

I have said that these contracts of gratuitous loans, were subjects of daily occurrence, in the actual business of human life. This record shows that the very defence set up by Richmond Terrell, is founded upon the validity of such contracts. Whether the generous confidence bestowed by either or both of these parties, in the other, has been abused, remains to be seen.

BOTILLA E. SMITH.
vs.
LIBRARY BOARD OF CITY OF MINNEAPOLIS.

(58 Minn. 108; 59 N. W. 979.)

Appeal by defendant, the Library Board of the City of Minneapolis, from an order of the District Court of Hennepin County, Thomas Canty, J., made December 30, 1893, denying its motion for a new trial. The plaintiff, Botilla E. Smith, owned a collection of rare coins and on April 6, 1890, delivered them in cases to defendant at its request for exhibition in its library on the corner of Tenth Street and Hennepin Avenue. Defendant agreed to and did pay the premium for fire insurance on the collection, but was to pay nothing more. About nine o'clock of the evening of September 1, 1892, there was a fire on Eleventh Street in the vicinity of the library building and it attracted the attention of those having charge of the property in the library. At about ten o'clock that night it was discovered that one of the cases containing coins had been taken from the frame and had disappeared. It contained two hundred and eighty American silver coins,

some of them rare and of early date. The property was undoubtedly stolen and was never recovered. This action was to recover the value. Plaintiff had a verdict for $677.45. Defendant moved for a new trial. Being denied it appeals.

COLLINS, J. For more than two years prior to September 1, 1892, plaintiff had been the owner of a large collection of coins, placed in cases for exhibition. During all this time these cases of coins were in the possession of defendant, and by it were being exhibited to the public, with other articles of interest, at its building in the city of Minneapolis. There was some dispute between the parties as to the terms or conditions under which the coins were placed in defendant's custody, but it is evident that they were loaned by plaintiff at defendant's solicitation; that nothing was to be paid for their use; but that defendant was to and did pay the premium upon a fire insurance policy covering the same, and did furnish one case for a part thereof. One evening, about the date first mentioned, one of the cases, with its contents, was stolen from the building, and lost to plaintiff, whereupon she instituted this action to recover the value of the coins, alleging that they were stolen and lost because of defendant's gross negligence and carelessness.

1. On the trial of the case there was introduced in evidence (defendant objecting) a receipt of date April 6, 1891, signed by defendant's librarian, in which he acknowledged that the coins had been received for exhibition in the loan collection of the library, to be returned in good condition. The ruling of the trial court when receiving this receipt in evidence is assigned as error on two grounds—First, that it was not signed by defendant board, or by any of its duly authorized officers, nor did it purport to be signed by the librarian by virtue of any authority of the board or of its officers, nor was any attempt made to show that it was so signed; second, that in no event was defendant board authorized to incur a liability of the character found in the receipt, or to enter into a contract of the nature of that attempted thereby, which, briefly stated, was a contract of bailment. It was stoutly maintained on this second point that, under its charter, defendant board, was not empowered to become a bailee. While we feel satisfied that on the evidence, as it stood when the court overruled the defendant's objection to the introduction of the receipt, there was nothing which warranted its reception, it is manifest that under the charge of the court no prejudice could have resulted to defendant from its introduction, provided it had authority, under its charter, to receive the coins as a loan from the owner; and this was in controversy, as before stated.

The defendant board derived its powers under Sp. Laws 1885, ch. 3. It was authorized to establish and maintain in the city of Minneapolis public libraries and reading rooms, galleries of art, and museums, for the use and benefit of the inhabitants of the city, and for this purpose had power to take, by "gift, grant, purchase, devise, bequest or otherwise any real or personal property." It had power to make and publish, from time to time, by-laws for its own guidance; rules and regulations for the government of its agents, servants, and employees, and "for the government and regulation of the libraries and other collections" under its control. It had other expressly enumerated powers, and finally, in addition to those, was granted "power and authority to undertake and perform every act necessary or proper to carry out the spirit and intent" of the act.

The defendant board was chartered for the purpose of establishing and maintaining public libraries and museums. While it was not expressly authorized to take property as a loan or deposit, or to incur the liability of an ordinary bailee, such express authority was not necessary. In addition to the powers expressly granted, it had those which are necessarily or fairly implied in or incident to the powers expressly granted, and those also essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. That it could take personal property in some other way than by gift, grant, purchase, devise, or bequest is evident from the words "or otherwise," which are added to those mentioned. It was also expressly empowered to undertake and perform every act necessary or proper to carry out the spirit and intent of the incorporating act. Coins of all descriptions are regarded as essential and indispensable to the establishment and maintenance of museums, and it is a well-known fact that in nearly every institution of this kind there are large and valuable collections owned by private individuals, and held by the exhibitors as loans or deposits. Frequently the most valuable works of art and the rarest collections of curios can only be obtained in this way. We have no doubt of the power of the board to take property of this character by express or implied contract, and to incur liability thereunder. In doing this it is undoubtedly acting within the scope of its powers, and carrying out the spirit and intent of the statute creating it.

2. It is admitted that defendant board desired that plaintiff place the coins in its custody for exhibition, and that the plaintiff was also desirous, for reasons of her own, that they be exhibited to the public and that the latter be informed as to the ownership. With this mutually understood, they were handed over and put upon exhibition, defendant having entire control of them for the time being. At defendant's request, plaintiff loaned her property to it, and the law required of the former that it exercise ordinary care and prudence in caring for the same. If ordinary care and prudence were not exercised by the board in regard to the property, and it was stolen, then de-

fendant board would be liable in damages, and the trial court so charged. But it was contended that some time after the coins came into defendant's possession, without any express understanding as to the latter's liability, a resolution was passed by the board, of which plaintiff was notified, that it would not be responsible for the safety of the coins, or for them, in any manner, except as to loss by fire. It did procure and pay for a fire insurance policy at this time. On the trial, plaintiff denied that she was informed of the resolution, and in view of the conflict in testimony the jury were instructed that, if they were of the opinion that plaintiff had knowledge of this resolution, she could not recover, unless they found that the coins were stolen and lost by reason of the gross negligence of the defendant. Of this feature of the charge the latter should not and does not complain. Evidently, under the charge of the court, as applied to the admitted fact, any error with respect to the admission of the receipt in evidence, and also as to what the librarian said to plaintiff and her husband relative to the responsibility of defendant board, worked no prejudice to it. The result was not affected by either the receipt or the statements.

We are of the opinion that plaintiff's husband was competent to testify as to the value of the coins. It was not necessary that he should have bought and sold such articles up to the day of trial. See Brackett v. Edgerton, 14 Minn. 174 (Gil. 134); Hoxie v. Empire Lumber Co., 41 Minn. 548, (43 N. W. 476); 7 Am. & Eng. Enc. Law, 512. But in any event the motion to strike out all of the testimony of the witness was properly denied, for much of his testimony related to matters other than values.

In view of the previous testimony of the janitor as to his knowledge of what transpired at the library building on the evening the coins were stolen, we think it was permissible to ask him as to his statements made next morning to plaintiff in reference to a fire in the vicinity of the building just before the coins were missed, and as to the attendants going to it, for the purpose of laying the foundation for impeachment. This disposes of all of the assignments of error which we regard as entitled to discussion.

Order affirmed.

Buck, J., absent, sick, and Canty, J., who, as district judge, tried the case below, took no part.

CURTIS N. BENNETT
vs.
MICHAEL O'BRIEN.
(37 Ill. 250.)

Writ of error to the Circuit Court of Livingston county; the Hon. Jonathan Duff, Judge, presiding.

This is an action on the case brought by Michael O'Brien against Curtis N. Bennett at the June term, 1864, of the Circuit Court of Livingston county, for the value of a mare. The plaintiff recovered a verdict for $120, on which the court rendered judgment, and the defendant appealed. The facts appear in the opinion of the court.

MR. JUSTICE LAWRENCE delivered the opinion of the court.

O'Brien let Bennett, the appellant, have the use of his horse without compensation. This gratuitous bailment imposed on the appellant the duty of extraordinary care. After a drive in January, 1864, of eighteen miles from his home, returning the next day, the mare sickened and died. The evidence is conflicting as to the cause of her death. Two witnesses swear that the defendant admitted she had been driven into a snow bank. The jury found a verdict for O'Brien, the plaintiff below, for the value of the mare.

The appellant insists that the court erred in refusing to give his 1st, 2d, 4th, and 7th instructions. The first was as follows:

If the jury believe from the evidence that the mare in question died from inevitable casualty or by causes or under circumstances over which the defendant had no control, and could not prevent, then they will find for the defendant, unless they further believe that the defendant was guilty of gross negligence and carelessness.

This instruction would have misled the jury. Although the direct cause of the mare's death may have been a disease over which the defendant had no control, yet if that disease was traceable to the slightest negligence on the part of the defendant, this would render him liable.

The second instruction was as follows:

If the jury believe from the evidence that the defendant used the same care, diligence and prudence in taking care of the mare in question that a prudent, careful man would take care of his own property under similar circumstances, they will find for defendant.

This instruction is wrong in assuming that the bailment was a bailment for hire.

When the loss of the mare is shown, the proof of negligence or want of care is thrown upon the plaintiff; it being a presumption of law that proper care and diligence were exercised on the part of the defendant.

There is some conflict of authority on this subject, but we think this instruction was properly refused in reference to a gratuitous bailee. When the death of the mare, in the hands of the defendant was proven, together with the character of the bailment, it devolved upon him to show that he had exercised the degree of care required by the nature of the bailment. These were facts peculiarly within his knowledge and power to prove, and any other rule would impose great difficulties upon bailors.

The seventh instruction was as follows:

If the jury believe from the evidence that the mare did not die from the effects of over driving and misusage on the part of the defendant, they will find for defendant.

This instruction, like the second, is objectionable because it assumes that the defendant was only bound to such care of the mare as would be a bailee for hire. Even if the mare did not die from positive over driving and misusage, yet if her disease was traceable to the slightest negligence on the part of the defendant, he would be liable. The counsel for appellant regard the bailment as a bailment for hire. We do not so consider it, but if it were doubtful upon the evidence, these instructions are wrong in assuming it to be a hiring, instead of putting the case hypothetically.

In regard to the character of the bailment, it may be remarked that the fact of the plaintiff being saved the keeping of his horse by loaning him to the defendant, although to that extent the loan may be considered an advantage to him, does not take from it the character of a gratuitous bailment. Such incidental advantage is not the compensation necessary to make the bailment one of hire. The loan of the use of domestic animals necessarily involves their keeping. He who borrows the horse of another for a week's journey, must not only incur the expense of feeding him, but he must take the responsibilities of a gratuitous bailee. Howard v. Babcock, 21 Ill., 265. In the case before us, no compensation was paid for the use of the horse. We think the verdict sustained by the evidence.

Judgment affirmed.

GREEN vs. HOLLINGSWORTH.—Detinue.

(5 Dana 174.)

From the Circuit Court for Greenup County.—April, 20.

Opinion of the court, by CHIEF JUSTICE ROBERTSON:

Hollingsworth having obtained a verdict and judgment against Green, in an action of detinue, for a gold watch, several errors are assigned by Green, as arising from instructions and refusals to instruct the jury on the trial.

It appears from the bill of exceptions, that the parties being intimate acquaintances and cordial friends, and both being in a jocund mood on a public occasion, while Hollingsworth was a candidate for the Legislature, Green said to him, in the hearing and presence of several persons—"give me your watch, and I will vote for you, and do all I can to assist you in your election"; whereupon, Hollingsworth handed the watch to him, without the chain; and Green having fastened a twine string and a key to it, put it in his pocket, and they shortly afterward separated, Green still retaining the watch; about three weeks after which, Green being on a hunting excursion, with the watch in his pocket, said, on his return home, that he had lost it in the woods: and having afterward engaged others to assist in searching for it, and not finding it, he offered a reward of $10 for its discovery and restoration; but the witnesses never heard that it had ever been since seen; that some time after the alleged loss of it, Hollingsworth requested Green to return it, which he, of course, failing to do, this suit was brought for a wrongful detention of it.

The jury had to decide whether the foregoing facts conduced most strongly to establish a gift, a loan, a deposit, or a sale, on an illegal consideration; and if there was no sale nor gift, it was the province of the jury to decide whether the bailment was a loan or a mere deposit and whether the watch had, as alleged, been lost; but it was the province of the court to decide respecting the degree of care required by law, according to the facts.

Hollingsworth could not recover unless the jury had concluded that the watch had been bailed to Green; for it is evident that if it was sold upon an illegal consideration, although the contract was void, the law would not help either party, standing, as they would, in equal fault. It is to just such a case that the maxim in pari delicto potior conditio defendentis, is conclusively applicable.

And whether, upon the hypothesis that there was a bailment, there should have been a recovery, depends on the following considerations:

First. If the bailment was a simple deposit, with implied leave to carry the watch in the pocket, and if it was lost by the bailee, he is not liable unless he was guilty of gross negligence, or unless, prior to the loss, he had violated his implied obligation to return it in a reasonable time, and thereby rendered himself responsible for all consequences; and whether, without demand, it was his duty to have returned it within three weeks after the date of the deposit, was a question of law for the court, and not the jury, to decide.

But the evidence will hardly allow the deduction that there was a mere deposit; and if it would, it would perhaps also show that it was a deposit at the instance of Green, rather than of Hollingsworth, and therefore required the observance of ordinary care, at least.

Second. If there was a simple loan, more than ordinary care was required by law. And if the watch was in fact lost, as alleged, it was the province of the court to decide as to what was gross, ordinary and slight neglect, and that of the jury to determine whether the facts established the one, or the other, or any degree of negligence.

If the watch was loaned to Green, when it was to be returned was a fact to be ascertained by the jury from the circumstances proved; and if those circumstances conduced to establish no special time, and, from the nature of the transaction as proved, the jury could have inferred that the parties actually intended a beneficial loan, the law made it the duty of Green

to return the watch in a reasonable time. But, in such a state of case, of indefinite loan for use, a court could not decide that Green was guilty of a breach of his implied obligation, in not returning the watch within three weeks, or the time that elapsed before the alleged loss of it. Nor could it be decided, as a matter of law upon the facts proved, that there was gross or even slight neglect in carrying the watch in his pocket when he was hunting. The use of it may have been, and probably was, especially important on such an occasion; and therefore, if there was culpable negligence in thus using it, the consequence might be that he could not have used it at all, without being responsible for an accidental loss of it in consequence of using it. But there may, prima facie, have been at least slight neglect in losing the watch out of his pocket.

If the watch was loaned without any express agreement, and if Green failed, upon a demand of restitution, to return it, while he had it, or converted it, in judgment of law, by seriously claiming it as his own, he would be liable for it, whatever may have happened to it, without the agency or assent of Hollingsworth. But there is no proof of any such demand or conversion prior to the loss of the watch. And if the parties did not intend a bailment, there was no ground for serious controversy. There is scarcely a pretext for presuming a sale,—it is much more probable that there was a gift. As the instructions given by the circuit judge were, in some respects, essentially variant from the foregoing principles, and may have been, to some extent, prejudicial to the plaintiff in error, the judgment must be reversed, and the cause remanded for a new trial, without any intimation as to whether the verdict could have been sustained had there been no error in the instructions.

O. S. CHAMBERLAIN vs. JOHN T. WEST.

(37 Minn. 54; 33 N. W. 114.)

June 1, 1887.

Appeal by defendant from an order of the district court for Hennepin county, Lochren, J., presiding, refusing a new trial.

MITCHELL, J. This action was brought to recover the value of a diamond scarf-pin, alleged to have been stolen from plaintiff's room while a guest at the West Hotel. It appeared from the evidence that the plaintiff was not the general owner of the pin, but that a year or two previous he had borrowed it from a friend, who, he says, "loaned it to him for ten years." The plaintiff had a verdict for the full value of the property. The defendant's contention is—First, that plaintiff, being a mere gratuitous bailee, had no such interest in the property as would entitle him to recover; and, second, even if he could maintain an action, he could only recover the value of his special property in the thing.

Nothing is better settled than that, in actions for torts in the taking or conversion of personal property against a stranger to the title, a bailee, mortgagee, or other special-property man is entitled to recover full value, and must account to the general owner for the surplus recovered beyond the value of his own interest; but as against the general owner or one in privity with him he can only recover the value of his special property. 1 Sedg. Dam. note a; 1 Suth. Dam. 210; Jellett v. St. Paul, M. & M. Ry. Co., 30 Minn. 265, (15 N. W. Rep. 237;) Russell v. Butterfield, 21 Wend. 300; Mechanics', etc., Bank v. National Bank, 60 N. Y. 40; Atkins v. Moore, 82 Ill. 240; Fallon v. Manning, 35 Mo. 271. A mere depositary or gratuitous bailee may maintain such an action. The bailee may maintain it, although not responsible to the general owner for the loss. This he may do, not only against one who has tortiously converted the property, but also against one through whose negligence or failure of duty it has been lost; as, for example, a common carrier or innkeeper. Edw. Bailm. § 37; Faulkner v. Brown, 13 Wend. 63; Moran v. Portland Steam Packet Co., 35 Me. 55; Finn v. Western R. Co., 112 Mass. 524; Kellogg v. Sweeney, 1 Lans. 397, 46 N. Y. 291.

2. Whether this pin was stolen from plaintiff's room, and whether he himself was guilty of contributory negligence, were, under the evidence, questions of fact for the jury. There is evidence reasonably tending to support the verdict, and hence this court cannot disturb it.

3. The defendant sought to relieve himself from his common-law liability as innkeeper by showing compliance with Gen. St. 1878, c. 124, §§ 21, 22, (Laws 1874, c. 52.) This statute requires the innkeeper, in order to bring himself within its provisions, to keep in his hotel an iron safe, suitable for the custody of money, jewelry, or other valuables, and to keep posted conspicuously at the office, also on the inside of every entrance door of every public sleeping, reading, bar, sitting, and parlor room of the hotel, a notice to the guests that they must leave their money, jewelry, and other valuables with the landlord for safe-keeping. It is incumbent on an innkeeper claiming the benefit of this statute affirmatively to show a substantial compliance with all its requirements. Much of the evidence on this point was so vague and indefinite, and mere impressions not within the personal knowledge of the witnesses, that it cannot be said that the posting of any such notices in the manner required was conclusively or even satisfactorily proved anywhere except in the sleeping-room occupied by plaintiff. No actual notice was brought home to plaintiff. Under these circumstances, defendant cannot complain that the court left it to the jury to determine from the evidence whether he had posted notices as required by the statute.

Order affirmed.

WOOD vs. McCLURE.
(7 Ind. 155.)

Appeal from the Decatur Court of Common Pleas.

DAVISON, J. The complaint is that McClure, the plaintiff, on, etc., at, etc., loaned his mare to Wood, who agreed to use her carefully, and return her in good condition. Averment, that Wood, while the mare was in his possession under said loan, abused, overworked and ill-treated her, so that she died. The proper issues being made, the cause was submitted to a jury, who found for the plaintiff. Motion for a new trial denied, and judgment on the verdict.

The evidence being closed, the Court charged as follows:

"If the jury find that said mare was loaned to Wood and was injured while in his possession by the slightest injury, from which she died, they may find for the plaintiff."

This instruction does not state the law correctly. The mere facts assumed by the Court, viz., that the mare, while in the possession of the bailee, received a slight injury, which caused her death, was not sufficient to render him liable, unless it was also shown that he had been guilty of some neglect of duty—some slight omission of diligence. A borrower, it is true, is bound to use extraordinary diligence in the care of property loaned to him, and is responsible for the slightest neglect; still, if the article loaned perish, or is lost or damaged, without any blame or neglect attributable to the borrower, the owner must sustain the loss. Scranton v. Baxter, 4 Sandf. 5.—Story on Bailments, s. 249.—Jones on Bailments, 49.

In the present case, the main question for the jury, in coming to a conclusion whether the bailee was or was not liable, was this: Was he guilty of any negligence? They were, however, under the above instruction, authorized to find a verdict against him, though innocent of any blame or neglect whatever.

But the record contains no bill of exceptions; nor does it appear that the charge was excepted to before the return of the verdict. Hence, it is insisted that the instruction, though erroneous, should not be allowed to reverse the judgment.

This position is correct. The code provides that "the party objecting to the decision of the Court, must except at the time the decision is made." 2 R. S., p. 115. In relation to this point, the rule of practice is, in effect, the same as it was anterior to the present code. Jones v. Van Patten decides that exceptions to instructions of the Court to the jury, will not be noticed in the Supreme Court, unless they appear by the record to have been taken before the jury delivered their verdict. 3 Ind. R. 107.—5 id. 542.

These cases are decisive of the one before us. The judgment must therefore be affirmed.

Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.

KENNEDY vs. ASHCRAFT.
(4 Bush 530.)

Appeal from Larue Circuit Court.

CHIEF JUSTICE WILLIAMS delivered the opinion of the court:

Appellant borrowed from appellee a mare to ride some three miles in the country, and instead of doing so, put the mare in a buggy, and drove her some twelve or fourteen miles, to a neighboring town, taking with him another man. The mare was unharnessed by the landlord, and ridden down to water by his son, a small boy, and then put into the stable and fed, without any attention or care by the appellant, and next morning was found dead, being much swollen, which, in the opinion of several witnesses, indicated that her disease was colic.

Upon trial, the jury found the value of the mare for appellee, and the court having refused a new trial, this appeal seeks a correction of alleged errors.

If there were no reversable errors in the instructions when applied to the evidence, the judgment must stand.

By the first instruction, the jury were directed, that if the letting was a loan, and not a hiring, "the defendant would be liable for any neglect whatever in the use and care of the animal."

In Story on Bailments (sec. 237) it is said: "As the loan is gratuitous, and exclusively for the benefit of the borrower, he is, upon the common principles of bailment already stated, bound to extraordinary diligence; and, of course, he is responsible for slight neglect in relation to the thing loaned."

Pothier says, that it is not sufficient for the borrower to exert the same ordinary care which fathers of families are accustomed to use about their own affairs; but that he ought to exert all possible care, such as the most careful persons apply to their own affairs; and that he is liable not only for slight, but for the slightest fault.

Again, Story (sec. 239) says: "What shall be deemed slight neglect or want of extraordinary diligence, must depend upon the particular circumstances of each case."

The court was therefore right in saying to the jury that the "defendant would be liable for any neglect; and if they believed the death of the mare resulted from any degree of improper usage or want of attention, they ought to find for plaintiff."

By the second instruction, the jury were directed, that if the letting was on hire, "the defendant was only bound to use and feed and attend to her, with such care as a man of ordinary prudence would bestow on his own property of the like kind under such circumstances; and if the defendant did bestow such ordinary care and diligence in the use and care of the mare, they ought to find for defendant." This instruction,

though not so pertinently worded as might have been, yet evidently means, that if the defendant used and cared for the mare with as much diligence as is common with men of ordinary prudence and discretion, then the law was for defendant, and does not bring the case within the rule, as recognized by this court in Jackson vs. Robinson (18 B. M., 7), wherein the lower court, in a case of bailment for the mutual benefit of both parties, instructed the jury to find for plaintiff, if the defendant was guilty of greater negligence than a prudent man would be ordinarily guilty of," which, in effect, told the jury that the defendant was responsible for such ordinary care as positively prudent men would have taken of such property under alike circumstances, instead of saying he was only liable for such ordinary care as ordinarily prudent men would have exercised under such circumstances; or, otherwise, to use the direct language of the court, "such as was usual with the common run of men," and which rule of responsibility was improperly applied to such a bailment. We regard this second instruction as tantamount to what this court recognized as the correct rule of responsibility in bailments for the mutual advantage of the parties.

The fourth instruction directed the jury, that if the defendant borrowed the mare to ride two or three miles in the country, and that he drove her in a carriage some twelve or fourteen miles, and that whilst at the town of New Haven the mare died, that "the defendant is liable for her value."

It is urged that this made the defendant liable at all events, though the death may have resulted from natural causes, and would have occurred even if used precisely as was expected, or not used at all, and perhaps may technically be liable to such objection; but when applied to the facts of this case, could not have misled the jury. Had there been evidence indicating that the death was from natural causes, which must have occurred at any rates, there would have been potency in the objection. Whilst some authors suggest such a loss resulting inevitably from causes disconnected with the improper use and bailment, or perhaps forming an exception to the general liability of a bailee in his own wrong, but which none say has ever been yet settled as a rule, it must clearly appear that such was the case, as this court, in Kelly vs. White (17 B. Mon., 141), held in relation to an instruction of similar import, "the instruction then is right so far as relates to this case, and the error, if any, could not have been prejudicial." The court therein further says, whether the relation between the illegal act and the damage sustained was sufficiently proximate to create a liability on the part of the wrongdoer, and to sustain the action, "has been treated as a question of law to be decided by the court, and not as a question to be determined by the jury after determining the facts by which the relation is demonstrated."

If this be correct, we cannot say, in view of all the facts developed, that the court erred in determining that the death of the mare, and consequent damages by reason thereof, were sufficiently approximate to render the defendant liable if he was a bailee in his own wrong, as submitted in the first part of the instruction for the jury to ascertain.

The first instruction refused, asked by defendant, was substantially given in instruction No. 2; the second refused instruction is, perhaps, technically correct law, but not applicable to this case, especially after the court had determined the death of the mare as sufficiently proximate to defendant's use, and made him responsible if such use was illegal and in his own wrong.

We have, therefore, failed to perceive any error in giving or refusing instructions as applicable to the facts of this case, hence, affirm the judgment, with damages.

LUCY A. SMILEY vs. IRA ALLEN.
(13 Allen 465.)

Replevin of a gold watch and chain and sundry articles of jewelry. The writ was dated November 10th 1864.

At the trial in the superior court, before Ames, J., it appeared that Francis Frye, in October 1864, was struck by the engine attached to a railroad train in West Roxbury, and was killed. The defendant, as a coroner of the county, caused an inquest to be duly held, and thereafter took charge of the articles described in the writ, all of which were found upon the person of the deceased. The plaintiff, who at first represented herself to be the wife of said Frye, claimed the property as her own, and demanded it of the defendant, before bringing this action. The defendant did not comply with the demand, but insisted that it was his duty to deliver it to the administrator of the estate of said Frye, when appointed; and it appeared that one Shepherd was appointed such administrator on the 7th of November 1864, and claimed and still claims that the property belongs to him in that capacity. It was not claimed that the articles came wrongfully to the hands of said Frye, but the plaintiff insisted that she delivered them to him, and permitted him to use and wear them as a favor and an act of friendship and kindness to him, without any stipulation as to the length of time that such use should continue, as a gratuitous bailment. And it appeared that he had usually worn said articles and carried them on his person for four or five years, and to the day of his death.

The defendant then contended that if the articles were ever the property of the defendant, (which he denied,) yet, under the circumstances of the case, she would not be entitled to maintain this action.

The judge ruled that, assuming the plaintiff's account of the transaction to be true

as above set forth, it was the duty of the defendant, as a coroner, to take charge of the personal property of the deceased found upon the body, including such articles of personal wear as were apparently or presumably his property, and including also such things as were intrusted to him, or in which he had a qualified or special property or right of possession as bailee; and that it was also his duty and his right to retain such articles in his possession, to deliver to the administrator of the estate of the deceased, if one should be appointed within sixty days, who should claim them, or to the public administrator, if no such appointment should be made; and that under Gen. Sts. c. 175, § 17, the defendant would not be liable, under the circumstances of the case, in the present action, but that the plaintiff must seek her remedy against the administrator.

The jury thereupon, by direction of the judge, returned a verdict for the defendant. The plaintiff alleged exceptions.

BIGELOW, C. J. Upon the undisputed facts of this case, the right of property in the articles replevied was at the time of suit brought in the plaintiff. We think it also clear that the right of possession was then in her, and that this action can be maintained.

The person deceased, on whose body they were found by the defendant, was a mere gratuitous bailee. The articles were lent to him by the plaintiff, subject to be reclaimed by her at any moment. His death did not in any way affect or change her right of property, or of immediate possession on due demand. It did make it the duty of the defendant to take charge of the property in his capacity as coroner. This is imposed on him by Gen. Sts. c. 175, § 17; but the same statute also makes it his duty to "deliver the same forthwith to those entitled to its care or possession." The administrator of the person deceased had no right or title in them, nor could he lawfully claim to retain possession of them as against the plaintiff. There was no lien on them in favor of the intestate's estate. The bailment was at an end, and the right of the plaintiff to resume possession was absolute. We know of no principle or rule of law by virtue of which an administrator can claim a right as against the owner to receive or take possession of property belonging to another person which was in the hands of his intestate at the time of his death, and which the latter would have been bound to deliver to the former at any moment on demand. Nor does the statute above cited, which imposes on a coroner the duty of taking charge of property of persons deceased, confer any such right. On the contrary, it is studiously framed so as to avoid any interference with the legal rights of parties. The possession which the coroner is authorized to take is for the immediate care and preservation of the property only, in order that it may be forthwith delivered to those entitled to its care or possession.

But it is suggested that a coroner is a judicial officer, and that no action can be maintained against him for the exercise of any authority coming within the scope of his legitimate jurisdiction. This is a well settled rule; but it has no application to the present case. A coroner is clothed with certain judicial powers; but he is also authorized to exercise ministerial and executive duties. For error, mistake, or even misconduct in the former capacity, he is not liable to an action; but when he acts in the latter capacity, he is answerable to those who are injured by any excess or abuse of his official powers. In this respect, he stands on the same footing with sheriffs and justices of the peace. We are unable to see that the duty imposed on him by the statute, of taking possession of property found on the body of a deceased person and of delivering it forthwith to the person entitled to it, has in it any of the elements of a judicial power or authority. It is the mere performance of a prescribed act. It involves no exercise of judgment or discretion, by which the rights of any person are conclusively settled. His action is in its nature purely ministerial, like the service of a writ or the levy of an execution. An officer is required to seize the goods of the debtor; he must determine what goods he will take; if he errs and takes the property of another person he is liable therefor. So here; the coroner is bound to take charge of the property, and to deliver it to the person entitled to receive it. If he refuses unreasonably or without sufficient cause, he violates his duty and is liable therefor.

But it is said that this interpretation of the statute casts an unreasonable burden on a public officer, by requiring him to determine at his peril in whom the right of possession of the property is vested which the law requires him to take in charge. We think this argument is pressed too far by the counsel for the defendant. A coroner cannot be held liable for property taken in charge by him, until after due demand and a wrongful refusal to surrender it, equivalent to a conversion. It is rightfully in his possession until due demand is made therefor, and he wrongfully refuses to give it up. He would not be liable on proof of a mere demand. If A. find the goods of B., and on demand answers that he knows not whether B. be the true owner, and therefore refuses to deliver them, this is not evidence of a conversion. Isaack v. Clark, 2 Bulst. 312. Gunton v. Nurse, 2 Brod. & Bing. 447. Clark v. Chamberlain, 2 M. & W. 78. Solomons v. Dawes, 1 Esp. 83. Davies v. Vernon, 6 Q. B. 443. If, in the present case, the defendant had, on the demand of the plaintiff for the articles in question, required reasonable proof of her title to the possession of them, his refusal to deliver them without such proof

would not have rendered him liable to an action.

But the evidence in this case discloses that on demand made he denied absolutely the right of the plaintiff to the possession of the articles. He set up against her claim the right of the administrator to receive them. This was a conversion. A refusal to surrender property belonging to a party, on the ground that it belongs to another person, proves a conversion. Caunce v. Spanton, 7 Man. & Gr. 903. 2 Saund. 47 f. Exceptions sustained.

C. W. BREWSTER, W. S. BURNS, A. T. MELVIN, L. LANDECKER, R. B. McBRIDE, J. G. McCALLUM, W. H. COOPER, O. H. BURNHAM, and F. A. BEE vs. H. H. HARTLEY, GEO. W. SWAN, JOHN BLAIR, JAMES BLAIR, TRUMAN WILCOX, F. A. BISHOP, G. G. CLARK, WM. C. WILKINSON, and S. D. BREWSTER.

(37 Cal. 15.)

Appeal from the District Court, Eleventh Judicial District, El Dorado County.

In 1862 a corporation was formed, called the Placerville and Sacramento Valley Railroad Company. On the 21st day of August, 1865, the corporation was indebted to Wells, Fargo & Co. in the sum of two hundred and sixty-eight thousand dollars for money advanced. On said day the Board of Directors of said corporation passed the following resolution:

"F. A. Bishop moved that ten thousand shares of the capital stock of the Placerville and Sacramento Valley Railroad Company be issued to Louis McLane, as trustee for Wells, Fargo & Co., as security for moneys advanced by Wells, Fargo & Co. to said railroad company, with authority to vote the same at all meetings of the stockholders; provided, the said Louis McLane enter into a written agreement that the said stock shall be transferred to the company on payment of said indebtedness to Wells, Fargo & Co., and in proportional amount as said payments are made."

On the same day (August 21st, 1865) the ten thousand shares of stock were issued to Louis McLane, and a certificate of stock delivered to him, and receipted for in the following words upon the books of the company:

"Received the above certificate subject to the articles of incorporation and by-laws of the company.

"Louis McLane, Trustee."

"Per Theo. F. Tracy."

On the 3d day of October, 1865, said Louis McLane entered into the following writing or agreement, which was placed on file in the office of said corporation, namely:

"The advance made by Wells, Fargo & Co., occasioning the indebtedness mentioned in the motion or resolution, of which the following is a copy, to wit: 'F. A. Bishop moved that ten thousand shares of the capital stock of the Placerville and Sacramento Valley Railroad Company be issued to Louis McLane, as trustee for Wells, Fargo & Co., as security for moneys advanced by Wells, Fargo & Co. to said railroad company, with authority to vote the same at all meetings of the stockholders; provided, the said Louis McLane enter into a written agreement that the said stock shall be retransferred to the company upon payment of said indebtedness to Wells, Fargo & Co., and in proportional amounts as said payments are made,—carried unanimously,'—having been made in consideration of the transfer of stock therein mentioned, and of the right of the transferee or his properly authorized agent or proxy to vote the stock so transferred at all meetings of said company and the stockholders thereof, I, Louis McLane, of the City and County of San Francisco, named in the said motion or resolution, in consideration of the premises and of the transfer of said stock to me, do hereby covenant and agree to and with the Placerville and Sacramento Valley Railroad Company to retransfer to said company said stock upon the payment of said indebtedness to Wells, Fargo & Co., and in proportional amounts as said payments are made. I to vote said stock as aforesaid by myself in person, or by any duly authorized agent or proxy. And for the consideration and upon the terms aforesaid, I hereby accept said trust.

"In witness whereof, I have hereunto set my hand and seal, this third day of October, A. D. 1865, at the City and County of San Francisco, State of California.

"Louis McLane. [Seal.]

"Witness: A. B. Forbes."

The Certificate Book of stockholders contains an entry showing said ten thousand shares of stock to be and stand on the said book in the name of Louis McLane, thus: "Louis McLane, trustee, ten thousand shares."

An election was held February 4th, 1868, at Placerville, in said county, being the time and place appointed by the by-laws for the election of Directors, at which, of the whole number of votes cast, each of the defendants, namely: H. H. Hartley, Geo. W. Swan, John Blair, James Blair, Truman Wilcox, F. A. Bishop, G. G. Clark, Wm. C. Wilkinson, and S. D. Brewster received ten thousand five hundred and twelve, ten thousand of which were cast by Louis McLane, by his proxy, Charles E. McLane. And three thousand and ninety-eight votes were cast for each of the plaintiffs, namely: C. W. Brewster, W. S. Burns, F. A. Bee, A. T. Melvin, L. Landecker, R. B. McBride, J. G. McCallum, W. H. Cooper, and O. H. Burnham.

All of the votes cast were admitted to be legal and correct votes, except the ten thousand votes so cast by said Louis McLane, which are claimed to be illegal by plaintiffs, but which is denied by defendants.

At the time and before said ten thousand votes were cast, the right to cast them was denied and objected to, and a protest was

made against their being cast by all the stockholders who voted for the plaintiffs.

The Chairman of said meeting having overruled said objection, an appeal was thereupon taken to said stockholders' meeting, who voted three thousand and ninety-eight shares against sustaining the same, and ten thousand five hundred and twelve shares to sustain it—ten thousand shares thereof being cast in manner aforesaid, against the objection and protest of all those voting against sustaining said decision—and the same was thereupon declared to be sustained, and said ten thousand shares were voted accordingly.

Said defendants were thereupon declared to be elected, against which declaration the plaintiffs then and there protested. Defendants are now, and have since said election, been acting as such Directors, and in the possession of said offices, together with the books and property appertaining thereto. Plaintiffs, before the commencement of this action and proceeding, and after said election, demanded the possession of said offices, books, and other property appertaining to said offices, which defendants refused to deliver. The whole number of shares of the capital stock was fifteen thousand, at one hundred dollars each; of which fourteen thousand six hundred and seventy-four shares have been issued, if said ten thousand shares are counted, or four thousand six hundred and seventy-four, if said disputed shares are not counted.

This action was commenced under the section of the Act concerning corporations recited in the separate opinion of Mr. Chief Justice Sawyer, and was submitted upon a stipulation of the attorneys that the foregoing were the facts. The case was submitted in the Supreme Court upon the following stipulation:

"It is hereby stipulated that the foregoing complaint, stipulations, and judgment contain a correct statement on appeal, and that this is a true transcript of the same, being the judgment roll in said cause."

The transcript on appeal contained the complaint, and a stipulation in place of an answer that the allegations of the complaint should be deemed denied without an answer, the agreed facts, and the above stipulation as to the transcript. There was no assignment of errors, or statement of the grounds upon which a reversal of the judgment was sought, in the transcript.

The case was submitted to the Judge below, and by him decided at Chambers. The defendants were by him adjudged to have been properly elected Directors. From his decision the plaintiffs appealed.

The other facts are stated in the opinion of the Court.

By the Court, RHODES, J:.

I. The point that the proceeding is without authority of law is based upon a typographical error in the statutes of 1851, p. 443, Sec. 31. It appears from that section, as printed, that the whole Act of 1850, concerning corporations, was repealed; but the Act, as enrolled, shows that only Chapter III of the Act of 1850 was repealed. Chapter I of that Act, which includes the section under which the proceeding was instituted, was left in full force.

II. The proceeding is clearly of a judicial character. The controversy was heard and determined by the Judge in his official capacity, and his decision was a final determination of the rights of the parties to the proceeding. The fact that the proceeding was instituted before the Judge, and not the District Court, does not prove that the proceeding was not a judicial proceeding, nor that the decision does not amount to a judgment, for the Legislature is not prohibited by the Constitution from conferring upon the Judges authority to hear and determine actions and proceedings at Chambers. Such authority is granted in respect to writs of mandamus, certiorari, and quo warranto. We are of the opinion that this is a special proceeding; that the decision is a judgment, and that an appeal therefrom is given by section three hundred and forty-seven of the Practice Act; and such, we judge from the stipulation, was the view of the counsel who appeared before the District Judge.

III. The parties recited in their stipulation all the facts in the case, and agreed that the stipulation should be a part of the judgment roll, and that no other statement on appeal should be required. The facts therein recited took the place and served all the purposes of a finding of facts by the Court. No statement on appeal was necessary. All the questions presented arise upon what the parties have agreed shall constitute the judgment roll, and no specification of the errors or ground relied upon is required to be made in the record.

IV. The power of electing the Directors of a railroad corporation is lodged by the statute in the hands of the stockholders. The exercise of this power having been regulated by the statute, the corporation cannot, by its by-laws, resolutions, or contracts, either give or take it away. Were the statute silent in this respect, the election of the Directors, like the election or appointment of subordinate officers, would be subject to the regulation and control of the corporation, but the statute having expressly declared who shall be entitled to vote for Directors, its provisions are imperative upon the corporation, constituting a part of the law of its being; and the corporation has no authority to extend or limit the right, as regulated by the statute. The first section of the Act of 1861 (Stats. 1861, p. 607) provides that the first Board of Directors shall be elected by the subscribers to the stock, and subsequent sections provide that after the first election the Directors shall be elected by the stockholders—each stockholder being entitled to one vote for each share of stock which he owned for ten days next preceding such election. The clause, therefore, of the resolution of

the Board of Directors giving Louis McLane authority to vote the stock transferred to him by the corporation, as well as the clause to the same effect in the agreement entered into by him with the corporation, was void.

It becomes necessary to ascertain the ownership of the stock voted upon by McLane. For this purpose the resolution of the Board of Directors, the receipt given for the stock and the agreement executed by McLane are to be construed together as constituting one transaction. The substance of the transaction is that Wells, Fargo & Co. advanced to the Placerville and Sacramento Valley Railroad Company the sum of two hundred and sixty-eight thousand dollars, and the railroad company, as security for the money so advanced, issued to Louis McLane, as the trustee for Wells, Fargo & Co., ten thousand shares of the capital stock of the railroad company, to be retransferred to the company upon payment of the indebtedness for the money so advanced, and in proportional amounts as said payments should be made. The time of payment is not specified. The respondents contend that the transaction is neither a mortgage nor a pledge of the stock, but only amounts to a trust; and the appellants claim that the transaction constitutes a pledge. We are of the opinion that it is a pledge.

A pledge is a bailment of personal property as a security for some debt or engagement. (Story on Bailm., Sec. 268.) The general property in the thing pledged remains in the pledgor, and only a special property vests in the pledgee. A delivery to the pledgee of the thing pledged is essential to the contract, and until that act is performed the special property that the bailee is entitled to hold does not vest in him. In respect to most kinds of property, a delivery of the property to the pledgee, without any written transfer of the title, is sufficient to pass the requisite special property. Incorporeal property, being incapable of manual delivery, cannot be pledged without a written transfer of the title. Debts, negotiable instruments, stocks in incorporated companies, and choses in action generally are pledged in that mode. Such transfer of the title performs the same office that the delivery of possession does in case of a pledge of corporeal property. The transfer of the title, like the delivery of possession, constitutes the evidence of the pledgee's right of property in the thing pledged. The transfer in writing of shares of stock not only does not prove that the transaction is not a pledge, but the stock, unless it is expressly made assignable by the delivery of the certificates, cannot be pledged in any other manner. In Wilson v. Little, 2 N. Y. 443, the stock was transferred to the defendants, but the Court held that the contract amounted to a pledge of the stock. (See, also, Jewitt v. Warren, 12 Mass. 300; Bowman v. Wood, 15 Mass. 534; Dewey v. Bowman, 8 Cal. 145; Story on Bailm., Sec. 290, and following; Parsons on Cont. 595.) In Dewey v. Bowman it is said that the pledgee has not the legal title to the property, and language of the same import is found in many cases. It was not intended to say in that case that the pledgee never receives the apparent legal title, but only that, as between him and the pledgor, the title, or more accurately, the general property, remained in the pledgor, for the subject matter of the contract was a lease which was assigned to secure the payment of a certain promissory note, and it was held that the contract was a pledge and not a mortgage. In Wilson v. Little, in speaking of the pledge of certain shares of stock, the Court say: "The general property which the pledgor is said to retain is nothing more than a legal right to the restoration of the thing pledged, or payment of the debt." A corporation, in pledging shares of its stock, which had not been issued at the time of making the contract, must, of necessity, issue them to the pledgee, or to some one for him.

The circumstance that the stock was issued to Louis McLane, as Trustee for Wells, Fargo & Co., instead of being issued in the name of the latter, does not alter the real nature of the transaction. McLane is described as the trustee of Wells, Fargo & Co., but his position and duties in respect to the stock, so far as either of the parties to the contract are concerned, is that of agent of the creditors. He is none the less a mere agent in the transaction because he is described as trustee. The transfer of the stock to him was in law a transfer to his principal, Wells, Fargo & Co. Had he been named as the agent of the creditors, there would be no room for doubt on this point. His true position in the transaction is to be determined, not by the title given to him, but by the acts and duties he is to perform; and these show that he bears the relation of agent to the creditors of the corporation.

The transaction lacks one essential element of a mortgage. A mortgage passes the title to the mortgagee, the mortgagor reserving the right to defeat the transfer and invest the title in himself by the performance of an express condition subsequent. Here no time was mentioned for the repayment of the money advanced, and the contract looked to the retransfer of the stock to the corporation. It is not claimed, on the part of the respondents, that McLane had any right to sell the stock, but it is admitted that he is to hold it until the money, or some part of it, is paid, and thereupon to retransfer the stock, or a proportional part of it, to the company. No other right in the stock is asserted for Wells, Fargo & Co. than that claimed for McLane. This evidently is not such a title as is held by a mortgagee of personal property. We are satisfied that the contract is a bailment of the stock, and we are unable to give it any place among the different kinds of bailment except that of a pledge.

It results from this view of the contract that, as between the parties, the general

property in the stock is in the pledgor—that the railroad company is its owner.

V. The question here is not whether the pledgee or a trustee to whom stock has been pledged or transferred by a stockholder, and who appears upon the books of the corporation to be the owner, is entitled to vote; but it is whether the agent or trustee of the pledgee, who is described in the Certificate Book of the corporation as a trustee, and who holds as such trustee or agent certain shares of stock which were pledged by the corporation to its creditor, is entitled to vote such stock. The designation of McLane as trustee was sufficient to show that he did not hold the stock in his own right, and as the corporation was one of the parties to the contract, its officers are chargeable with notice of the manner in which he held the stock. The case falls within the principle of Ex parte Holmes, 5 Cow. 426, in which it was held that there could be no vote upon stock owned by the company, though held by trustees; that it was not stock to be voted upon by any one within the meaning of the charter or the general Act relating to that subject. Subsequent cases, like Ex parte Barker, 6 Wend. 510, though qualifying and restricting the broad language of Ex parte Holmes so as not to exclude the vote of a trustee upon the stock held in trust for a stockholder, have not questioned the doctrine that the stock belonging to the corporation, though held in the name of trustees, was not entitled to be voted upon. This doctrine must command the assent of every one, unless it can be shown that a corporation can become a stockholder in the sense of the statute of its own stock, receiving from itself dividends, and responding to itself for calls for assessments, and being responsible for the debts of the corporation, first as a corporation, and second, as a stockholder.

VI. It is objected that an investigation cannot be here collaterally made of the terms and conditions upon which the trustee holds the stock. To what extent evidence, if objected to, would be admissible to prove such terms and conditions, it is unnecessary to inquire, for the case was presented to the Court below upon an agreed statement of facts, without reserving the question of the competency, relevancy, or admissibility of any fact in the statement, and it is now too late to raise the question. The judgment of the Court was invoked upon the facts recited in the statement.

VII. There is another view of the matter which appears to us to be equally decisive of the case. The whole Act proceeds on the theory that the certificates of stock are to be issued only upon the payment in full for the stock. Section fourteen is as follows: "Certificates of stock shall be issued, signed by the President and Secretary, in such manner as may be prescribed by the by-laws of the company, for all stock paid up, from time to time, in compliance with the requirements of such Directors, or that may be fully paid in advance of such requirements by the voluntary act of any stockholder of such company." This provision clearly negatives by implication the right to issue the certificates of stock in advance of payment. There are many provisions of the Act that lend support to this construction. The "Book of Stockholders" is required to contain the amount of cash actually paid to the company by the stockholders respectively for their stock. In the next section (twelve) it is provided that the stock shall be transferable in the manner provided by the preceding section, and upon the books of the company, upon proper assignment and delivery to the assignee of the receipts for the installments paid on such stock, or the certificates of stock, when fully paid. The provision of the Act is general that all stockholders shall be liable to calls for assessments until the stock is paid up, and that payment may be enforced by suit and sale of the stock. The Act also authorizes the holders of the railroad bonds, with the consent of the corporation, to convert the principal into stock—that is, dollar for dollar. The manifest purpose was to place all stockholders upon an equal footing. The Act is not liable to the charge of inequality, if not absurdly, of restricting the corporation so that it could not issue the certificates of stock to the original subscribers to the stock, without payment in full, and permitting it to issue the remainder of the capital stock without payment.

Counsel have discussed the question whether the corporation can issue stock except in pursuance of a subscription; but that is not the question now before us, nor does it afford a test for its solution. It may be conceded that the corporation may issue its stock to its creditor in satisfaction of its debt, and the creditor may not be technically a subscriber to the stock, though he is substantially. In such case the creditor does that which is a prerequisite in every issue of stock—he purchases and pays for the stock. His demand stands in the place of so much money.

The provision of section thirteen, that the Directors may "call in and demand from the stockholders the sums by them subscribed, in equal installments of not more than ten per cent per month, unless otherwise stipulated in the articles of subscription, at such time as they may deem proper," instead of lending support to the respondents' position, that the stock may be issued without payment therefor, implies that payment must be made, and that the calls may be greater than ten per cent per month when the subscribers have so stipulated. The authority given in section four to the Directors to open books of subscription upon such terms as they may direct, does not permit them to receive subscriptions without any terms—that is, without payment or promise of payment for the stock. And neither this provision, nor that of section nine, which is also relied on by the respondents, and which gives the Directors power "to make and execute contracts

of whatsoever nature or kind, fully and completely to carry out the objects and purposes of such corporation," abrogates the special provisions relative to the issuing of the stock. In Clark v. Farrington, 11 Wis. 325; Cin. I. & C. R. R. v. Clarkson, 7 Ind. 595; Carr v. Le Fevre, 27 Penn. St. 413, and other cases cited by the respondents, the question was considered whether the company could receive anything but money on the subscription for stock; but if the position is tenable that the stock might have been issued without payment in anything, we are confident that it would have been taken in some of those cases, and the discussion of that question would have been useless.

While the position that the corporation may issue its stock in payment of its indebtedness is not questioned, it does not follow that the stock may be issued to secure such indebtedness. Had the stock been issued in the usual manner, and afterwards become the property of the corporation, and been held in such a manner that it did not merge, the corporation might deal with it the same as any stockholder, unless prohibited by the statute; but the claim of authority to pledge the unissued stock necessarily assumes the very point in controversy—the authority to issue the stock without purchase or payment.

The capital stock of the corporation, previous to its being issued, cannot, in any proper sense, be called the property of the corporation. When the certificates of stock are issued to a stockholder, they are, in his hands, the muniments and evidence of his title to a given share in the property, income, and franchises of the corporation. (Mechanics' Bank v. N. Y. and N. H. R. R. Co., 13 N. Y. 627.) The corporation possesses only the right, the power to issue the stock, and a condition precedent to the exercise of the power is the purchase and payment for the stock. This restriction, if it may properly be so called, is not more unreasonable than those relating to the amount of money the corporation may borrow and the rate of interest it may pay, and they all tend in some degree to protect the stockholders and creditors. If the power exists in the corporation to issue stock to secure a loan or indebtedness, it is practically unlimited, and the Directors may issue and pledge all the capital stock not held by stockholders as security for a trifling loan, and by the aid of the stocks thus issued, they may increase the capital stock, and pledge the new stock to secure another loan, and thus perpetuate themselves in power beyond the reach of redress on the part of the stockholders, who may have contributed much the larger portion of the assets of the corporation.

We are of the opinion that the shares of stock issued to McLane to secure the payment of the money advanced to the corporation, were illegally issued, and were not entitled to be voted upon at the election for Directors, and that the plaintiffs received a majority of the legal votes cast at the election.

Judgment reversed; and it is further ordered and adjudged that, at the election held on the 5th day of February, A. D. 1868, by the stockholders of the Placerville and Sacramento Valley Railroad Company, for the election of Directors of said corporation, C. W. Brewster, W. S. Burns, F. A. Bee, A. T. Melvin, R. Landecker, R. B. McBride, J. G. McCallum, W. H. Cooper, and O. H. Burnham, were duly elected Directors of said corporation.

Sawyer, C. J., concurring specially.

This is an appeal from an order of judgment in a summary proceeding under section fifteen of Chapter I of the Act of 1850, concerning corporations, by a portion of the stockholders of a railroad corporation, to set aside an election of Directors. The section is as follows:

"Upon the application of any person or persons, or body corporate, that may be aggrieved by or may complain of any election held by any corporate body, or any proceeding, act or matter in or touching the same, it shall be the duty of the District Judge of the district in which such election is held (reasonable notice having been given to the adverse party, or to those who are to be affected thereby, of such intended application) to proceed forthwith and in a summary way to hear the affidavits, proofs and allegations of the parties, or otherwise inquire into the matters or causes of complaints, and thereupon establish the election so complained of, or to order a new election, or make such order, and give such relief in the premises as right and justice may appear to the said District Judge to require; provided, that the said Judge may, if the case appear to require it, direct the District Attorney of his district to exhibit one or more information or informations in the nature of a quo warranto in the premises."

The respondents object that no appeal is authorized, and this Court has no jurisdiction to entertain the appeal. I can see no answer to this objection. The proceeding was not had under the Practice Act, and its provisions are inapplicable. The proceeding authorized by the section cited is special and summary, had before the Judge, as such, and not before the Court. The object, doubtless, is to give a speedy remedy, which may be pursued, in a perfectly clear case, at once before the Judge in vacation, wherever he may be found in the district at the time the emergency arises. The provision makes it "the duty of the District Judge * * * to proceed forthwith and in a summary way to hear the affidavits, proofs and allegations of the parties," etc. But it also permits him, in a case of great gravity or difficulty, or when the case is not clear—"if the case appear to require it"—to direct the District Attorney to exhibit an information in the nature of a quo warranto; that is to say, to require the proceeding to be had in the ordinary, regular, more deliberate and solemn mode provided in the Practice Act

for determining such questions by the Courts of justice. But, so far as the special and summary proceedings under section fifteen are concerned, I think the parties are limited to the remedy as there given. It is complete within itself. It was, to my mind, clearly never contemplated that there would be an appeal. The proceeding is at chambers before the Judge, and not a proceeding of the Court as such. The fact that the papers were afterwards attached together and marked filed, and called a judgment roll by the clerk, does not change its character. The proceeding does not purport upon its face to be a Court proceeding, and there is nothing authorizing it as a Court proceeding.

If the parties choose to adopt this mode of redress, I think they must be content with the remedy afforded. I am of opinion, therefore, that the appeal should be dismissed. But as my associates have disposed of the case upon other than jurisdictional grounds, I will add that, whether the stock in question is regarded as an ordinary pledge or as a trust, I concur in the conclusion that Mr. McLane was not entitled to vote upon it, upon the grounds somewhat generally stated in the fifth point of the opinion of Mr. Justice Rhodes and upon the authorities therein cited.

Crockett, J., concurring specially.

I concur in the judgment and opinion to the effect that the stock held by the trustee did not entitle him to vote at the election of Directors; but I express no opinion as to the validity of the stock in the hands of the trustee, as a security for the debt to Wells, Fargo & Co.

Sprague, J., concurring specially.

I concur in the judgment.

Mr. Justice Sanderson, being disqualified, did not sit in this case.

AGNES BORLAND, AS EXECUTRIX, ETC., RESPONDENT, v. NEVADA BANK OF SAN FRANCISCO, APPELLANT.

(99 Cal. 89; 33 Pac. 737.)

Appeal from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial.

The facts are stated in the opinion of the court.

HARRISON, J.—The plaintiff seeks to recover from the defendant as a stockholder in the Wyoming and Dakota Water Company its proportionate liability of certain indebtedness of that corporation to the plaintiff. The case was tried in the court below without a jury, and judgment rendered in favor of the plaintiff, from which and an order denying a new trial the defendant has appealed.

In 1877, August Hemme, being heavily indebted, contemplated going into bankruptcy, and as the defendant was one of his creditors to the amount of several hundred thousand dollars, Mr. Flood, who was its vice-president, proposed to him that if he would turn over to the bank what property and securities be held, it would carry him through. Hemme's indebtedness to the bank was evidenced by several promissory notes upon which he had given collateral security, and in response to this proposition of Mr. Flood he turned over to the bank various properties, upon which the bank thereafter from time to time realized by sales, and applied the amounts to his credit. In March, 1880, Flood, having learned that Hemme had certain shares of stock in the above-named corporation which he had not turned over to the bank, sent for him, and upon his demand that this stock should be given up to the bank, Hemme caused the same to be transferred on the books of the corporation from the name of his wife into that of George B. Bailey, trustee, and delivered the certificate therefor to Flood. Bailey was an employee in the bank, in whose name all securities held by the bank, whether as proprietor or collateral, were placed and held by him as trustee for the bank. It does not appear that any entry of the transaction was made upon the books of the bank, and the certificates for the stock were themselves placed by one of the employees of the bank in an envelope and marked as held as security against Hemme's account. At this time the bank still held some of the other property which had been turned over to it in 1877 undisposed of, and disposals thereof were thereafter made from time to time, and the proceeds placed to the credit of Hemme's account. This stock, however, was never disposed of by the bank, but diminished in value so that it was regarded of no value whatever, and the notes themselves became outlawed, and in 1882 were surrendered to Hemme, at which time he made a written assignment of the stock to the bank.

It is contended by the plaintiff that the transaction between Hemme and Flood was an absolute transfer of the stock, by which the entire title thereto was vested in the bank, while the defendant contends that the stock was received and held by it only as a collateral security for the indebtedness of Hemme; and upon the determination of this disputed point hinges the liability of the defendant, for if it took the stock as security merely, it was not a stockholder, liable for the debts of the corporation, while if it became the absolute owner thereof, it is chargeable with its proportionate liability of the corporate debts. Section 322 of the Civil Code declares: "Each stockholder of a corporation is individually and personally liable for such portions of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation. . . . The term 'stockholder,' as used in this section, shall apply not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of the stock, although the same appear on the books in the name of another. . . . Stock held as col-

lateral security, or by a trustee, or in any other representative capacity, does not make the holder thereof a stockholder within the meaning of this section, except in the cases above mentioned, so as to charge him with any proportion of the debts or liabilities of the corporation; but the pledgor or person or estate represented is to be deemed the stockholder as respects such liability."

The parties to the transaction under consideration did not by any words or instrument attempt to define the relation which they should hold to the property after it had been delivered by Hemme to the bank, and the evidence relating to the transaction itself is exceedingly meager. There was no express agreement of any kind between them. Their relations at the time were evidently of an unfriendly character, and they were dealing with each other in the attitude of a creditor seeking to get from his debtor that which he had agreed to give him, and a debtor reluctantly parting with what he had agreed to give. Although Hemme, when asked at the trial whether he delivered that stock absolutely to Flood, or whether he retained an interest in it, stated that he delivered the stock absolutely to Mr. Flood as the property of the bank, he did not testify that anything of that nature was said either by Flood or himself at the time it was delivered, or at any time, and his testimony cannot be considered as anything more than either his own opinion of the transaction, or as a purpose which he then had but which he did not disclose.

The transaction cannot be regarded as a sale of the stock from Hemme to the bank. There was nothing said by either party in reference to buying or selling the same, nor was the value of the stock agreed upon or even discussed; nor was any price fixed at which Hemme would part with it or Flood accept it. Story, in his treatise on Sales, section 1, defines a sale to be "a transfer of the absolute title to property for a certain agreed price," and in section 217 of the same treatise states that the price required in a contract of sale must be: 1. Money or its negotiable representative; 2. Certain and definite, or capable of being rendered definite; 3. An actual price, seriously intended to be exacted. Section 1721 of the Civil Code defines a sale to be "a contract by which for a pecuniary consideration called a price, one transfers to another an interest in property." It is not necessary, however, that the price for which property is sold shall be money only, or that it shall be actually delivered at the time of the transaction. The term, as here used, is equivalent to compensation. (Hudson Iron Co. v. Alger, 54 N. Y. 177.) But as values are expressed in money units, a sale implies a reciprocal transfer of this compensation, past, present, or future, whose value in money is agreed upon between the parties. It is, however, the agreement to pay a price, rather than the actual payment of the price, which is the essential element of a sale, but the price itself must be definite, or the agreement must contain such elements that the price can be ascertained therefrom. In addition to the necessity for a price, there must be the assent of the parties that the transaction shall be a sale. This must be an express agreement, or such an implication must follow from the nature of the transaction itself. The mere transfer of possession without the agreement, express or implied, that such transfer is a sale on the one hand and a purchase on the other, will not be a sale or have the effect to transfer the title. The testimony of Grayson that at some time subsequent to the transfer of the stock Flood spoke of the transaction as a "purchase," cannot be used to determine the nature of the transfer. Flood, as the agent of the defendant, could not bind it by any admissions or declarations respecting the character of the transaction, which he might subsequently make in reference thereto. (Beasley v. San Jose Fruit Packing Co., 92 Cal. 388.)

Neither can the transaction be regarded as a payment by Hemme upon the amount of the indebtedness against him held by the bank. Payment, like sale, can result only from the mutual agreement of the parties that the transaction shall have that effect, and without such consent the transaction cannot be treated by the court as a payment. Technically, payment can be made only in money. It is defined in the Civil Code to be "performance of an obligation for the delivery of money only." (Sec. 1478.) Payment may, however, be made in merchandise or any commodity other than money which the parties to the transaction agree shall be accepted as payment, but the consent of the creditor to accept as payment the thing received is as essential as the purpose of the debtor that it shall have that effect. "The acceptance of any valuable thing in discharge of the debt amounts to payment, but it is the distinct agreement of the creditor to accept the thing in discharge of the debt that gives it the character of payment. Without this, the transaction is regarded either as furnishing matter of set-off or as security collateral to the original debt, according as the subject received is in possession or in action." (Covely v. Fox, 11 Pa. St. 174.) But, although the receipt of a commodity by a creditor from his debtor at an agreed valuation, with the agreement that the sale shall be applied in a credit upon the debt, is equivalent to a payment, both of these elements are wanting here. If it was the purpose of Hemme to transfer the stock in part satisfaction or in payment of his obligation to the bank, such purpose was ineffectual without the assent of the bank.

Inasmuch as no express agreement between the parties relative to the character of the transaction, and no statement by them, or either of them, of the character in which it should be treated, was shown at the trial, we are compelled to determine their rights according to the principles of law applicable to such a transaction in the

absence of any agreement. In other words, we are to ascertain what legal presumption would arise from the transaction in view of the circumstances under which it was had, having reference also to the relation which the parties held to each other. If there had been no previous relations between them, the deposit of the stock would constitute a mere bailment, for there is nothing indicative of a gift, and it is not pretended that such was the intention of either of the parties. The owner of property remains such until he is divested of his ownership by law, or by his voluntary act. The mere transfer of his property to another does not divest him of his ownership, unless such was his intent, and manifested by suitable acts. If the person to whom the transfer is made is his creditor, his ownership will none the less be retained in the absence of any evidence respecting his motives in making the transfer, and even if it was his purpose to divest himself of his title thereto, or to make a transfer in satisfaction or payment of his obligation, either in whole or in part, such purpose would be ineffectual without the consent of the creditor to receive it therefor; yet, as it must be presumed that the parties to such transaction made the transfer for some purpose, and as their act is entitled to receive consideration, the transaction will be regarded as having been made in accordance with their presumed motive. The law will make the inference therefrom that by the transaction they intended to effect that which would be of mutual benefit to each without causing a loss to either, or giving to either an advantage which would not be presumed to have been within their contemplation. Hence, when a debtor deposits property with his creditor, in the absence of any showing as to the purpose with which the deposit is made or received, it is presumed that it was intended as a collateral security for the debt. Unless there is some evidence tending to show an intention on the part of the debtor to give, and also on the part of the creditor to receive, the property in satisfaction of the debt, either in whole or in part, the law presumes that it is given only as a collateral security. Especially does this presumption arise if the property given is itself a chose in action or a security of a different nature from the debt, whose value is neither intrinsic nor apparent, and is not agreed upon by the parties, for the reason, as was said by the supreme court of Pennsylvania, in Leas v. James, 10 Serg. & R. 315: "Such assignment is not in its nature a payment. It puts no money in the hands of the creditor, but only gives him the means of collecting money from another." The duty of establishing the contrary is affirmative, and it rests upon the debtor. If he fails to perform this duty the law makes the positive inference that the assignment is only as collateral security. (Jones on Pledges, sec. 17; Colebrooke on Collateral Securities, sec. 29; Eby v. Hoopes, 1 Pennypacker, 177; Bayard v. Shunk, 1 Watts & S. 94; 37 Am. Dec. 441; Stone v. Miller, 16 Pa. St. 450; Perit v. Pittfield, 5 Rawle, 166; Caldwell v. Fifield, 24 N. J. L., 150; Sutphen v. Cushman, 35 Ill. 186; Harris v. Lombard, 60 Miss. 29.) The debtor cannot make his creditor a forced purchaser of the property or compel him to exchange his obligation for the property transferred, and this is eminently the case where no value is agreed upon, or even spoken of at the time of the transfer. The burden is always upon the debtor to show that a substituted performance of his obligation to pay money was accepted by the creditor as the equivalent of payment, or in satisfaction of the obligation. Taking the promissory note of a third party from the debtor will always be regarded as given for collateral security unless proof is made that it was given and received as payment. (Brown v. Olmsted, 50 Cal. 162.) "The mere acceptance by the creditor of a negotiable note of a third person makes it but collateral security; when such a note is given for a pre-existing debt the presumption is that it was not the intention of the parties that it should operate as an immediate and absolute satisfaction and discharge of the debt, and nothing short of an actual agreement, or some evidence from which a positive inference of discharge can be made will suffice to produce such effect." (Wilhelm v. Schmidt, 84 Ill. 187.)

There is no evidence in the record herein which tends to rebut this presumption that the stock of the water company was taken and held by the defendant as collateral security for the debt of Hemme. Hemme testified that in March, 1880, when Flood sent for him and demanded the stock, he went out and brought in a certificate for twenty-four thousand shares which stood in the name of his wife, and that at Flood's request he thereupon caused it to be transferred on the books of the corporation to the name of Bailey, and then delivered the certificate to Flood; that he estimated the stock to be of the value of from two and a half to three dollars per share; that nothing was said, either by Flood or himself, about the value of the stock, or concerning the amount with which he should be credited therefor; nor was anything said as to the amount of the purchase price, or any sum fixed at which he should be allowed credit upon his account; that in June, 1880, Flood, having learned that he had four thousand other shares of stock, again sent for him and demanded this stock also; and that, after having it transferred into the name of Bailey, he brought the certificates to the bank and laid them down on the desk in front of Flood and walked out without saying anytning, and that no mention was then made of money or price to be allowed him therefor. This, is in substance, all the evidence of what was said by either Flood or Hemme at the time of the transaction, and, in the absence of any statement or agreement by the parties concerning the relations thereafter to be held by them respec-

tively to the stock, it becomes necessary to apply the foregoing principles of law to determine that relation. For this purpose it is also proper to consider the relations which Hemme and the bank held to each other, as well as any circumstances which would give to Flood a reason for demanding the stock, or to Hemme a reason for delivering it. Hemme was still heavily indebted to the bank upon the obligations for which he had given various collateral securities in 1877, many of which were still held by the bank, undisposed of. His indebtedness at that time amounted to several hundred thousand dollars, and Flood had said to him that, if he would give him what securities he had, he would carry him through. Accordingly, Hemme turned over to the bank a line of securities whose value was estimated to be nearly four hundred thousand dollars, and the bank thereafter proceeded to realize upon them, but they were insufficient to meet the amount of the indebtedness. In view of the fact that Flood's agreement with Hemme was based upon the implied promise of Hemme that he would turn over what he had, we find ample reason for Flood, when he learned that Hemme had this water stock, to demand that it should be turned over to him, and also for Hemme to comply therewith; and, even if there were no other evidence in the case, it would follow that the bank would be regarded as holding the stock in the same capacity as it held the property which was turned over to it in 1877. There is no evidence in the record tending to show that the transfer in 1877 had any other character or effect than to operate as a collateral security for the indebtedness, and the relation of the parties at the time it was made, as well as the interview between Flood and Hemme prior thereto, and the subsequent dealings of the bank with the property, as well as the statement of some of the plaintiff's witnesses, are confirmatory of the presumption that it was held as collateral security for that debt. The notes of Hemme, by which that indebtedness was evidenced, were retained by the bank after the transfer was made, and it does not appear that any credit was indorsed thereon, or that any amount was placed to the credit of Hemme's account, except as the various securities were realized upon from time to time. In Sutphen v. Cushman, 35 Ill. 186, the supreme court of Illinois said: "The appellant was indebted to the appellee at the time the conveyance was made, and there is no evidence whatever of the discharge of that indebtedness. The bond and note by which the greater portion of it was evidenced were retained by the appellee, as well as the Lighthall notes, which had been pledged as security, and the payment of the indebtedness might have been enforced at any time thereafter. Until the contrary is shown the presumption is that the indebtedness was not satisfied by the conveyance; and absolute certainty in regard to the fact takes the place of presumption in case the creditor retains the evidence of the indebtedness, the securities pledged for its payment, and collects the money due upon such securities. In the present case, the indebtedness of Hemme was retained upon the books of the bank as one of its assets, and the retention of the notes by the bank, without any indorsement of payment thereon, is persuasive evidence that it was the intention of the parties that the indebtedness should remain for its full amount until it should be reduced by the application of the proceeds resulting from the sale of the securities. In the absence of any evidence tending to show an agreement to reduce the indebtedness by any fixed amount, this is the necessary presumption, for it is not to be supposed that the bank became the owner of the property turned over to it, and at the same time held the indebtedness against Hemme for its full amount; and, in the absence of any agreement regarding the amount for which the property had been accepted by the bank, there would be no means of determining that the indebtedness had been reduced in any amount. In any attempt to enforce the indebtedness against Hemme, he could have compelled the bank to first exhaust these securities before calling upon him for any deficiency, whereas, if the bank was the owner of these securities, he would have had no such right, and the bank could enforce its indebtedness for the full amount and still remain entitled to the property turned over to it by him.

We have carefully examined the record, and are satisfied that there was no evidence before the court to sustain its finding that the defendant was the owner of the stock in question; and for that reason its judgment and order denying a new trial are reversed.

McFARLAND, J., GAROUTTE, J., PATERSON, J., and DE HAVEN, J., concurred.

Rehearing denied.

MEAD, ADMINISTRATRIX v. BUNN.

(32 N. Y. 275.)

Appeal from the general term of the Supreme Court, in the sixth district, where a judgment entered in favor of the plaintiff, upon the report of a referee, had been affirmed.

This was an action, in the nature of trover, brought by David Mead, Jr., the appellant's intestate, against William A. Bunn, for the conversion of a promissory note for $133, made by one Stevens, and others, in favor of the plaintiff, and by him pledged to the defendant.

The defendant was the holder of a bond, executed by the plaintiff and one Crydenwise, on the 8th December, 1857, secured by a mortgage, upon a farm owned by the latter, for the payment of $1053, on the 1st April, 1859, with annual interest. In February, 1858, Crydenwise, who was engaged in the erection of buildings upon his farm,

that would enhance its value, cut down ten trees growing thereon. The defendant, thereupon, threatened the obligors with a suit in equity, falsely representing that the mortgage contained a provision, under which the act of Crydenwise, in cutting down the trees, made the whole mortgage-debt payable immediately, as a forfeiture for the breach of the supposed condition; he also represented, that by a contrivance between himself and the scrivener, this clause had been concealed from the obligors, at the time the papers were executed.

On these representations which the referee found to be false and fraudulent, the plaintiff was induced to agree to pay $100 of the principal sum, before it became due; and to pledge as security for such payment, the note now in question, for an amount exceeding that sum, with an agreement that, in case of default, the defendant might appropriate the note to his own use, on indorsing $100 upon the mortgage.

The plaintiff subsequently made a tender of the amount due to the defendant, as stated in the opinion, and demanded a surrender of the note, which was refused; the defendant asserting his right to appropriate it to his own use, and to indorse a credit of $100 on the mortgage; whereupon, this suit was brought. Other facts are stated in the opinion of the court.

On this state of facts, the referee directed a judgment in favor of the plaintiff, which having been affirmed at general term, the defendant appealed to this court. The appeal was prosecuted by the plaintiff's administratrix, after his decease.

PORTER, J. The note, for the conversion of which the action was brought, was originally the property of the plaintiff. He continued to be the owner, at the time this suit was commenced, unless his interest had passed, by an effectual transfer, to the defendant.

The facts on which the appellant rests his claim, are these: He held a bond, executed by the plaintiff and one Crydenwise, on the 8th of December, 1857, accompanied with a mortgage from the latter, covering a farm owned by Crydenwise, and securing the payment of $1053, on the 1st of April, 1859, with interest, payable annually on the first of April. In February, 1858, some two months after the execution of the mortgage, Crydenwise, who was then engaged in erecting buildings which would enhance the value of the property, had occasion to cut ten of the trees then growing on the farm. The defendant seized the opportunity to menace the obligors with a suit in equity, and, to induce them to yield to his exactions, he represented, that the mortgage contained a provision, under which the act of Crydenwise, in cutting these trees, made the whole amount secured by the mortgage due immediately, as a forfeiture for breach of the supposed condition. He also represented that, by contrivance between himself and the scrivener, this clause had been concealed from the obligors, at the time the papers were executed. These representations were false; they were made with deliberation and design; they accomplished the fraudulent purpose meditated by the defendant; and induced the plaintiff and Crydenwise, in compliance with the defendant's demands, to agree to pay $100 of the principal debt, a year before it matured, and to secure the payment of the sum thus extorted, by the pledge of a note for a larger amount, then held and owned by the plaintiff. The defendant, in harmony with his general purpose of exaction, required and obtained a stipulation, that in case of default in the prompt payment of the $100, on the 20th of April next ensuing, he should be at liberty to indorse that sum as paid on the mortgage, and to appropriate the pledged note to his own use, thus securing to himself a bonus of $33, as a forfeiture for the non-payment of $100, within two months and a half from the date of the engagement. The plaintiff undertook, but failed to comply with the conditions of the pledge.

The facts, though insufficient to satisfy the terms of the arrangement, and work out the redemption of the note, are still significant, in developing the fraudulent purpose of the defendant. The interest on the mortgage was paid on the 1st of April, pursuant to the terms of the bond, and on the 20th of the same month, the day appointed for the redemption of the pledge, the plaintiff offered $63.90 in money, and the balance of the $100, in the dishonored note of a third party, held and owned by him, the payment of which was guaranteed by the defendant; and to this, it is conceded, there was no defence. The acceptance of these was refused, on the sole ground, that the money offered was not tendered in gold. The plaintiff, within a reasonable time, renewed the offer of the guarantee, with the balance in coin. The defendant then raised the objection, that he was not bound to accept the guarantee in part payment, and, as the entire amount was not offered in gold, and the day of payment had passed, he claimed to be entitled to appropriate the $133, secured by the pledged note. He accordingly indorsed on the bond a payment of $100, not due by its terms, and never, in fact, made, and refused to surrender the note, in compliance with the plaintiff's demand.

The tender was insufficient, and the plaintiff would, therefore, be without redress, but for the inherent vice which corrupted the transaction in its origin. It is found, as matter of fact, that the pledge was procured by falsehood, and, though unredeemed, it cannot be permitted to stand. A contract obtained by fraud, though perfect in form, is void in law. The element of fair and free consent is essential to the validity of every mutual engagement. The homely maxim that honesty is policy, is nowhere more firmly rooted and grounded, than in the foundations of our civil jurisprudence. No man can safely rest on a

title acquired through his own deliberate wrong; and in the present case, the defendant has no semblance of claim to the note in question, except that which he seeks to deduce from his own fraud.

It is unnecessary to consider the question, whether the extortionate terms of the pledge rendered it void, as contra bonos mores, and opposed to public policy; for the agreement was fatally tainted in its inception, and it was no sooner concluded between the parties, than it was annulled by operation of law.

It is claimed, on behalf of the appellant, that the mortgage was duly recorded, and that the plaintiff was, therefore, chargeable with constructive notice, that the statements of the defendant, as to its contents, were false. No such fact is found by the referee; but, if it were otherwise, it is sufficient to say, that it is neither the purpose nor the office of the recording acts, to charge the immediate parties with constructive notice of the precise contents of the instruments they execute, but to notify subsequent purchasers and incumbrancers of the rights such instruments are intended to secure.

It is also claimed, that the plaintiff, having heard the mortgage read by the scrivener, before he affixed his signature, was not at liberty to credit the subsequent false and fraudulent statement of the defendant, that it contained a provision declaring the principal due immediately, if growing trees were at any time cut by the mortgagor. On this subject, it is enough to say, that the defendant falsely and fraudulently represented to the plaintiff that, by collusion between himself and the scrivener, the mortgage was so read, by design, at the time of its execution, as to mislead and deceive the parties by whom it was executed.

It is insisted, on behalf of the appellant, that the offer of the plaintiff, on the 20th of April, to pay $100 of the principal sum secured by the mortgage, before it became due by its terms, was a ratification of the pledge procured by the defendant's fraud. No such ratification is found by the referee; and on appeal, every reasonable intendment, on questions of fact, as well as of law, is to be made in support of the original judgment. The party who alleges error in the court below, holds the onus of showing that, from the facts found, an erroneous legal conclusion has been deduced; or that some error of law has occurred in the interlocutory proceedings by which such conclusion was reached.

It is not the province of this tribunal, to review the findings of fact in the courts below, unless in exceptional cases; as, where the judgment has been already reversed, or where the appeal is from a decree in the surrogate's court, or in the late court of chancery; but if we were at liberty, in this case, to reconsider the facts, we find nothing in the evidence to justify the conclusion that the plaintiff ever ratified the pledge into which he was drawn by falsehood and deception. It is true, that on the 20th April, he offered to pay $100 on the mortgage, if the defendant would surrender the Stevens note; that offer was rejected. If it had been accepted, the defendant would have had the benefit of a payment of a portion of his debt, before it became due. But there was no waiver of the fraud, no recognition of the validity of the pledge, and no release by the plaintiff of his interest in the Stevens note. It belonged to him in his own right; he demanded and sought to reclaim it; the defendant, as the referee finds, rudely refused to surrender it, unless redeemed by the payment of $100 in gold; this was a plain conversion of the note; it was an unavailing attempt to use, for a fraudulent purpose, a possession acquired by fraudulent means. The collateral pledge was void; and no validity was imparted to it, by the unaccepted offer of the plaintiff to pay a portion of the mortgage-debt, before it matured.

It is claimed, that when this offer was made, if not before, the plaintiff was constructively chargeable, by lapse of time, with notice of the fraud by which the defendant had entrapped him into the engagement. This proposition rests on the mistaken assumption, that a false representation by one of the parties to a contract puts the other on inquiry as to its truth. Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual engagement; and he is under no obligation to investigate and verify statements, to the truth of which, the other party to the contract, with full means of knowledge, has deliberately pledged his faith. The judgment of the court below was right, and should be affirmed, with costs.

Judgment affirmed, with costs, and ten per cent. damages.

WILSON vs. LITTLE, et al.
(2 N. Y. 443.)

Appeal from the superior court of the city of New York where James Wilson brought an action on the case against Jacob Little and others for wrongfully selling fifty shares of stock in the New York and Erie Railroad Company. The cause was tried before Sandford, J., in December, 1847, and the plaintiff had a verdict for $4.000 damages, subject to the opinion of the court on a case to be made, with liberty to either party to turn the case into a bill of exceptions. The amount of the verdict, if the plaintiff was entitled to recover, was also subject to adjustment by the court. On a case being made, the superior court deducted from the verdict the amount of the debt to secure which the stock in question had been pledged to the defendants, and gave judgment in the plaintiff's favor for $2609.05, damages and costs of suit. The case having been turned into a bill of

exceptions, the defendants appealed to this court. The facts are sufficiently stated in the opinion of the court.

RUGGLES, J., delivered the opinion of the court. This was an action for wrongfully selling fifty shares of Erie railroad stock, which the defendants, Little & Co. had received in security for a loan of $2,000 made by them to Wilson, through the agency of R. L. Cutting, a broker. The contract in writing was in these words:

"New York, Dec. 20, 1845.

$2,000. I promise to pay Jacob Little or order two thousand dollars, for value received, with interest at the rate of seven per cent. per annum, having deposited with them as collateral security, with authority to sell the same at the broker's board, or at public auction, or at private sale, at option, on the non-performance of this promise, without notice on fifty Erie.

R. L. Cutting."

The stock in fact belonged to the plaintiff Wilson, but stood in Cutting's name on the books of the New York and Erie Railroad Company. It was of that kind known as consolidated capital stock. Cutting negotiated the loan as the plaintiff's broker. On the same day Cutting made a transfer of the stock on the books of the company in the words following:

"N. Y. & Erie Co.

For value received, I hereby transfer unto Jacob Little & Co., all my right, title and interest in fifty shares of the consolidated capital stock of the New York & Erie Railroad Company. New York, Dec. 20th, 1845. R. L. Cutting."

It is contended, on the part of the defendants, that the transaction was a mortgage and not a pledge; that the money was payable immediately, and the stock became absolutely the property of the appellants, and was only redeemable in equity. If this be true, the supreme court and the court for the correction of errors must have rendered their judgments in the case of Allen v. Dykers, (3 Hill, 593, and 7 id. 498,) upon a mistaken view of the law. In that case, as in the present, there was a loan of money, a promissory note for the payment of the amount, in which it was stated that the borrower had deposited with the lenders, as collateral security, with authority to sell the same on the non-performance of the promise, 250 shares of a stock therein mentioned. The money in that case was payable in sixty days—the sale was to be made at the board of brokers, and notice waived if not paid at maturity. The stock was assigned to the lenders of the money, and the transfer entered on the books of the company, on the day the note was given. With respect to the question whether the stock was mortgaged or pledged, I can perceive no difference between that case and the present. The question does not appear, by the report of that case, to have been raised. It would have been a decisive point, for if it had been a mortgage and not a pledge, the plaintiff must have failed. The sale of the stock in that case, by the lender, before the maturity of the note, did not make it the less decisive. (See Brown v. Bement, 8 John. 98.) If there had been good ground for saying, in Allen v. Dykers, that the stock was mortgaged and not pledged, it is not to be believed that it would have escaped the attention of the eminent counsel who argued the cause, and of both the courts; and on examining the question, I am satisfied that if the point had been taken it would have been overruled.

The argument of the defendant in this case is founded on the assumption that when personal things are pledged for the payment of a debt, the general property and the legal title always remains in the pledgor: and that in all cases where the legal title is transferred to the creditor, the transaction is a mortgage and not a pledge. This, however, is not invariably true. But it is true that possession must uniformly accompany a pledge. The right of the pledgee cannot otherwise be consummated. And on this ground it has been doubted whether incorporeal things like debts, money in stocks, &c., which cannot be manually delivered, were the proper subjects of a pledge. It is now held that they are so; and there seems to be no reason why any legal or equitable interest whatever in personal property may not be pledged; provided the interest can be put, by actual delivery, or by written transfer, into the hands or within the power of the pledgee, so as to be made available to him for the satisfaction of the debt. Goods at sea may be passed in pledge by a transfer of the muniments of title, as by a written assignment of the bill of lading. This is equivalent to actual possession, because it is a delivery of the means of obtaining possession. And debts and choses in action are capable, by means of a written assignment, of being conveyed in pledge. (Story on Bail. §§ 290, 297.) The capital stock of a corporate company is not capable of manual delivery. The scrip or certificate may be delivered, but that of itself does not carry with it the stockholder's interest in the corporate funds. Nor does it necessarily put that interest under the control of the pledgee. The mode in which the capital stock of a corporation is transferred usually depends on its by-laws. (1 R. S. 600, § 1.) It is so in the case of the New York and Erie Railroad Company. (Laws of 1832, ch. 224, § 18.) The case does not show what the by-laws of that corporation were. It may be that nothing short of the transfer of the title on the books of the company would have been sufficient to give the defendants the absolute possession of the stock, and to secure them against a transfer to some other person. In such case the transfer of the legal title being necessary to the change of possession, is entirely consistent with the pledge of the goods. Indeed, it is in no case inconsistent

with it, if it appears by the terms of the contract that the debtor has a legal right to the restoration of the pledge on payment of the debt at any time, although after it falls due, and before the creditor has exercised the power of sale. Reeves v. Cappen (5 Bing. N. C. 142,) was a case in which the debtor "made over" to the creditor "as his property" a chronometer, until a debt of £50 should be repaid. It was held to be a valid pledge.

In the present case the note for the repayment of the loan and the transfer of the stock were parts of the same transaction, and are to be construed together. The transfer, if regarded by itself, is absolute, but its object and character is qualified and explained by the contemporaneous paper which declares it to be a deposit of the stock as collateral security for the payment of $2,000, and there is nothing in the instrument to work a forfeiture of the right to redeem or otherwise to defeat it, except by a lawful sale under the power expressed in the paper.

The general property which the pledgor is said usually to retain, is nothing more than a legal right to the restoration of the thing pledged on payment of the debt. Upon a fair construction of the note and the transfer taken together, this right was in the plaintiff, unless it was defeated by the sale which the defendant made of the stock.

In every contract of pledge there is a right of redemption on the part of the debtor. But in this case that right was illusory and of no value, if the creditor could instantly, without demand of payment and without notice, sell the thing pledged. We are not required to give the transaction so unreasonable a construction. The borrower agreed that the lender might sell without notice, but not that he might sell without demand of payment, which is a different thing. The lender might have brought his action immediately, for the bringing an action is one way of demanding payment; but selling without notice is not a demand of payment, and it is well settled that where no time is expressly fixed by contract between the parties for the payment of a debt secured by a pledge, the pawnee cannot sell the pledge without a previous demand of payment, although the debt is technically due, immediately. (Story on Bail. § 308; Stearns v. Marsh, 4 Denio, 227.)

Payment of the note in this case was not demanded until the 3d of January, 1846. Previous to that time, and about the 24th of December, 1845, the defendants had sold the whole or the greater part of the fifty shares of consolidated stock pledged to them by the plaintiff, and were therefore not in condition to fulfill the contract on their part by restoring the pledge. Nor were they able nor did they offer to restore the same kind of stock, or stock of the same value as that which had been pledged in behalf of the plaintiff. On the 3d of January, when the defendants offered to deliver the converted stock, which was of a different kind and value, the plaintiff's broker was willing to receive any stock of the same description as that which had been pledged; but no stock of tnat kind was offered by the defendants. There was at that time a material difference in the market price between the consolidated and the converted stock of the company, the former selling at $85, and the latter at $55 per share. The pledge of the 50 shares of consolidated stock, therefore, could not be restored or made good to the plaintiff by assigning to him the same number of shares of converted stock. The defendants were bound to restore the identical stock pledged. The sale of it by the defendants before payment demanded was therefore wrongful, and the evidence sustains the third count in the plaintiff's declaration. The defendants having voluntarily put it out of their power to restore the pledge, a tender of the money borrowed would have been fruitless, and was therefore unnecessary. (3 Hill, 596; 7 id. 498.)

The remaining question is as to the rule of damages. The stock was disposed of by the defendants as early as the 24th of December, when its market price was about $68 the share. The defendant did not, however, distinctly inform the plaintiff then or afterwards that he had sold it, although he said he "had not got it," and gave that as a reason why he did not then transfer it, promising at the same time, that he would make the transfer as soon as the stock came in. The plaintiff, to accommodate the defendant, agreed to wait until the following day, when the transfer was not made, the defendant again promising to make it shortly. The plaintiff's broker reminded the defendant of the stock frequently, and on the 30th of December, formally notified him that he wanted to pay the loan and get back the stock, insisting that there should be no more delay, and that if it was not returned, he was directed by the party for whom he was acting to buy fifty shares at the board and charge it to the defendants. The defendant then said the stock should be returned the next day, but failed to return it; and it was not until the 2d of January that the defendant ceased to hold out the expectation of restoring the stock, or stock of the same kind and of equivalent value. On that day and on the 3d of January, the consolidated stock sold at $85 the share.

The defendants insist that they are chargeable only with the value of the pledge at the time it was wrongfully converted by them to their own use on or before the 24th of December, and not with its increased value at any subsequent period. The court below in making up the verdict estimated the stock at $84 the share. In actions for the wrongful conversion of personal property, it has in some cases been held that the value of the property is to be estimated according to its price at the time of the

conversion, and in others that the plaintiff is entitled to damages according to its value at any time between the time of the conversion and the day of the trial. (Bank of Buffalo v. Kortright, 22 Wend. 348, 356.) It is unnecessary in this case to settle the general rule. The ground on which the defendants insist that the damages must be estimated according to the price of the stock on the 24th of December, is that the plaintiff, on learning that the defendants had sold it, might then have gone into the market and purchased it at the current price on that day. But it is evident that he was prevented from doing so by the repeated promises of the defendants to restore the stock. Although the plaintiff was strictly entitled to a retransfer of the same shares that were pledged, it appears that his broker was willing to receive other stock of the same description and value, which the defendant promised from day to day to give, the plaintiff being all the time ready to pay the money borrowed. Time having thus been given to the defendants at their request for the fulfilment of their obligation, and the plaintiff having waited for the delivery of the stock for the accommodation of the defendants, and having relied on the expectation thus held out, and lost the opportunity of purchasing at a reduced price, it is manifestly just that the plaintiff should recover according to the value of the thing pledged when the defendant finally failed in his promises to restore it.

Judgment affirmed.

CHARLES O. NEWTON & ANOTHER vs. SOLOMON A. FAY.

(10 Allen, 505.)

CHAPMAN, J. This is a bill in equity to redeem certain shares of stock of the Otis Manufacturing Company and of the Springfield Fire and Marine Insurance Company, which the bill alleges were transferred by Jacob B. Merrick, the plaintiff's intestate, to the defendant, as collateral security for a note made by Merrick to the defendant. The answer admits that the defendant holds the stock of the Otis company as alleged in the bill, and there is no controversy in respect to that stock; but it denies that the stock of the insurance company was transferred to him as collateral security, and says that the conveyance of it to him by Merrick was intended to be an absolute sale or gift. On an issue framed to try this question before a jury, it appeared that the transfer of the stock was in the usual form of an absolute transfer, and the plaintiffs were permitted to prove by oral evidence that it was intended to be a security for the note, and was founded on no other consideration. The question now presented is, whether this evidence was admissible.

It is not contended by the defendant's counsel that the provision of Gen. Sts. c. 68, § 13, affects the question. That provision is, that "in transfers of stock as collateral security, the debt or duty which such transfer is intended to secure shall be substantially described in the deed or instrument of transfer. A certificate of stock issued to a pledgee or holder of such collateral security shall express on the face of it that the same is so holden; and the name of the pledger shall be stated therein, who alone shall be responsible as a stockholder." The obvious purpose of this section is to enable the pledgee to hold the security without being liable for the debts of the corporation or to taxation for the property; and if it were to be construed as excluding all other methods of conveying stock as collateral security, it would exclude evidence of a separate defeasance in writing. It was not framed with a view to that question, but altogether alio intuitu. It is to be noticed that it speaks of such a transfer of stock as a pledge, though the general property in the stock apparently passes to the vendee. The ordinary distinction between a mortgage and a pledge is, that by the former the general property passes, while by the latter it does not, but merely a special property passes. It is held in New York that a transfer of stock as collateral security is to be regarded as a pledge rather than a mortgage. The reason assigned is, that in order to constitute a pledge the possession must pass, and possession of stock cannot be transferred except by a transfer of the stock itself. A delivery of the scrip or certificate does not transfer the stock. The owner usually writes on his certificate a transfer very much like a bill of parcels, or a power of attorney to some one to make the transfer, and the papers which complete the possession in the vendee are made by the officers of the corporation. On account of this peculiar character of the property, it was formerly doubted whether it could be the subject of a pledge. But it is now held that it can be, and it is considered to be more in accordance with the intention of the parties to treat it as a pledge than as a mortgage. Wilson v. Little, 2 Comst. 443. Allen v. Dykers, 3 Hill, 593. Dykers v. Allen, 7 Hill, 497. Vaupell v. Woodward, 2 Sandf. Ch. 143. The same doctrine seems to be recognized in Pennsylvania. Gilpin v. Howell, 5 Penn. State R. 41. In New York it is also applied to the transfer and delivery of commercial paper. White v. Platt, 5 Denio, 269.

If regarded as a pledge, it is more in the nature of a trust than if regarded as a mortgage. The principal reason assigned for not regarding a mortgage as strictly a trust is, that the mortgagee has a property in the thing which he may make absolute in case the condition is not performed, by foreclosing the right of redemption. But the pledgee cannot do this. If the debt or duty is not discharged, he must avail himself of the security by selling the thing pledged, and not by foreclosure; and he holds the avails of the sale in trust to discharge the debt or duty, and, if any bal-

ance remains, to pay it to the pledger. Gen. Sts. c. 151, §§ 9, 10.

The practice of taking transfers of stock as collateral security is very general among all classes of business men and moneyed corporations; and in a large proportion of cases the transfer is absolute, and the purpose and consideration of the transfer are evidence by mere oral agreement. The question raised in this case is, therefore, of great practical importance.

The rule relied on by the defendant, that parol evidence is inadmissible to prove that a sale or conveyance in writing which is absolute in its terms was not intended to be absolute, but was given as a pledge or mortgage, is well established in respect to actions at law, and this court have so held in Harper v. Ross, ante, 332. It does not, however, apply to a bill of parcels. Hazard v. Loring, 10 Cush. 267. Jewett v. Warren, 12 Mass. 300. Hildreth v. O'Brien, ante, 104.

But this is a suit in equity, and it is therefore important to inquire what is the rule which courts of equity have applied to this subject. If a pledge or mortgage of property were to be regarded merely as a trust, the evidence would be admissible; for it is well settled that, since the statute of frauds as well as before, a trust of personal chattels may not only be created but if necessary established and proved by mere parol declarations. Hill on Trustees, 57, and cases there cited. Some of the cases are very strong. In Kingsman v. Kingsman, 2 Vern. 559, the defendant held property by an absolute legacy, and a trust was decreed on the strength of his admissions made in the presence of several witnesses. Nab v. Nab, 10 Mod. 404, is another strong case of the same character. But a mortgage is not regarded as strictly a trust, and no case has been found where the question has been discussed in respect to a mortgage or a pledge of a chattel. The cases which have come under discussion have been formal conveyances of real estate, and it seems to be well settled as a principle of equity jurisprudence in the courts of equity in England, in the United States courts, and in some of our state courts, that oral evidence is admissible in a suit in equity to prove that a conveyance of real estate, absolute in its terms, was intended as a security for a debt, or an indemnity against a liability, and that upon such evidence a decree of redemption will be made.

The policy of courts of equity has been from the earlier times to protect debtors, whom they regard as the weaker party, against being wronged or oppressed by creditors, whom they regard as the stronger party. Their method of interference has been by preventing the creditor from maintaining his title according to the legal effect of his conveyance whenever it was inequitable for him to do so. Therefore it was held in Howard v. Harris, 1 Vern. 190, that if a mortgage is made by its terms irredeemable, or the redemption is restricted such restrictions are disregarded. In Spurgeon v. Collier, 1 Eden R. 55, the same doctrine was held, and Lord Northington said that a man will not be suffered in conscience to fetter himself with a limitation or restriction of his time of redemption. In Vernon v. Bethell, 2 Eden R. 110, parol evidence was admitted to prove that an absolute conveyance of an equity of redemption of real estate was made as security for a loan and for no other consideration, and the vendor was permitted to redeem. The court said that necessitous men are not, truly speaking, free men, but to answer a present exigency will submit to any terms that the crafty may impose upon them. When such parol evidence has been admitted, it has not been regarded as inconsistent with the statute of frauds. In Walker v. Walker, 2 Atk. 98, Lord Hardwicke said it had nothing to do with the statute of frauds. In Kunkle v. Wolfersberger, 6 Watts, 126, Gibson, C. J. said, the proof raises an equity consistent with the writing. It seems to be regarded as an inquiry into the consideration of the sale, for the purpose of doing equity between the parties. The rule on this subject and the reason of it are fully and clearly stated by Mr. Justice Curtis, in Russell v. Southard, 12 How. 139. He says: "To insist on what was really a mortgage as a sale is in equity a fraud which cannot be successfully practised under the shelter of any written papers, however precise and complete they may appear to be." He cites several English as well as American authorities to sustain this position. In the prior case of Morris v. Nixon, 1 How. 126, the same doctrine had been before held, and in Babcock, v. Wyman, 2 Curtis C. C. 386; S. C. 19 How. 289; it was reaffirmed. The case of Russell v. Southard came up from Kentucky, and Mr. Justice Curtis says: "It is suggested that a different rule is held by the highest court in Kentucky. If it were, with great respect for that learned court, this court would not feel bound thereby. This being a suit in equity, and oral evidence being admitted or rejected not by the mere force of any state statute, but upon the principles of general equity jurisprudence, this court must be governed by its own views of those principles." But he cites the case of Edrington v. Harper, 3 J. J. Marsh. 355, where it was held that the fact that the real transaction between the parties was a borrowing and lending will, whenever or however it may appear, show that a deed absolute on its face was intended as a security for money, and whenever it can be ascertained to be a security for money, it is only a mortgage. Mr. Justice Story had held the same doctrine at a still earlier period. He held that parol evidence was admissible to show that an absolute deed was intended as a security for money, and that such a deed should be treated as a mortgage, whether the defeasance was omitted by fraud, mistake or accident, or by de-

sign, upon mutual confidence between the parties; for he says the violation of such an agreement would be a fraud of the most flagrant kind, originating in an open breach of trust, against conscience and justice. Taylor v. Luther, 2 Sumner, 228. Jenkins' v. Eldredge, 3 Story R. 293. The same rule has long been held in New York and on the same ground. Strong v. Stewart, 4 Johns. Ch. 167, was decided by Chancellor Kent on the strength of several English authorities cited by him. See also Slee v. Manhattan Co. 1 Paige, 48; Van Buren v. Olmstead, 5 Paige, 9. In the latter case the rule is said to be well settled. After considerable discussion it was settled that the rule was limited to cases in equity, and did not prevail in courts of law. Webb v. Rice, 1 Hill, 606. Hodges v. Tennessee Ins. Co. 4 Selden, 416. But by the code parol evidence is made admissible both at law and in equity to show that an assignment, though absolute in its terms, was a security for a loan or an indemnity against a liability, and is therefore a mortgage. Despard v. Walbridge, 15 N. Y. 374. In Wright v. Bates, 13 Verm. 341, the court say: "It is well settled law in this state that a court of chancery will treat an absolute deed of real estate, given to secure the payment of a debt, as a mortgage, as between the immediate parties, especially if the grantor continues to remain in possession, though the defeasance rests wholly in parol." But where possession has followed the deed through several grantees, such evidence is held inadmissible. Conner v. Chase, 15 Verm. 764. And in this last case Williams, C. J. argues against the rule itself. In a note to 2 Cruise Dig. (Greenl. ed.) tit. xv. c. 1, § 20, it is said that "in Maine and Massachusetts the statutes recognize only two modes of creating a mortgage to which the chancery jurisdiction of the courts extends, namely, by proviso inserted in the deed, and by a separate deed of defeasance. All equitable mortgages created by contract of the parties seem therefore to be excluded. Relief, if any, in other cases must be referred to the head of fraud, trust, or accident and mistake." Since the publication of that work relief has been afforded under this head in a case where an absolute deed was alleged to have been intended as a security for a debt, and where the answer and proof showed the intention. Howe v. Russell, 36 Maine, 115. No case has arisen in this commonwealth where this court could consider whether it would adopt the rule of equity admitting parol evidence to prove that an absolute deed was given as security for a loan or for indemnity. For though the court has had jurisdiction of trusts for many years, yet the jurisdiction has been strictly construed, and has been held not to extend to trusts created by converting a fraud into a trust. Mitchell v. Green, 10 Met. 101. As a mortgage is not strictly a trust, but the element of fraud is held to enter into the attempt to convert it into an absolute sale, the court could not, prior to 1855, have entertained jurisdiction of such a case. The present case does not require us to decide whether the rule ought to be adopted here in application to a mortgage of real estate.

But in respect to the transfer of stocks, which requires but little formality between the parties, and is often made in the hurry of business, as a bill of parcels is made, and as to which a trust may be created and proved by parol, and which is to be regarded as a pledge rather than a mortgage, when used as a collateral security, we think the principle of equity jurisdiction so fully established elsewhere in regard to instruments much more formally executed ought to be adopted, admitting oral proof as to the consideration and purpose of the transfer, and that, upon the discharge of the debt or duty secured by it, the pledger should be permitted to redeem.

Decree for the plaintiffs.

SARAH J. HOGUE vs. MINNESOTA PACKING & PROVISON CO.

(59 Minn. 39; 60 N. W. 812.)

Omit

Appeal by defendant, The Minnesota Packing and Provision Company, a corporation, from an order of the District Court of Hennepin County, Charles B. Elliott, J., made March 24, 1894, denying its motion for a new trial.

The Travelers' Insurance Company of Hartford, Conn., on December 11, 1872, insured the life of Hugh W. Hogue in the sum of $2,000 payable to his wife the plaintiff, Sarah J. Hogue. The policy contained this provision, "Ninth. No assignment of this policy shall be valid unless made in writing indorsed hereon and unless a copy shall be given to this company within thirty days after its execution." The wife on June 10, 1874, by writing indorsed on the policy assigned all her rights under it to her husband. A copy of the assignment was duly given to the Insurance Company.

Afterwards he erased the assignment made by his wife by drawing pen marks through her signature and gave back the policy to her. He afterwards in the spring of 1892 without the knowledge or consent of his wife took the policy which was then paid up in full and pledged it without writing to L. P. Van Norman as security for $100 which he then borrowed of him. She, hearing of this, demanded the policy of her husband. Thereupon, he on September 1, 1892, executed and delivered to his wife a written reassignment to her of the policy, but it was not written upon the policy, nor was a copy of it sent to the Insurance Company.

Afterwards, in September, 1892, upon the husband's request Van Norman delivered the policy to the defendant, The Minnesota Packing and Provision Company, and it repaid to him the $100. On December 30, 1892, Hugh W. Hogue owed defendant $327.15 and gave it his note for this amount due on demand. He orally agreed with defendant

that it should hold the policy as security for the payment of this note. He also signed an order on the back of the note directing the agents of the Insurance Company to pay the note from any money that might become due on account of the policy. The wife, being informed of these facts, demanded of defendant the policy and being refused she brought this action to recover it. The surrender value of the policy was then $660. The issues were tried December 15, 1893, before Seagrave Smith, J., who made findings of these facts and ordered judgment for plaintiff. He being absent a motion for a new trial was made before Chas. B. Elliott, J., but was denied. Defendant appeals from the order.

MITCHELL, J. The facts found by the court, and supported by the evidence, are as follows: In December, 1872, the Travellers' Insurance Company of Hartford, Conn., issued to plaintiff, as beneficiary, a policy of insurance upon the life of her husband.

One of the stipulations in the policy was that "no assignment of this policy shall be valid unless made in writing, indorsed hereon, and unless a copy of such assignment shall be given to this company within thirty days after its execution." In June, 1874, the plaintiff, in writing, indorsed thereon, assigned the policy to her husband. A copy of this assignment was given to the company, within thirty days. Thereafter, the husband, "with the desire and intent to restore the title to said policy in the plaintiff," erased the assignment indorsed thereon, and returned the policy to her, and she afterwards kept it in a writing desk in her room. Subsequently, the husband, without the knowledge or consent of the plaintiff, took the policy, and pledged it to one Van Norman, as security for a debt of his own. Plaintiff, on learning of this, demanded of her husband a return of the policy. Thereupon the husband executed and delivered to her a written assignment of the policy, "with the intent and desire on part of both parties to vest the complete title to the policy in the plaintiff." But, the policy being then in the possession of Van Norman, and never after having come into the control of the plaintiff, this assignment was never attached to or made a part thereof, and, so far as appears, was never given to or filed with the insurance company.

Thereafter, the husband, without the knowledge or consent of plaintiff, pledged and delivered the policy to defendant, as collateral security for an indebtedness owing from him to it. It probably appears from the evidence that this pledge of the policy by the husband to defendant was in part as security for money to be thereafter advanced by it to him; and that this money was in part used in paying the debt due from the husband to Van Norman; and that, upon that being done, the possession of the policy was transferred from Van Norman to defendant. But, as we view the case, these facts are not material.

The debt due from the husband to defendant being still unpaid, the latter refused to deliver the policy to plaintiff, whereupon she brought this action to recover the possession of it, or its value.

The policy being in no sense negotiable paper, and there being no case, upon the facts, for the application of the doctrine of equitable estoppel, the defendant must prevail, if at all, upon the ground that the policy is the property of the husband, for the reason that the reassignment of it by him to plaintiff is invalid, because not indorsed and a copy of it given to the company, as required by the stipulation in the policy above quoted.

It is well settled that a policy of life insurance, where the policy contains no provision to the contrary, is assignable as any other chose in action; at least, provided the assignee has an insurable interest in the life of the insured, which, of course, the wife has in the life of her husband. The great weight of authority would seem to be that, in the absence of restrictive words, there is not even this limitation upon the assignability of such policies. But on this point we have no occasion to express an opinion. It will be observed that the provision of this policy is not that an assignment of it without the consent of the company shall be void,—a very common provision, the object of which is, doubtless, to prevent speculative or gambling insurance, which might increase the risk.

In this case the consent of the company to an assignment is not necessary. All that is required is that the assignment be in writing on the policy, and a copy of it furnished to the company, within thirty days. This provision is not one which is intended to guard against increased risks, and does not go to, or infuse itself into, the essence of the contract. Its sole purpose is to protect the company against the danger of having to pay the policy twice, by requiring written evidence of any change of beneficiaries to be put into reliable form, and promptly furnished to the company.

All that could, at the very most, be claimed as the effect of a noncompliance with this stipulation, is that the company might disregard the attempted assignment, and pay the money to the original beneficiary; in other words, such attempted assignment would be merely voidable at the option of the company. The provision being exclusively for the protection of the company, it might waive its requirements if it saw fit.

The assignment in this case from the husband to the wife would be perfectly good as between the parties; and if, in case of his death, the insurance company saw fit to pay the money to the wife, those claiming under the husband would not be heard to object because the assignment was not indorsed on the policy, or given to the company. This, it seems to us, is decisive of this case.

The objection to the assignment is not one that can be raised by the defendant, or

by any one except the insurer. It is urged, however, that the defendant is subrogated to the rights of Van Norman. We fail to see how the mere fact that some of the money advanced by the defendant to the husband was used to pay his debt to Van Norman could have that effect, even if Van Norman had any rights as against the plaintiff. But, upon the facts found, Van Norman had no such rights.

The parol assignment of the policy to the plaintiff by her husband, accompanied by delivery, made her the equitable owner. Chapman v. McIlwrath, 77 Mo. 38.

The subsequent taking of the policy from the possession of plaintiff was a wrongful act on part of the husband, and Van Norman could acquire no greater rights to it than the husband had. The written assignment of the policy by plaintiff to her husband having been canceled by the erasure of plaintiff's signature, it appeared on the face of the policy that the wife was the beneficiary; and hence, as already suggested, there was no room for invoking the doctrine of equitable estoppel.

Order affirmed.

Gilfillan, C. J., took no part.

AMARIAH A. TAFT vs. IRA E. BOWKER & trustee.
(132 Mass. 277.)

Trustee process. The Milford Savings Bank, summoned as trustee, answered that, at the time of the service of the writ, December 15, 1879, there stood on its books to the credit of the defendant the sum of $292.95. James F. Sawin appeared as claimant of the funds in the hands of the trustee. Trial between the plaintiff and the claimant, the defendant having been defaulted, in the Superior Court, without a jury, before Aldrich, J., who reported the case for the determination of this court, in substance as follows:

The claimant testified that, on August 24, 1874, he lent the defendant $420, and took his promissory note for that amount payable on demand, with Bowker's bank-book as collateral security; that there was no written assignment of the book.

The defendant testified: "I saw Sawin, and said I wanted to borrow money. He said he would lend me some if I would secure him. I told him I could give him my bank-book in addition to my note. He let me have the money, and I gave him my note and delivered this bank-book as security, if I did not otherwise pay him. I gave him the bank-book as security for the payment of the note."

The first notice the bank had that the claimant held the defendant's deposit book, or that he made any claim to the deposit, was by a letter from the claimant, dated December 12, 1879, which was received by the treasurer of the bank about an hour before the service of the trustee writ.

Under date of August 24, 1874, the defendant signed and gave the claimant a written order, of which the following is a copy: "To the treasurer of the Milford Savings Bank. Pay to James F. Sawin or his order, of Natick, Mass., the amount of deposits and interest that are due on my deposit-book No. 633, and all amounts that may become due until further notice from me." But it was admitted at the trial that this order was not written and delivered until December 24, 1879. The first deposit made by the defendant was on April 5, 1856, and the last on February 13, 1865.

"Upon this evidence, I found as a matter of fact that there was no assignment (prior to the service of the trustee process) to Sawin of the funds in the bank belonging to Bowker, and that all the parties intended was that the book delivered by Bowker to Sawin should be held by the latter as collateral security, and that the delivery of the book was not accompanied by any assignment of the fund represented by the book. I therefore found the claimant had not maintained his claim, and ordered the trustee to be charged upon its answer."

If the above finding and order were authorized by the evidence, they were to be affirmed; otherwise, a new trial was to be granted.

FIELD, J. The report states that, "upon this evidence, I found as a matter of fact that there was no assignment (prior to the service of the trustee process) to Sawin of the funds in the bank belonging to Bowker, and that all the parties intended was that the book delivered by Bowker to Sawin should be held by the latter as collateral security, and that the delivery of the book was not accompanied by any assignment of the fund represented by the book. I therefore found the claimant had not maintained his claim, and ordered the trustee to be charged upon its answer."

It is manifest that the learned justice means by this language that he found that there was no express assignment of the fund, and that no writing was executed and delivered which in legal effect was an assignment of the fund, and that he ruled, as matter of law, that a delivery of the bank-book by Bowker to Sawin, with the intention that it should be held by Sawin as collateral security for the payment of Bowker's debt, did not constitute a valid equitable assignment of the fund as against the trustee process.

That a delivery of a savings-bank book with the intention of transferring the title to the money deposited transfers the equitable title to the deposit has been decided in Pierce v. Boston Five Cents Savings Bank, 129 Mass. 425.

That the book was delivered with the intention that it should be held as collateral security does not affect the application to this case of the principle established by that decision. Such an equitable title must prevail against the trustee process. Norton v. Piscataqua Ins. Co. 111 Mass. 532.

New trial ordered.

FIRST NATIONAL BANK OF GREEN BAY vs. JOHN B. DEARBORN.

(115 Mass. 219.)

Replevin of one hundred barrels of flour. At the trial in the Superior Court, Dewey, J., with the consent of the parties, withdrew the case from the jury, and reported it to this court in substance as follows:

At the trial the following facts appeared: R. G. Parks, residing and doing business in Green Bay, Wisconsin, under the name of R. G. Parks & Co., was engaged in the manufacture of flour at a mill in Neenah, in the State of Wisconsin, about thirty or forty miles from Green Bay. The plaintiff bank had its place of business at said Green Bay. Prior to the transactions, in regard to the flour in question, Parks had forwarded flour to Harvey Scudder & Co., at Boston, and drawn drafts upon them, only a part of which had been accepted and paid. On October 17, 1870, Parks applied to the plaintiff in Green Bay to advance $400 upon the one hundred barrels in controversy, which the plaintiff agreed to do. Parks then left with the plaintiff the following draft, addressed to Harvey Scudder & Co. of Boston: "$400. Office of R. G. Parks & Co., Green Bay, Wisconsin, October 17, 1870. At sight, pay to the order of M. D. Peak, cash, four hundred dollars, value received, and charge the same to the account of R. G. Parks & Co." Written in pencil across the face of the draft were these words: "Hold this till to-morrow when I will give you B. L."

On the following day Parks delivered to the plaintiff the following written instrument: "Chicago and Northwestern Railway Company, Neenah, October 17, 1870. Received from R. G. Parks & Co. one hundred barrels of flour, branded W.—Rec. in rain. Consigned to Harvey Scudder & Co., Boston, Mass., via Green Bay. To be forwarded to Ft. Howard Station, upon the terms and conditions of the published tariff of this company. A. H. Boardman, Agent." The plaintiff thereupon placed to the credit of Parks on their books the sum of $400.

It was admitted by the defendant that Parks delivered the draft and the railroad receipt to the plaintiff for the purpose of securing the advance of $400 on the flour; and that it was the understanding that by that transaction the property was transferred to the plaintiff as security for its advance.

The flour, which in fact was at the time of the above transaction the property of Parks, and was at his mill in Neenah until it was delivered to the railroad company, and had not been seen by the plaintiff or Parks, had been delivered to the agent of the railroad company by the agent of Parks, on October 17, prior to the signing of the railroad receipt.

The plaintiff forwarded the receipt and draft to Boston, where the former was presented to Harvey Scudder & Co., who declined to accept it, giving as a reason therefor that they had not received the bill of lading; and they never in fact made any advance or payment on account of the flour, or received or offered to receive the flour. Shortly before the flour arrived at Boston, one of the firm of Harvey Scudder & Co. informed a member of the firm of Scudder, Bartlett & Co., who were creditors of Parks, that the flour was likely to arrive, and that Harvey Scudder & Co. had no claim upon it; and upon its arrival at the depot in Boston, about November 7, 1870, the defendant, a deputy sheriff, attached it as the property of Parks & Co., on a writ in favor of Scudder, Bartlett & Co., and the defendant held it under said attachment at the time of service of this writ.

If upon these facts the plaintiff is entitled to maintain the action, judgment is to be entered for the plaintiff, with nominal damages, otherwise for the defendant.

AMES, J. It appears that when the draft was discounted and the receipt delivered to the plaintiff, both parties understood that it was an advance by the bank, "on the flour." Both parties intended that the property should be, and understood that it was, by that transaction, transferred to the bank, as security for that advance. The discounting of the draft was a sufficient consideration for such a conveyance. If there was a sufficient delivery of the property to the plaintiff, there was nothing to hinder the intention of the parties from going into full effect.

The character and situation of the property at the time of this transaction were such that an actual delivery was impossible. A constructive or symbolical delivery was all that the circumstances allowed, but a delivery of that nature, if properly made, would have been sufficient to give the plaintiff corporation the title to the property, and an immediate right of possession, which it could maintain, not only against Parks himself, but also against his creditors. Tuxsworth v. Moore, 9 Pick. 347. Fettyplace v. Dutch, 13 Pick. 388. Whipple v. Thayer, 16 Pick 25. Carter v. Willard, 19 Pick. 1. The delivery of the evidences of title, with orders indorsed upon them, would be equivalent to the delivery of the property itself. Gibson v. Stevens, 8 How. 384. Nathan v. Giles, 5 Taunt. 558. National Bank of Cairo v. Crocker, 111 Mass. 163, and cases there cited. All that would be necessary in such a case would be that the thing actually delivered should have been intended as a symbol of the property sold.

In this case, the only thing which was delivered to the plaintiff, as the representative or symbol of the property intended to be transferred to the plaintiff, was the written acknowledgement of the railroad corporation that they had received the merchandise for transportation, consigned to Harvey Scudder & Co., of Boston. No order of any kind was indorsed upon this receipt, and no attempt was made to transfer it to the plaintiff in any mode, other

than by mere manual delivery. But the receipt was evidence of ownership in Parks, and the only voucher which he had in order to show his right to the goods after parting with their actual possession. It was the means which he had of calling the carrier to account if the goods should be lost or injured, and it might well be supposed that the carrier would not ordinarily give up the goods except upon the production and surrender of that receipt. Whatever right Scudder & Co. might have had to take the flour into their own hands if they had accepted the draft, it is certain that on their refusal to receive the consignment, the property remained in the hands of the carrier as the property of the consignor, or any person deriving title from the consignor; the carrier would not be wholly relieved of responsibility by the refusal of Scudder & Co. to receive the property, but would continue to be liable, at least for reasonable care in its custody, to the true owner.

It is true that a receipt of this kind does not purport on its face to have the quasi negotiable character which is sometimes said to belong to bills of lading in the ordinary form; neither does it purport in terms to be good to the bearer. But independently of any indorsement, or formal transfer in writing, the possession and production of it would be evidence indicating to the carrier that the bank was entitled to demand the property, and that he would be justified in delivering it to them. There are cases in which the delivery of a receipt of this nature, though not indorsed or formally transferred, yet intended as a transfer, has been held to be a good symbolical delivery of the property described in it. In Haille v. Smith, 1 B. & P. 563, Eyre, C. J., uses this language: "I see no reason why we should not expound the doctrine of transfer very largely, upon the agreement of the parties, and upon their intent, to carry the substance of that agreement into execution." In Allen v. Williams, 12 Pick. 297, 301, Shaw, C. J., in delivering the judgment of the court, says: "Even a sale or pledge of the property without a formal bill of lading, by the shipper, would operate as a good assignment of the property; and the delivery of an informal or unindorsed bill of lading, or other documentary evidence of the shipper's property, would be a good symbolical delivery, so as to vest the property in the plaintiffs." It is true that he adds that it was not necessary to place the case upon that ground. But this dictum was cited with entire approbation, in a case raising that exact point, in the Court of Appeals of the State of New York. Bank of Rochester v. Jones, 4 Comst. 497. In that case, as in this, the plaintiff had discounted a draft drawn against a quantity of flour, and its title, as in this case, depended upon a carrier's receipt, delivered to it without any written indorsement. The court held that the plaintiff thereby acquired a sufficient title to the property, and could call the consignee to account for it, he having converted the property to his own use, without accepting the draft. It is not necessary to hold that the plaintiff was absolute owner of the property; it is enough that it had a right of property and of possession to secure the payment of the particular draft; and the right of the former owner, Parks, in the specific property, had become divested, leaving him only a right in the surplus money which might remain after a sale of the flour, and a payment of the draft from the proceeds. De Wolf v. Gardner, 12 Cush. 19, 24.

Some reliance was placed by the defendant's counsel upon certain local statutes and judicial decisions of the State of Wisconsin. But, if applicable at all, they do not in our judgment affect the decision of the case. If we are right in holding that there was a sufficient delivery to pass the property to the plaintiff corporation, the carrier must be considered, after that time, as its bailee, and as holding the property for it, and not in any adverse relation. His possession would be the possession of the plaintiff.

Our conclusion therefore is that the clear intent of the parties, that the property should stand as security to the plaintiff in discounting the draft, was carried into effect in a manner sanctioned by sound authorities, and that there are no special equities in favor of an attaching creditor that make it desirable to defeat that intent.

Judgment for the plaintiff.

THE THIRD NATIONAL BANK OF BALTIMORE vs. WILLIAM A. BOYD.

(44 Md. 47.)

Appeal from the Circuit Court for Howard County.

On the morning of Monday, the 10th of August, 1872, when the officers of The Third National Bank of Baltimore arrived at the bank, it was discovered that since the close of business on Saturday evening, the vault and safe of the bank had been broken into by burglars, and robbed of a large amount of money and valuable securities. The entrance had been effected through the walls of an adjoining building, belonging to Mr. John S. Gittings, by tenants of that building, who had rented it doubtless for the express purpose of carrying out the scheme of plunder. By appropriate and ingenious tools, the walls of both buildings, and of the vault, and the iron plates between the double walls of the vault had been perforated, and the safe within forced open. Among the valuables taken were some $64,000 in money belonging to the bank; $10,000 in the custody of the paying teller; $40,000 of coupon bonds belonging to the family of the acting president of the bank and in his custody; and various coupon bonds belonging to the appellee, the market value of which at that time was nearly $26,000. To recover the value of these last mentioned

bonds the present suit was instituted by the appellee against the appellant in the Supreme Court of Baltimore City, whence it was removed, on the suggestion and affidavit of the latter, to the Circuit Court for Howard County, where it was tried. There was much testimony in relation to the circumstances attending the proceedings of the burglars, and in regard to the precaution taken by the appellant, and by other banks in the city of Baltimore, to guard the money and other valuables in their custody. On one side, the object was to show, that every thing was done that could be reasonably required on the part of the defendant for the safe-keeping of the bonds in its vault; on the other, that there was such remissness in various respects as rendered the defendant liable to the owners of special deposits.

At the close of the testimony, the plaintiff offered seven prayers, of which the Court granted the first, fourth, fifth, sixth and seventh, and rejected the second and third. The first and seventh prayers are sufficiently set out in the opinion of this Court; the fourth, fifth and sixth are as follows:

4. That if the jury shall find that the bonds of the plaintiff were in the custody of the defendant under the agreement, and for the purposes set forth in the plaintiff's first prayer, and that the robbery and loss of the bonds thereby which have been given in evidence, might have been prevented by ordinary vigilance and care on the part of the watchmen of the bank, or either of them, then the loss of the plaintiff's bonds by said robbery is no defence to the plaintiff's claim in this action.

5. If the jury find that the bonds of the plaintiff being in the custody of the defendant under the agreement, and for the purpose set forth in the plaintiff's first prayer, were lost or stolen by reason of any neglect of or inattention to duty on the part of any of the officers or employees of the bank, which the jury shall find to amount to want of ordinary vigilance and care, the defendant is responsible therefor.

6. That the degree of care which the defendant was bound by law to take of the bonds of the plaintiff in its custody under the agreement set forth in the plaintiff's first prayer, is not to be determined by the care which the defendant may have seen fit to take of similar property of its own at the same time. And the fact that the defendant lost a large amount of its own moneys and securities at the same time, and in the same way, with the bonds of the plaintiff, is therefore not in itself sufficient to exempt the defendant from liability to the plaintiff in this action, unless the jury shall find that the care which the defendant took of its own property was reasonable care.

The defendant offered eleven prayers, of which all but the tenth were either granted by the Court or conceded by the plaintiff's counsel. The tenth, which the Court rejected, is contained in the opinion of this Court. The defendant excepted. The verdict and judgment were for the plaintiff, and the defendant appealed.

The cause was argued before Bartol, C. J., Stewart, Bowie and Alvey, J.

BARTOL, C. J., delivered the opinion of the Court.

This suit was brought by the appellee, to recover the value of certain coupon-bonds and stocks, that passed like bank notes, by delivery; which had been deposited by the plaintiff with the defendant, and which had been stolen from the defendant, in consequence of its alleged failure to exercise ordinary care in the custody of them.

The case is one that, from its nature, depended at the trial below, mainly on the questions of fact arising upon the evidence, with regard to the manner in which the bonds were lost, and the vigilance and care exercised by the bank in their custody. These were questions exclusively for the jury, whose province it was to decide whether there was any want, or omission of ordinary care and diligence on the part of the bank, from which the loss of the plaintiff's property resulted. These questions were submitted to the jury by the Circuit Court, were decided by them against the bank, and we have no authority or power to review their verdict.

All the prayers asked by the defendant, being either conceded by the plaintiff's counsel or granted by the Circuit Court except the tenth; the only matters presented for our consideration on this appeal, arise upon the defendant's tenth prayer, which was refused; and the first, fourth, fifth, sixth and seventh prayers of the plaintiff, which were granted.

It appears by the evidence that the appellant was a Bank organized under "the National Currency Act of 1864." The firm of William A. Boyd & Co., of which the appellee was senior member, was a large customer of the bank, through which all the banking business of the firm was transacted, and from which it received accommodations as needed. On the 5th day of February, 1866, the firm was indebted to the bank about $5000, when the appellee voluntarily proposed to the president of the bank, to deposit with the bank a large amount of bonds, about $37,000, as collateral security for his present and future indebtedness. The terms of the deposit as agreed on between Mr. Boyd and the president, were dictated by the latter to the discount clerk—and were as follows:

"Third National Bank,
February 5th, 1866.

William A. Boyd has deposited with the Third National Bank of Baltimore $20,000 in United States 5-20 bonds, and $1500 5-20 July, 1865; $5000 Hudson County, New Jersey; $5000 Town of Saratoga, New York, 7 per cent. bonds; $5000 Stock of Third National Bank of Baltimore, as collateral security for the payment of all obligations of Wm. A. Boyd and Wm. A. Boyd & Co. to the Third National Bank of Baltimore, at present exist-

ing, or that may be incurred hereafter, with the understanding that the right to sell the above collaterals in satisfaction of such obligations, is hereby vested in the officers of the Third National Bank.

[Signed] A. H. Barnitz,
Discount Clerk."

This paper was kept by the cashier of the bank in the same envelope with the bonds,—afterwards memoranda were enclosed therein, signed by the appellee's attorney and by the cashier, showing that certain of the bonds originally deposited had been withdrawn, and others deposited to replace them.

It appears from the evidence "that while these collaterals remained in the bank, the firm kept a deposit account with the bank, having an average amount of about $4000 on deposit, and from time to time as it needed, obtained discounts ranging from $2000 to $15,000 on the security of the collaterals, but frequently, and for considerable times, as much as five months at a time, it sometimes owed the bank nothing, but left the bonds in its vault; that at times when the firm wanted money for a very short time, it had obtained it from the bank, on the security of these collaterals on what were called 'call loans' by checks such as the following:

Baltimore, July 13, 1871.

"Third National Bank of Baltimore pay to order of call loan on general collaterals, four thousand dollars.

William A. Boyd & Co."

"The firm was not indebted to the bank subsequent to July 1872, when it paid its last indebtedness; the bonds were not withdrawn, but left with the defendant, under the original agreement." The bank was robbed and the bonds stolen in the manner described in the testimony, between Saturday evening the 17th and Monday morning the 19th of August 1872. It appears from the proof that the giving of the bonds as collateral security, was the voluntary act of the plaintiff, not done at the instance or request of the defendant; that the bank officers considered the account of the plaintiff's firm a very desirable one, and considered the arrangement by which every liability of theirs was secured by the collaterals, very advantageous to the bank; "which was under no obligation to lend them anything; but the bonds and stocks were to be held as collateral security for all loans that might be made to them, and for their liability on any paper signed or endorsed by them, which might at any time be held by the bank."

The defendant, by its tenth prayer, asked the Court to instruct the jury "That the defendant had no power by the Act of Congress, under which it was incorporated, to assume and undertake the keeping of the plaintiff's bonds, while they were not held as collateral security for debts owing to it, and if the jury shall find that when the bonds were stolen * * * there was not and had not been for nearly three weeks, any indebtedness for which they were held as security, then the plaintiff cannot recover in this action."

This prayer raises the question of the power of the bank to accept and retain the deposit of the plaintiff's bonds, in the manner and for the purpose disclosed in the evidence. Having been organized under the Act of Congress of 1864 ch. 106, the powers of the bank are limited and defined by the provisions of that Act.

By section 8, it is authorized, "to exercise all such incidental powers as shall be necessary to carry on the business of banking by discounting promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security, and by obtaining, issuing and circulating notes according to the provisions of this Act."

The construction of this section was considered by this Court in Weckler vs. First National Bank of Hagerstown, 42 Md. 581. The precise question however now presented, did not arise in that case. There the attempt was made to hold the bank responsible for alleged fraudulent representations made by its teller in the sale of bonds of the Northern Pacific Railroad Company, which the narr. alleged the bank was engaged in selling on commission. It was decided, that "the business of selling bonds on commission was not within the scope of the powers of the corporation," under the Act of Congress to which we have referred. It was further held that the defence of ultra vires was open to the bank under the decision in "The Steam Navigation Co. vs. Dandridge, 8 G. & J., 318, 319; and consequently that the bank was not responsible for any false representations made by its teller to the plaintiff, whereby she was induced to purchase the bonds in question." It is contended that the case now under consideration comes within that decision. In the argument of the cause, the counsel for the appellant has treated the transaction as a mere gratuitous deposit, simply for the convenience or accommodation of the appellee, and for the purpose of affording a place of safe-keeping for his bonds, and has argued that the bank had no power to accept a bailment of that kind, or in other words to become a mere safe deposit company, and was not therefore responsible for the loss. There is very strong ground, both upon reason and authority, in support of the proposition that a National Bank, deriving its existence and exercising its powers under the Act of Congress referred to, is not authorized to enter into a contract as a mere gratuitous bailee, by receiving on special deposit for safe-keeping merely, coin, jewelry, plate, bonds or other valuables. Such a contract does not appear to be authorized by the terms of the 8th section, as a transaction "within the ordinary course and business of banking or incident to it"; and has been decided by the Supreme Court of Vermont, to be unauthorized by the law, and beyond the scope

of the corporate powers. Wiley vs. First National Bank of Brattleborough, 47 Verm., 546. The very well considered opinion by Judge Wheeler in this case, will be found in The American Law Register, N. S., Vol. 14, p. 342, accompanied by an able note from the pen of Judge Redfield, in which the cases are collected and reviewed.

In the case of The First National Bank of Lyons vs. The Ocean National Bank, 60 N. Y., 278, the Court of Appeals of New York have recently made a similar decision.

Assuming these decisions to be correct, and we are not disposed to question their soundness; it is clear that the contract entered into by the bank in this case, was not a mere gratuitous bailment. As shown by the paper of February 5th, 1866, the bonds were not received on special deposit, for safe-keeping merely, but were received as collateral security for a debt then existing, and for all obligations that might thereafter be incurred by the depositor.

We entertain no doubt of the power of the bank to enter into a contract of that kind. To accept such collateral security for existing debts, and for future loans and discounts is a transaction within the usual course of the business of banking, and incident thereto, and therefore within the terms of the Act of Congress.

The power of National Banks to receive such deposits, was distinctly recognized by the Supreme Court of Vermont, and the Court of Appeals of New York, in the cases before cited, and we are not aware that it has ever been questioned. On this point we refer to the able opinion of Judge Sharswood, in Erie Bank vs. Smith, Randolph & Co., 3 Brewster, 9.

In Maitland vs. The Citizens' National Bank, 40 Md., 540, this Court affirmed the right of a National Bank to receive on deposit, the note of a third person as collateral security for future loans or advances to the depositor.

The original contract of bailment being valid and binding, the obligation of the bank for the safe custody of the deposit, did not cease when the appellee's debt had been paid. There is no evidence that the contract was changed, on the contrary, the evidence shows "the bonds remained with the bank under the original agreement." as collateral security for any indebtedness of the appellee that might thereafter accrue, and for any liability of himself or of the firm of which he was a member, or any paper signed or endorsed by them, which might at any time be held by the bank. For these reasons the Circuit Court committed no error in refusing the appellant's tenth prayer.

The appellant's counsel have argued that the memorandum of February 5th, 1866, cannot be construed as a contract made by the appellant, because it does not appear that the officers by whom it was made, were authorized to bind the bank.

This point is not properly before us, was not made in the Circuit Court, and is not presented by the bill of exceptions. All the prayers of the appellant go upon the theory, that the bonds were held by the bank as collateral security.

But even if the question of the authority of the officers to bind the appellant, were open on this appeal, it may be observed that the contract of bailment being one which it was competent for the corporation to make, and having been made by its officers, acting within the scope of their general powers and apparent authority, and in the exercise of powers usually delegated to like officers, the bank would be estopped to deny their authority. It may be added further, that there was evidence from which the jury might properly have inferred, that the authority had been conferred upon the president and cashier, and that their acts were known to and sanctioned by the directors. Union Bank vs. Ridgely, 1 H. & G., 325, 413, 430.

But as we have before said, the question of the authority of the officers to act for the bank in the transaction is not before us. 29 Md., 2, Rule 4.

With respect to the several prayers of the appellee which were granted by the Circuit Court, and referred to in the bill of exceptions, we do not understand that any objection is made to them by the appellant, so far as they instructed the jury upon the question of the degree of care which the appellant's officers were bound by law to exercise in the custody of the appellee's bonds. In this respect they do not differ from the prayers granted at the instance of the appellant.

By the appellee's first prayer, the jury were instructed that the defendant would be responsible if the jury found from the evidence that the bonds had been stolen, "in consequence of the failure on the part of the defendant, to exercise such care and diligence in the custody or keeping of them as at the time, banks of common prudence in like situation and business, usually bestowed in the custody and keeping of similar property belonging to themselves; that the care and diligence ought to have been such as was properly adapted to the preservation and protection of said property, and to have been proportioned to the consequence likely to arise from any improvidence on the part of the defendant." No objection has been made, nor could any be justly urged against this proposition. The prayer further instructed the jury, that in determining whether or not such care and diligence were used, "the jury may take into consideration whether it was a proper precaution for the defendant to have had an inside watchman at night, and on Sundays, whether such watchman ought to have kept awake at night, and whether the bank ought ever to have been without an inside watchman at any part of the day on Sunday, and that they may take into consideration the nature and value of said bonds, their liability to loss, the temptation they offered

to theft, the difficulty of recovering them if stolen, the situation of the building and vault, and the sufficiency of the safe in which the defendant kept them at the time they were stolen."

Exception has been taken to the last part of the prayer, because of the enumeration of certain questions, as proper to be considered by the jury, in determining whether such care and diligence had been used by the bank, as was defined in the prayer. But we find no error in this part of the instruction, the particular subjects of inquiry mentioned, were proper for the consideration of the jury; their province was not invalid, nor was there anything to mislead them, they were not told that in any of the particulars mentioned, the evidence showed a want of due and ordinary care on the part of the bank; and by the appellee's seventh prayer, they were instructed, "that it was a question to be determined by them from all the facts and circumstances in the case, whether there was or was not that degree of care and diligence used by the defendant, in the protection and preservation of the plaintiff's property which is defined in the plaintiff's first prayer."

The degree of care and diligence required by the law, was properly defined by the Circuit Court; the question whether it had been exercised by the defendant, was fairly submitted to the jury upon all the facts and circumstances of the case—this was a question of fact, exclusively within the province of the jury to decide; we have no power to disturb their verdict; and we have refrained from stating the facts and circumstances showing the manner in which the most extraordinary and unforseen robbery was committed upon the bank.

The only question left for us to consider is, as to the proper measure of damages. This was decided by the Circuit Court to be, "the value of the bonds at the time they were stolen." The appellant contends that this was error, and insists that the true measure is their value on the 9th day of September, 1872, when they were demanded by the appellee. It appears by the agreement of counsel, that the bonds had slightly diminished in value, between the time of the robbery and the time they were demanded. At the former date, they were worth $25,911.25, and at the latter, their value was $25,400.63.

In our opinion, the rule laid down by the Circuit Court is correct. In a case of this kind, the measure of damages is the value of the property lost, the only question is at what time is this value to be computed. Its value not being fixed and permanent, but liable to fluctuate, the time fixed for ascertaining it, may become of much importance, and has been the subject of considerable discussion in the Courts, and the decisions are by no means uniform. In Maryland the measure of damages in trover, is ordinarily the value of the property at the time of the conversion, Hepburn vs. Sewell, 5 H. & J., 211; Sterling vs. Garritee, 18 Md., 468, and we think the same rule may, by analogy, be applied to the present case. Here the ground of the action is the alleged breach of the contract of bailment, by reason of the failure on the part of the bank to exercise due care in the custody of the bonds, whereby they were lost; the true measure of damages would seem to be their market value, computed at that time. This question arose in Balto. Marine Ins. Co. vs. Dalrymple, 25 Md., 244. In that case there was a pledge or hypothecation of stock as collateral, the contract of bailment having been broken by the illegal sale of the stock by the bailee, the other party being cognizant of the breach, waited for two years, and the stock haven risen in the market, demanded the same offering to redeem, and claimed that the value of the stock should be computed at the time of his demand. But it was held that the measure of damage was its value at the time of the breach.

Without repeating the reasons and authorities upon which that decision was placed, we refer to the opinion of the Court, at pages 305, 306, 307, 308.

In Maury and Osbourn vs. Coyle (34 Md., 235, cited by the appellant, it was ruled that the plaintiff was entitled to recover the value of the bonds deposited, ascertained at the date they were demanded. But that case is not applicable here, there was no evidence of the time when they had been lost, or that they had changed in value; and the contract there sued on, was not the same as this. In that case, by the contract of bailment, the bailee had the option to return the securities deposited, or their value in money on demand. In this case, the legal obligation of the bailee, was to keep the bonds of the appellee safely, and to return them to him when the contract ended. Strictly, this obligation could not be discharged by the payment to the appellee of their value in money; after the bonds had been lost, and it had become impossible to return them, there was no necessity for a demand, and when made, it could have no significance or effect, in determining the rights of the parties, these had become fixed when the breach occurred by the loss of the bonds, and in our judgment, the proper measure of damages is their value computed at that time. Finding no error in the rulings of the Circuit Court, the judgment must be affirmed.

Judgment affirmed.

JAMES T. ANDERSON et al., APPELLANTS v. W. H. CAROTHERS, et al., RESPONDENTS.

(18 Wash. 520; 52 Pac. 229.)

Appeal from Superior Court, Kittitas County.—Hon. John B. Davidson, Judge. Affirmed.

DUNBAR, J. The appellants sued upon a promissory note. The respondents answered, denying the responsibility of the firm in the execution of the note, and set up certain facts constituting a coun-

ter-claim, to-wit: that the defendants were indebted to them for a balance due upon a sale of sheep made by them to the defendants; that the defendants had given to the plaintiffs a bill of sale of 1900 head of sheep in August, 1893, said sheep then being at Trevor, Wisconsin; that the plaintiffs took possession of said sheep thereunder as security for the balance due them on the note; that the sheep were to be put on the market and sold, and plaintiffs were to retain from the proceeds the amount of their claim and pay the balance to defendants; alleged negligence on the part of the plaintiffs in selling said sheep, failure to care for them properly while they were in the possession of the plaintiffs; that by reason of the carelessness, negligence and wrongful acts of the plaintiffs, the sheep were not sold until the market had fallen, and the cost for their keeping had become very great; and that by reason of the negligence, carelessness and wrongdoing aforesaid, the defendants had been damaged in the sum of $4,000. It is urged by the appellants that the court erred in admitting in evidence in support of defendants' counter-claim the written agreement called the bill of sale. The ground of plaintiffs' objection was that the counter-claim did not state facts sufficient to constitute a cause of action. The real objection here must go to the pleadings, for if there was sufficient in the pleadings to constitute a cause of action the bill of sale could be introduced properly as evidence tending to support the allegations of the answer by showing the circumstances surrounding the parties when the contract was made, and the obligations of the plaintiffs under the pleadings. There was no demurrer to the affirmative answer, and an objection was virtually raised to the pleadings by the objection to the admission of this testimony. It would have been better practice, if the affirmative answer did not state sufficient to constitute a defense to the action, to have demurred to the same, but, considering the objection to the testimony, we do not think that the cases cited by the appellant sustain his contention. This is not the ordinary case of the pledgor and pledgee (after the pledgor's default) under an agreement that on such default the pledgee may sell the pledged property and pay himself out of the proceeds, under which circumstance it has sometimes been held that the pledgee is liable only for such wilful default as will show an intent to injure or defraud the pledgor.

The first case cited by the appellant, Durant v. Einstein, 35 How. Pr. 223, is a case of this kind. This was a sale of stock which was placed in the hands of the pledgees as collateral security, below the market price, and there was no obligation on the part of the pledgee there to do anything but to sell the stock, but here the answer shows an entirely different case. The property pledged here was live stock, which required the exercise of discretion in sustaining it and every day that it remained unsold added an additional expense which destroyed its value, and, in addition to the allegations of the complaint that the sheep were not sold when they should have been sold, it is also alleged that they were not properly fed and cared for.

The citation from Jones on Pledges, § 735, while asserting the doctrine of the case just cited, concludes:

"It must appear that there was an intent to injure the pledgor, or that there was such recklessness shown, in the mode or time of selling, that such intent might be inferred."

We think the answer in this case alleges a state of facts from which this intent might be inferred.

In Whitin v. Paul, 13 R. I. 40, it was held that while the pledgee of certain promissory notes was not bound to forecast the market for the pledgor yet he was bound to use reasonable and ordinary diligence in realizing their value, but was not bound to exercise extraordinary care.

Schouler on Bailments and Carriers, in section 206, condenses the rule into the following expression.

"The true idea to be conveyed is, that the parties must be presumed to have contracted for applying the collateral in the manner which best consists with the rights of both," and the authorities amply sustain this announcement.

We think it plainly appears from the allegations of the answer in this case that the plaintiffs did not apply the collateral in the manner which best consisted with the rights of the defendants, which could have been done, without interfering with any rights of their own.

The second assignment, that the court erred in permitting the witness George Wright to testify over the objection of plaintiffs' counsel concerning the market price for sheep between the date of the agreement and September 13, 1893, falls within the objection just discussed.

Several errors are alleged in relation to the instructions of the jury, but the record discloses the fact that no exceptions were taken to the instructions given or to the refusal of the court to give instructions asked by the appellants. They will therefore not be considered by this court.

The judgment will be affirmed.

Scott, C. J., and Anders, Gordon and Reavis, JJ., concur.

LUCIA SCOTT vs. BELLE REED.

(83 Minn. 203; 85 N. W. 1012.)

Action in the district court for Ramsey county to recover $235 damages for the conversion of a seal-skin coat. The case was tried before Kelly, J., who directed judgment in favor of plaintiff for $165. From an order denying a motion for a new trial, defendant appealed. Affirmed.

LOVELY, J. This is an action to recover the value of property, alleged to have been converted by defendant. The cause was tried to the court, who found that plaintiff was the owner of the property; that she had affected a loan thereon from the defendant at a usurious rate of interest; that it had been used by the pledgee, to the owner's detriment during

the period of the pledge; also that the owner had demanded a return of the same,—and upon such facts found, as a conclusion of law, that plaintiff was entitled to recover for its value, which was found by the court. Motion for a new trial was denied, from which order, upon a settled case, the whole evidence is brought here for review.

The facts which authorized these findings may be briefly stated as follows: The plaintiff owned a lady's seal-skin coat and a pair of diamond earrings, upon which she had borrowed sums of money by placing such property in pledge as security for the loans. She was anxious to secure a lower rate of interest, and, through a third party, entered into an arrangement with the defendant to place the earrings and seal-skin coat in pawn to her for $140. To that end the third party, acting for plaintiff, gave a note of $147 to the defendant in his own name, took the property out of the previous pawn, and placed the same in pledge to defendant to secure payment of the new loan. The money actually obtained by this last loan was $140. The additional sum in excess of $140, as the testimony reasonably tends to show, was in consideration of the use of such money at the usurious interest of five per cent. per month. The plaintiff redeemed the earrings by paying the sum agreed upon as their value, leaving the seal-skin coat in pawn. Plaintiff afterwards called upon the defendant to redeem the coat, but, upon examination of the same, determined not to do so, for the reason that it had been damaged by defendant's use of the same while in her possession.

Notwithstanding the zealous contention of defendant's counsel that the evidence does not sustain the findings of the court to the effect that the loan of money by defendant was usurious, and that the seal-skin coat had been used and damaged by defendant while in pawn, yet under the evidence, the findings of the trial court were, in these respects, amply sustained, to the effect that the device by which the $7 was included in the note provided for an unlawful rate of interest, in violation of the usury laws of this state, which conferred no right whatever on the defendant to retain the property as collateral security for a usurious loan. There is evidence, also, to support the view that the third party, who was an undisclosed principal, made the negotiation entirely for the benefit of the plaintiff, which fact was known to the defendant. The testimony was also ample to show that the property, which was wearing apparel, had been damaged while in the possession and care of the defendant, which constituted a conversion of the same, and justified the recovery of its value. Story, Bailm. §320.

The order of the trial court is affirmed.

EDWIN COOLEY vs. MINNESOTA TRANSFER RAILWAY CO.

(53 Minn. 327, 55 N. W. 141.)

Appeal by plaintiff, Edwin Cooley, from an order of the District Court of Ramsey County. J. J. Egan, J., made September 10, 1892, denying his motion for a new trial.

On October 14, 1889, at Minneapolis, the plaintiff, Edwin Cooley, signed as surety, or indorsed, notes for the benefit of Cable & Chute, railroad contractors, to the amount of $7,362.43, due one year thereafter. To secure him against loss, they mortgaged to him on that day their horses and mules and other personal property used in grading. In May following, the property was taken by consent of both parties to Custer City, South Dakota, to work on a railroad which Cable & Chute had contracted to grade at that place. When these notes fell due, plaintiff was compelled to pay them, and in March, 1891, he sent A. D. Polk, his agent, to Deadwood, S. Dak., to take the property or make new arrangements for his indemnity. Cable & Chute then turned over the property to this agent in pledge for the payment of their debt to plaintiff, and he shipped it, eleven car loads, to Minnesota Transfer, near St. Paul, sending men with it and having possession of it. To avoid paying freight it was shipped in the name of, and consigned to, Cable & Chute, for when they took the grading contracts it was agreed that their property was to be taken out there and returned free of freight.

On its arrival, April 8, 1891, the defendant, the Minnesota Transfer Railway Company, unloaded and stored the property and fed the horses and mules, and kept it until May 15th following, claiming a lien on it as warehousemen for the expense and their charges, amounting to $489. Meantime, on April 13, 1891, William Hogan commenced an action in the District Court against Cable & Chute to recover $1,500 and interest due him upon a promissory note made by them to him November 25, 1890, and then past due. He made affidavit and garnished the Minnesota Transfer Railroad Company, as having property in their hands belonging to Cable & Chute. John C. Bullitt, Jr., was appointed agent of the Railway Company to make its disclosure, and he stated the facts before a referee who reported the disclosure to the District Court. Meantime, on May 4, 1891, the plaintiff, Cooley, demanded the property and commenced this action in replevin against the Railway Company, gave bond and took possession of the property. The company answered, claiming a lien for the $489, and stating the garnishment they were under. On June 29, 1891. Cooley agreed with Cable & Chute to take the property absolutely, and allow them $5,000 for it upon the debt for which it was pledged. Plaintiff then sold it, realizing $4,460 for it. Hogan obtained judgment in his suit May 6, 1891, for $1,603.23. He moved the court November 14, 1891, to be permitted to intervene and become a party to this replevin suit. This motion was unopposed, and he intervened, and filed his complaint in intervention. He claimed that plaintiff's mortgage, the pledge made in Dakota, and the sale on June 29, 1891, were all invalid, fraudulent and void as against creditors; and this was the question litigated at the trial.

The trial court made findings of fact and ordered judgment against plaintiff for a return of the property, or, if a return could

not be had, then that the Railway Company recover $489, and interest and costs; and Hogan recover $1,603.23, the amount of his judgment against Cable & Chute, with interest and costs. Plaintiff moved for a new trial, and being denied, appeals.

DICKINSON, J. This was an action of replevin to recover forty-three horses and mules which, in the course of transportation by rail from Deadwood, So. Dak., to St. Paul, had been delivered to the defendant, the Transfer Railway Company, and unloaded, and left in its yards. The possession of the property by the railway company was rightful; at least, until it refused to deliver it to the plaintiff, upon his demand, on the 14th day of April, 1891. The property had been owned by Cable & Chute prior to March 20th of that year. The plaintiff's asserted right to recover it rests upon the alleged fact that at the latter date, at Deadwood, Cable & Chute had delivered it to the plaintiff in pledge, to secure him for certain indebtedness and liability incurred in their behalf; it being agreed that the plaintiff should take the property to St. Paul and dispose of it for his reimbursment.

The railway company asserts a lien upon, and right to retain possession of, the property, on account of its charges for feeding and caring for the same, (amounting to $489,) from the time when it was received by it, April 8th, until it was taken by the plaintiff in this action of replevin, on the 15th of May.

While the railway company was so holding the property, and before the plaintiff demanded that it be surrendered to him, William Hogan had commenced an action on contract against Cable & Chute for the recovery of $1,500 and interest, and had caused process of garnishment to be served upon the railway company on account of its holding this property, which Hogan claimed to belong to Cable & Chute. During the pendency of this action of replevin, Hogan was allowed, upon his motion, to intervene, as a party therein, without objection, so far as appears. He had then recovered judgment in his action against Cable & Chute. His contention in this action is that the property belonged to Cable & Chute, and that he secured a lien thereon by virtue of the garnishee proceedings, and that as to him the alleged pledge to the plaintiff was invalid, if any such pledge was made.

The plaintiff, having taken the property by virtue of the process in this action, sold the same.

The court, deciding the case without a jury, found that Cable & Chute "pretended or attempted" to pledge the property to the plaintiff, but that this was void as to creditors, and as to the defendant, and that, as to the intervener, (Hogan,) Cable & Chute remained the absolute owners. Judgment was allowed in favor of the railway company, against the plaintiff, for the recovery of the amount of its charges for keeping, $489, and in favor of the intervener, Hogan, and against the plaintiff, for the recovery of the amount of his (Hogan's) judgment against Cable & Chute. This appeal by the plaintiff is from an order refusing a new trial.

A chattel mortgage had been given by Cable & Chute to the plaintiff, covering some, but not all, of the property here involved, long before the alleged pledge. We deem this of little importance, for if we could ascertain from the case what part of this property was included in the mortgage, it does not appear what was the value of the same. The plaintiff's case really rests upon the pledge, rather than upon the prior mortgage.

The case, as between the plaintiff and the railway company, seems plain irrespective of the question as to the sufficiency and effect of the pledge. When the plaintiff demanded possession of the property, there having been a delay of several days on account of some unadjusted claim of charges for transportation, the defendant was not holding the property in the relation of a carrier, but as a warehouseman, and such had been the case for some six days; and in the meantime, and just before such demand, the garnishment had been made in behalf of Hogan. The garnishment legally charged the company with the responsibility of retaining the property, as in custody of the law, in order that it might be applied to the satisfaction of Hogan's debt, if he should succeed in maintaining his claim. It excused the company from delivering the property to the plaintiff. Drake, Attachm. 453; Stiles v. Davis, 1 Black, 101. Whether goods in the possession of a common carrier, and while actually in transit, may be the subject of garnishment, we do not consider. We do not construe the finding of the court to be that the defendant retained the property as a common carrier.

The defendant company had a lien upon the property for its proper charges for keeping it; and the determination of the court, awarding a recovery therefor against the plaintiff, who had replevied and sold it, was justified by the evidence, and was in accordance with the law. Whether the pledge was complete and effectual, or not, the result, in this particular, would be the same.

Different questions are presented, as between the plaintiff and the intervener. As between them, the question is one of priority of rights. If the pledge to the plaintiff was complete and effectual, and was still in force at the time of the garnishment by Hogan, any rights which the latter might acquire by the garnishment would be subordinate to those of the plaintiff as pledgee.

It does not appear on what ground, or for what reason, the court found the pledge to have been void as to Hogan, a creditor of Cable & Chute. If it was because the evidence was deemed insufficient to establish the fact of the pledge having been made at Deadwood, we should be compelled to say that the court had failed to fully appreciate the force of the evidence; for, as we read it, it is all one way, and was of such a nature as to forbid any other conclusion than that the property was, by Cable & Chute, actually and completely delivered to, and taken possession of by, the plaintiff, to be by the latter retained, and

disposed of for his reimbursement. It may be supposed, however, that the court considered that the circumstances connected with its transportation to St. Paul avoided or terminated the pledge, or precluded the plaintiff from asserting his rights as a pledgee, as against Hogan. These circumstances were as follows:

Cable & Chute had taken the property to Deadwood pursuant to some agreement with Streeter & Co., who had some contract or work of railroad construction there. Cable & Chute had a subcontract under Streeter & Co., and their agreement with Streeter & Co., involved an undertaking on the part of the latter to furnish transportation for this property to Deadwood, and back to St. Paul. Cable & Chute had completed their contract, so that they were entitled to call upon Streeter & Co. to have the property returned to St. Paul without expense to them. When the property was pledged to the plaintiff, his agent, who had it in his possession, arranged with Cable & Chute to conceal this fact from Streeter & Co., lest the latter should refuse to abide by their agreement to have it transported back to St. Paul. Hence the shipment was made in the name of Streeter & Co., and Cable & Chute were named as consignees; and Streeter & Co. arranged the matter of transportation so that no charge was made therefor to the plaintiff, nor to Cable & Chute.

This did not avoid or terminate the pledge. The plaintiff employed an agent who remained in charge of the property during its transportation to St. Paul. The possession was never in fact restored to Cable & Chute, nor do they appear to have ever claimed to be in possession after they delivered the property to the plaintiff. As between those parties, it is certain that the pledge remained effectual. Even if, after the property had been delivered in pledge to the plaintiff, the latter had intrusted it again to the pledgors as his agents or bailees for the special purpose of taking it to St. Paul in his behalf, to be there again restored to him, we suppose that the pledge would remain good. The possession of the original pledgors, as the agents of the pledgee, would be his possession. Casey v. Cavaroc, 96 U. S. 467. But, however that may be, this case is stronger for the plaintiff than that just supposed, for the property was not in fact redelivered to the pledgors, but remained, uninterruptedly, in the custody of the plaintiff's agent.

The fact that the plaintiff, for the purpose above stated, employed the names of Cable & Chute as consignees, so that it might appear that the property was shipped for them, did not, as we have said, divest the plaintiff of his pledge. Neither did it subordinate the plaintiff's rights, as pledgee, to the subsequent claim of Hogan under garnishment, or estop the former from claiming the preference which his pledge secured to him. There is no registry law relating to the pledging of property. If the pledge was effectual, it is not material whether Hogan had notice of it or not. His debt was not created in reliance upon any appearance of continued possession, or of absolute title, in Cable & Chute, by reason of their being named as consignees. It long antedated the transactions here in question. Nor, even if the concealment of the pledge from Streeter & Co., for the purpose stated, was a fraud upon the latter, it would not affect the case of Hogan. It did not concern him in any way. But it is not even apparent that the concealment was a fraud upon Streeter & Co. Their agreement to secure free transportation back to St. Paul was not discharged by the pledging of the property to the plaintiff. In brief, the pledge to the plaintiff was valid, and was prior and superior to any rights acquired by the subsequent garnishment, and there is nothing in the case to estop him from asserting his superior right.

A considerable time after the garnishment, while the plaintiff still held the property, it seems that Cable & Chute sold the same to him for a specified price, which he was to apply as payment on the indebtedness to him. It is contended that thereby the plaintiff waived and lost his rights as pledgee, so that, by reason of the garnishment, the intervener's rights were superior to any remaining in the plaintiff. We cannot so hold. The transfer of the legal title, for a specified price, to be applied on the debt, was not inconsistent with, and did not divest the plaintiff of, the essential rights which he already had under the pledge; that is, the possession of the property, and the right to dispose of it for the satisfaction of his debt. That right still remained, as against creditors of the pledgor who might have secured attachments subsequent to the pledge. It may be that the added interest which the sale conferred—the legal title—was held subject to the intervening garnishment, and that the plaintiff might be accountable to the intervener for the value of the property in excess of the debt, if there was any such excess. But the case does not present that question.

It is unnecessary to consider whether the claim of the intervener was a proper subject of litigation in this action.

As between the plaintiff and the defendant railway company, the order is affirmed. As between the plaintiff and the intervener, it is reversed.

VANDERBURGH, J., did not take part in this decision.

Application for reargument denied June 7, 1893.

EDWIN A. NORTON vs. LUCY BAXTER, & ANOTHER, IMPLEADED, &c.

(41 Minn. 146, 42 N. W. 865.)

Appeal by defendants Lucy and Stephen H. Baxter from a judgment of the district court for Hennepin county, where the action was tried by Hicks, J.

DICKINSON, J. This is an action to foreclose a mortgage upon a lot of land, designated as lot 14, executed by the defendants Touseley and wife to the plaintiff, in August, 1887, and to bar or enjoin these appellants Lucy

Baxter and Stephen H. Baxter from proceeding to enforce an earlier mortgage, executed by one Nye, in 1886, under circumstances to be hereafter referred to. This appeal by the two defendants just named is from a judgment granting that relief. The mortgage last referred to, which the appellants claim the right to enforce as the earlier lien, was executed under these circumstances: September 20, 1886, Tousley and wife conveyed several lots of land, including this lot 14, to one Nye, without consideration, and for the use and benefit of the grantor, Tousley. The same day Nye gave to Tousley her (Nye's) promissory note for $2,500, for the accommodation only of the payee, and executed to him a mortgage upon the same land, in terms securing the payment of the note. Subsequently, prior to Tousley's mortgage to the plaintiff, Nye reconveyed the property to Tousley. While Tousley held the accommodation note of Nye and the mortgage securing it, in October, 1886, he borrowed $700 from the defendant Stephen H. Baxter and a brother, William Baxter, giving to them his note therefor, payable to the defendant Lucy Baxter. As collateral security Tousley executed an assignment to Lucy Baxter of the Nye note and mortgage, and delivered it to the Baxter brothers. Lucy Baxter had no interest in this transaction, and knew nothing of it, her name being employed for the benefit of the brothers. An agreement accompanied the assigned note and mortgage, authorizing the sale of the pledge after notice, upon default of Tousley to pay the debt secured thereby. June 22, 1888, W. H. Baxter, assuming to act in behalf of Lucy, after notice to Tousley, offered the pledged note and mortgage for sale at auction. Tousley bid $800 for it, and no other bona fide bid was made; but the note and mortgage were struck off to one Prouty at $817. The securities were then assigned to him, although he paid nothing therefor, and he reassigned the same to Stephen H. Baxter. June 29, 1888, Tousley tendered to the Baxter brothers, who then had possession of the Nye note and mortgage, and to Stephen H. Baxter, the sum of $820 in payment of his own note, which the Nye note and mortgage had been pledged to secure. This tender was sufficient in amount to pay his debt. The tender was refused.

The pretended sale of the pledged securities to Prouty, and the assignment of the same to him, and by him to Stephen H. Baxter, were not effectual as a sale of the securities so as to extinguish or prejudice the previously existing rights of the pledgor. The general property in the pledge remained in the pledgor after as well as before default. The default of the pledgor to pay his debt at maturity in no way affected the nature of the pledgee's rights concerning the property, except that he then became entitled to proceed to make the securities available in the manner prescribed by law or by the terms of the contract. It is not the case of a defeasible title becoming absolute at law by default in the performance of the prescribed condition. The property was held as security before default. It was held only as security after default. The pledgee was authorized to sell the securities, and by a sale in good faith the pledgor would have been divested of his property. But the pledgee could not give it away, so as to affect the rights of the pledgor, nor could a pretended and merely colorable sale, without consideration, divest the pledgor of his rights as such, or confer upon the pretended purchaser any greater interest than that held by the pledgee.

The question which the appellant's now present is whether, upon tender of payment of the principal debt, the pledged note and mortgage ceased to be available and enforceable as collateral securities. It is a general principle that tender of payment of a debt, to secure which personal property has been pledged, discharges the lien, terminating the special property rights of the pledgee. Coggs v. Bernard, 2 Ld. Raym. 909, 917; Ratcliff v. Davies, Cro. Jac. 244; Hancock v. Franklin Insurance Co., 114 Mass. 155; Hathaway v. Fall River Nat. Bank, 131 Mass. 14; Ball v. Stanley, 5 Yerg. 199, (26 Am. Dec. 263;) Mitchell v. Roberts, 17 Fed. Rep. 776; Loughborough v. McNevin, 74 Cal. 250, (14 Pac. Rep. 369, 15 Pac. Rep. 773;) Ratcliff v. Vance, 2 Const. (S. C.) 239; Kortright v. Cady, 21 N. Y. 343, (78 Am. Dec. 145;) Cass v. Higenbotam, 100 N. Y. 248, (3 N. E. Rep. 189;) Moynahan v. Moore, 9 Mich. 8, (77 Am. Dec. 468;) Stewart v. Brown, 48 Mich. 383, (12 N. W. Rep. 499.) The appellants concede that while the general rule is that tender of the amount due, at the time it becomes due, discharges the lien of collateral securities, yet contend that such is not the effect of a tender after that time. Such a distinction has been recognized in respect to mortgages, based upon the fact that the legal title has become vested in the mortgagee. No such distinction can be made in the case of bailments of personal property as security. The relations and rights of the parties are unchanged by the occurrence of the default. The pledgee has not even after default the absolute legal title. The character of the bailment is not changed. It is still a pledge, and can be enforced or made available only as such. But the very terms of the contract in this case were that, if the debt should be paid "before the sale of said property," the property should be returned.

The appellants rely, also, upon the fact that, so far as appears, the tender of Tousley was not kept good. There is some conflict in the authorities at the present day as to the necessity for this, in general, in order that the lien of the pledge may be discharged. We deem it unnecessary to determine whether the strict rule of the common law has been modified. It may be conceded for the purposes of this case that upon equitable grounds a pledgor, whose tender has been refused, should not be allowed affirmative relief, especially of an equitable nature, unless he has kept good his tender, or at least comes before the court in an attitude of willingness to pay what is due from him. Tuthill v. Morris, 81 N. Y. 94. The defendants in this case are not entitled to favor upon equitable grounds. The tender made by Tousley, the common debtor of both

parties, was sufficient, and, so far as appears, there was nothing to justify the refusal to accept it or to qualify the strict legal effect of the refusal. After an unauthorized and, as it would seem, a fraudulent sale, Baxter, who was a party to it, refusing to accept from Tousley the payment of his debt, asserts in this action the right to hold and enforce the pledged securities, not merely as securities for his debt of $700, but as his own property, the mortgage being an incumbrance of $2,500, with interest. This plaintiff has not been in default. He owes nothing to the defendants, and is not chargeable with fault because the debtor did not keep his tender good. He, also, is a creditor of Tousley, having mortgage security junior to that which was pledged to the defendants. Tousley, the common debtor, was bound to pay both. The unjustified refusal of Baxter to accept payment was prejudicial to the plaintiff holding the junior mortgage. The pledged note and mortgage of Nye, if released from the pledge, would not, as to the plaintiff, have been available in Tousley's hands as a senior incumbrance upon the land, having been executed for the accommodation of Tousley. In view of the relations between the plaintiff and Baxter, there appears to be nothing to modify the strict rule of the common law that a tender of payment of the debt discharges the pledge, so far, at least, as it affects the plaintiff. Of course, the debt of Tousley was not thus discharged.

Judgment affirmed.

LEVI MOORE, APPELLANT, v. THE METROPOLITAN NATIONAL BANK, IMPLEADED, &c., RESPONDENT.

(55 N. Y. 41.)

(Argued October 3, 1873; decided November 11, 1873.)

Appeal from judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment in favor of defendant, The Metropolitan Bank, entered upon an order dismissing the complaint as to it, upon trial of issues of fact settled herein to be tried by a jury.

This action was brought to restrain defendants from disposing of and to recover possession of a certificate of indebtedness of the State of New York for $10,000, issued by the new capitol commissioners under chapter 830 of the Laws of 1868. Issues were settled and directed to be tried by a jury.

It appeared, upon the trial, that the certificate in question was delivered by plaintiff to defendant Miller with an assignment thereon, as follows:

"$10,000.

"For value received, I hereby transfer, assign and set over to Isaac Miller the within described amount, say ten thousand dollars.

"LEVI MOORE."

This assignment and delivery was induced by false representations upon the part of Miller as to his responsibility. Miller applied to plaintiff for a loan of $7,000, and relying upon such representations the latter delivered to him the certificate so assigned, receiving therefor two notes amounting to $7,000 and Miller's check for $3,000, and under the agreement that Miller should get the certificate cashed in New York, paying the $3,000 out of the proceeds. In case it was not cashed in three weeks, the certificate was to be returned and the check and notes taken up. The certificate was not cashed in three weeks. Upon the trial before the jury, plaintiff introduced in evidence the certificate with said assignment thereon, and also a similar assignment from Miller to defendant, The Metropolitan National Bank, dated November 22, 1868. At the close of the evidence the counsel for the bank moved for a dismissal of the complaint as to it upon the ground, among others, that upon the plaintiff's proofs the bank was, prima facie, a bona fide purchaser for value of the certificate from Miller, and so was entitled to hold the certificate; which motion was granted and plaintiff excepted.

GROVER, J. The judge erred in ordering a dismissal of the complaint against the bank. Such an order could not be properly made upon the trial of issues settled in an equity action before a jury. Upon that trial, a verdict upon all the issues as to all the parties should have been rendered, and the cause afterward heard by the court upon the verdict and other competent evidence produced by the parties, and the judgment should then be given by the court. (Birdsall v. Patterson, Com. of App., 51 N. Y., 43.) But a reversal of the judgment in favor of the bank upon this ground merely, will leave the real and only question litigated between the plaintiff and the bank undisposed of. This should be avoided, if it is presented by the case in a manner enabling the court to determine it. That question is, whether the bank, having in good faith taken a transfer of the certificate from Miller as security for his note, given to it at the time for money then loaned by the bank to him, acquired a title to the certificate, valid as against the plaintiff, as security for the money so loaned. It is clear that it acquired nothing more, as against the plaintiff or Miller. Upon repayment of the money loaned, and interest, the bank would be bound to retransfer the certificate to the party entitled, which the judgment given in the action between the plaintiff and Miller shows to be the plaintiff. The bank cannot make title to the certificate upon the ground that Miller had authority from the plaintiff to sell it, as his agent in New York, for the reason that the case shows that, unless he affected a sale there within three weeks from the time he received the certificate from the plaintiff, he was to return the same to him, and receive back from him the notes and his check given by him to the plaintiff therefor, and that the bank did not obtain the certificate from Miller until after the expiration of the three weeks. Had the plaintiff authorized Miller to sell the check, as his agent, this would not confer authority to pledge it as security for a loan of money from the bank. Besides, the case fails to show that Miller was to sell the certificate, as agent for the plaintiff, but

it does show that he purchased the same from him, giving notes and his check therefor, coupled with an agreement that, if he failed to get it cashed in New York in three weeks, he should return it to the plaintiff, and receive back the notes and check. This did not constitute Miller the agent of the plaintiff. If he got the certificate cashed, it was for himself, and the money received therefor would have been his, and not that of the plaintiff. The case further shows that the plaintiff executed an absolute transfer of the certificate written thereon to Miller, and delivered the same to him. It further shows that Miller, in making the purchase, practiced such a fraud upon the plaintiff as would authorize him to rescind the contract, as to him, and that he did, upon the discovery of such fraud, elect to rescind the same. The question is thus presented whether a bona fide purchaser of a chose in action, not negotiable, from one to whom the owner has transferred the apparent absolute ownership, upon the faith of such ownership obtains a valid title as against such owner, although his vendor had not such title. The counsel for the plaintiff insists that this precise question was decided against the title acquired by such purchaser, by this court, in Bush v. Lathrop (22 N. Y. 535), where it was held that equities existing between the assignor and the assignee of a chose in action, not negotiable, attend the title transferred to a subsequent assignee for value, without notice,—that the latter takes the exact position of his vendor. The counsel for the bank, to sustain its title, cites McNiel v. The Tenth National bank (46 N. Y., 325). In this it was held that, where the owner of corporate stocks conferred upon another an apparent title to or power of disposition over it, he is estopped from asserting his title as against an innocent third party who has acquired title in good faith from such apparent owner. It is obvious that both these cases cannot be upheld, unless there shall be found to be a distinction between the acquisition of title to stocks in a corporation and choses in action not negotiable. The Commercial Bank of Buffalo v. Kortwright (22 Wend., 348) involved the same question as the latter, which was decided the same way by the Court for the Correction Errors. Further discussion of the principle upon which the decisions in these cases were based, or citation of the authorities sustaining it, is unnecessary. That work has been well done by the able judges who delivered the opinions therein. The counsel for the plaintiff concedes that the rule is the same in regard to goods and chattels. A citation of the numerous authorities sustaining this position is therefore, unnecessary. Yet it is beyond question that the general rule is that a purchaser of corporate shares, or of goods and chattels acquires only such title as the vendor had thereto. Ballad v. Burgett (40 N. Y., 314) was decided upon this ground. One reason why an owner of corporate shares or of goods and chattels, who has conferred upon another the apparent ownership, without transferring to him a valid title, was held precluded from asserting his title, against a bona fide purchaser from such apparent owner, is that such purchase was made upon the faith of the title which he had apparently given, and that it would be contrary to justice and good conscience to permit him to assert his real title against an innocent purchaser from one clothed by him with all the indicia of ownership and power of disposition. Another reason was, that were the rule otherwise, it would afford opportunities for the perpetration of frauds upon the purchasers from such apparent owners. Where one, known to be the owner of shares or chattels, delivers to another the scrip or possession of the chattels, together with an absolute written transfer of all his title thereto, he thereby enables him to hold himself out as owner, and, as such, obtain credit upon and make sales of the property; and if, after he had so done, the owner was permitted to come in and assert his title against those dealing upon the faith of these appearances, the dishonest might combine and practice the grossest frauds. Another reason is that it presents a proper case for the application of the legal maxim that, where one of two innocent parties must sustain a loss from the fraud of a third, such loss shall fall upon the one, if either, whose act has enabled such fraud to be committed. All these reasons, it is obvious, apply with all their force to choses in action. Why should the owner of a horse or of bank shares, who has given to another an absolute written transfer of all his right thereto for some purpose other than that of passing the title, be precluded, as against a bona fide purchaser from such person, from asserting his title, while, under the same state of facts, he may reclaim from such purchaser a bond and mortgage or a certificate of indebtedness like the one in question? As to the former he is estopped, while as to the latter the same state of facts, it is insisted, will work no such result. The counsel for the plaintiff insists that such distinction should be made, for the reason that the purchaser of corporate shares and chattels from the apparent owner obtains a legal title which is valid and may be asserted in a court of law, while the assignee of a chose in action, not negotiable at common law, obtained an equitable title only; and that the equity of the former owner, being prior in time to that acquired by the purchaser, is superior thereto, the rule in equity being that, where the equities are equal, the first in time shall prevail; but upon what ground the same state of facts that will estop a party from the assertion of a legal title will not also estop him from the assertion of an equitable one the counsel fails to show, for the very good reason that no such ground exists. It is so obvious that the estoppel should, upon principle, apply to the latter equally with the former, that a distinction can only be justified upon authority.

The council further insists that to apply the same rule to non-negotiable choses in action will, in effect, make them negotiable. Not at all. No one pretends but that the purchaser will take the former subject to all defences, valid as to the original parties, nor that the mere possession is any more evidence

of title in the possessor than is that of a horse. In both respects, the difference between these and negotiable instruments is vital and and not at all affected by the application of the same rule as to chattels. In Bush v. Lathrop (supra), the learned judge commences his examination of the authorities by citing the remark of Lord Thurlow, in Davies v. Austen (1 Vesey, 247), that "a purchaser of a chose in action must always abide by the case of the person from whom he buys." When applied to the facts of that case it was entirely correct. It was a case where the assignee of a legacy sought to enforce rights against the executor not possessed by his assignor. He then proceeds to examine the authorities pro and con., which he thought somewhat conflicting, and arrived at the conclusion that there was a decided preponderance in favor of the right of the owner to reclaim from the bona fide purchaser. Sandford v. Van Rensselaer (Hopkins R., 569; S. C. in error, 7 Cowen, 316) was much relied upon by the learned judge. That was a contest between assignees, from the same assignor, of two mortgages as to their respective priority, and had nothing to do with the point under consideration. Covell v. The Tradesman's Bank (1 Paige, 131), also relied on, was placed upon the ground that the plaintiff had the legal title to the sealed note in question and the power to sue upon it, and that in such a case was entitled to the money due thereon, his equity being equal to that of the other claimant. This is now changed by the Code, by which the power to sue is placed in the assignee of choses not negotiable, and therefore the reason for the judgment no longer exists. Muir v. Schenck (3 Hill, 398) was a contest between the assignees claiming from the same assignor, which was an entirely different case from the assignor who has made an absolute assignment claiming in opposition thereto from a bona fide purchaser from his assignee. The same remark is applicable to Pailon v. Martin (1 Sand. Ch., 569) and Sweet v. Van Wyck (3 Barb. Ch., 647). I think the conclusion of the learned judge, that the owner can assert title to a chose in action from a bona fide purchaser from one to whom he has given the apparent ownership, is unsound in principle and not sustained by authority. No allusion whatever is made by him to the rule as to corporate shares or chattels, or to the reasons upon which it is founded; no distinction is made between this kind of property and non-negotiable choses in this respect, and I think that none is warranted by reason or well-considered authority. Bush v. Lathrop was decided by a majority of the court, three of the judges dissenting. Some of the majority may have concurred upon the ground of notice to the purchaser; but whether so or not, I think McNeil v. The Tenth National Bank (supra) identical in principle with the present, much better considered, and that its principle should control. It follows that the bank, if it made the loan in good faith to Miller, upon the credit of the certificate, acquired a title thereto valid against the plaintiff to the extent of the loan. From the papers it appears that the certificate, at the time, amounted to something more than the loan to Miller by the bank. This excess belongs to the plaintiff. Cases where Bush v. Lathrop was referred to, in the opinions delivered in this court, with apparent approbation were cited by the counsel; but in none of them was the question in the present involved. In that several legal propositions were stated with perfect accuracy. It was in reference to these that the case has been so referred to, without at all considering the present question. I think the recital in the assignment from Miller to the bank, that it was for value received, was not evidence in favor of the bank against the plaintiff, of the payment or loan of the money to him; that the introduction of the assignment by the plaintiff, for the purpose of showing what claim the bank made, or for any other purpose, did not make it so.

The judgment in favor of the bank must be reversed and new trial ordered, costs of the appeal to abide the final judgment for costs in the cause.

All concur, except Allen and Folger, JJ., who concur in the result, on the ground of the mistrial; but Allen, J., dissents from the opinion, as to rights of a bona fide purchaser, and Folger, J., does not vote thereon.

Judgment reversed.

CYRUS L. BROWN v. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968)

Action in the district court for Hennepin county to recover the amount of a life insurance policy. The court, Johnson, J., found in favor of plaintiff for the sum of $2,027, and interest, and from an order denying a motion for a new trial, defendant appealed. Reversed.

MITCHELL, J.

This action was brought to recover on a life insurance policy which had been paid at its maturity to the Security Bank of Minneapolis; the plaintiff claiming that he was the owner of the policy, and that the defendant had no right to pay the money to the bank. The action was tried by the court, which ordered judgment for the plaintiff for the face of the policy. All the assignments of error challenge the sufficiency of the findings of fact to support the conclusions of law. Omitting immaterial matters, and stating the findings according to their legal effect, they are substantially as follows:

On April 6, 1872, the defendant issued to the plaintiff a policy on his life for $2,000, payable to himself in twenty years, or, in case of his death before that date, to his personal representatives or assigns. On March 16, 1881, the plaintiff assigned the policy to one Hadley. This assignment, which was indorsed on the policy, was absolute in form, but was made in fact merely as indemnity or security to Hadley for a loan of $1,000, which he agreed

shortly to procure for the plaintiff, but which he failed to do; so that the consideration for the assignment wholly failed, and hence, as between plaintiff and Hadley, the former was the owner of the policy, and the latter had no interest in it. Hadley, however, remained in possession of the policy until May 23, 1887, when he assigned and delivered it to the Security Bank of Minnesota as security for money loaned by it to him, and which he has never repaid.

When the officers of the bank took an assignment of the policy as security, they did not know "how said Hadley became possessed of said policy, or the assignment of the same from Brown to Hadley, * * * or what was the consideration for the assignment," but, "from an examination of said policy and said assignment, believed that said Hadley was the owner of said policy." They took the assignment from Hadley "for a valuable consideration, without any notice or knowledge of any claim on the part of said Cyrus L. Brown or his wife to said policy, and without any knowledge or notice of any rights or equities existing between said Brown or his said wife and said Hadley in any manner relating to said policy"; nor did they ever acquire any such notice or knowledge prior to the date of the payment of the policy at its maturity.

The policy, with the two assignments, remained in the possession of the bank until the policy matured, in 1892, when the defendant paid the amount due on it to the bank, after taking from it a bond of indemnity against the claims of any other persons. Plaintiff had paid the premiums on the policy up to the time he assigned it to Hadley, in March, 1881; and thereafter up to the time it matured, in 1892, the premiums (the amounts of which are found by the court) were paid by Hadley, and have never been repaid to him by plaintiff. In March, 1884, plaintiff notified the defendant not to pay any money on the policy to Hadley, or to any one else except himself, and that Hadley had no right to or interest in the policy; but there is no finding that plaintiff ever took any active measures to secure a return of the policy from Hadley. He never knew that Hadley had assigned it to the bank until after the defendant had paid it to the bank. Neither the bank nor Hadley had any insurable interest in the life of the plaintiff.

The defendant's defense is that it has paid the amount of the policy to the party entitled to it, to wit, the bank; and it bases the bank's right to the money on two legal propositions, viz.: (1) That the policy was assignable to any one, although not having any insurable interest in the life of the insured; and (2) although, as between plaintiff and Hadley, the former owned the policy, yet the plaintiff by his conduct in clothing Hadley with all the indicia of ownership, is estopped to assert his own rights as against the bank, an innocent purchaser for value. The plaintiff takes issue with the defendant on both propositions.

In view of the conclusion at which we have arrived upon the second proposition, it becomes unnecessary to consider the first, although we remark in passing that we have not discovered anything which has changed the impression as to the state of the authorities on the question which we expressed (obiter, it is true) in Hogue v. Minn. P. & P. Co., 59 Minn. 39, 60 N. W. 812.

We do not, however, place our decision of the second proposition upon the ground advanced by council for the plaintiff, which is, in substance, that estoppels must be mutual and reciprocal; that only parties to the suit, and their privies, can take advantage of an estoppel existing as between themselves; and that an estoppel available only to a stranger to the action will not avail either of the parties; hence, even if an estoppel existed in favor of the bank against the plaintiff, this is not available to the defendant. This is a misapplication of a very familiar and well-settled rule of law. If the defendant had paid the amount of the policy to the party who, as between plaintiff and the bank, was entitled to it, that was a perfect defense to the action. The issue before the court was who was entitled to the money,—plaintiff or the bank; and for this purpose it was competent for the defendant to establish the right of the bank as against plaintiff, whether that right was based upon equitable estoppel or upon contract.

We, however, place our decision upon the ground that, this policy being a mere non-negotiable chose in action, the bank occupies the exact position of its assignor, Hadley, and took it subject to the equities existing between him and his assignor, the plaintiff, unless the latter is equitably estopped by his conduct from asserting those equities against the bank, and that there are no facts in this case which create any such estoppel.

Upon the facts found, the defendant has nothing upon which to base an equitable estoppel, except the bare fact that plaintiff delivered possession of the policy to Hadley, accompanied by an absolute assignment, without any expressed conditions or limitations, and thereby clothed him with the indicia of absolute ownership. The bank officers relied upon, and based their belief in Hadley's ownership upon, their examination of the policy and the assignment without knowing, and presumably without attempting to ascertain, how or for what purpose the assignment to Hadley was made, or what the consideration for it was. If it be said that plaintiff was negligent in not taking active measures to secure a return of the policy from Hadley, and in not personally paying the premiums on his own policy, the answer is that, if so, such negligence did not constitute any breach of duty, either legal or moral, towards the bank, or any one else who might see fit to deal with the policy. The doctrine that the assignee of a nonnegotiable chose in action takes it subject to all existing equities and defenses is not confined to equities or to defenses existing in favor of the debtor or obligor who executed the chose in action, but it also applies to cases where the chose in action has gone through successive assignments to the

second and subsequent assignees, if there were equities subsisting between the original assignor, or any other assignor, and his immediate assignee, in favor of the former.

What is called the doctrine of "latent equities" has received some judicial support. This means that in a case like the present the equities of plaintiff, the original assignor, are latent, and cannot prevail against the title of the bank, the second assignee; that the only defenses subject to which the assignee of a nonnegotiable chose in action purchases are those existing in favor of the debtor who issued the obligation or security. This doctrine has been generally condemned as unsound and tending to extend the peculiar qualities of negotiable paper to things in action not negotiable, and to destroy the fundamental distinction between negotiable and nonnegotiable demands. For a full discussion of this whole subject, see 1 Pomeroy, Eq. Jur. §707, et seq.; Pomeroy, Code Rem. §154, et seq.; also Bush v. Lathrop, 22 N. Y. 535.

The leading case in favor of the doctrine of "latent equities" is Moore v. Metropolitan, 55 N. Y. 41, which squarely overrules Bush v. Lathrop, supra; saying that it and McNeil v. Tenth, 46 N. Y. 325, cannot both stand, unless there shall be found to be a distinction between the acquisition of title to stocks in a corporation, and choses in action not negotiable, and then concluded that there is no distinction. But, as Mr. Pomeroy clearly points out, the court in Moore v. Metropolitan do not make the slightest allusion to the narrow limits placed in McNeil v. Tenth upon the use of the estoppel, viz. to cases in which the assignor, by a written instrument over his signature, confers, not only the apparent title, but the unconditional power of disposition over the security. But the most important distinction between the two cases lies in the fact that in the McNeil case the subject of the assignment was not a mere nonnegotiable chose in action, but certificates of corporate stock, which are universally dealt in by business men as if they were in all respects negotiable, and are transferred from hand to hand by a blank assignment accompanied by a power of attorney giving the holder full power of disposition according to the usual course of dealing with like securities. The decision is but another instance of the manner in which business usages are adopted and incorporated into the law by the progressive course of judicial legislation.

But no such considerations exist in the case of an ordinary chose in action, like a life insurance policy, which is not only nonnegotiable in fact, but is so considered and treated by business men. And if, in the case of an ordinary nonnegotiable chose in action, the effect of an estoppel be produced against an assignor from a mere assignment, absolute on its face, executed by the owner and delivered to his assignee, it is but an easy step, as Mr. Pomeroy suggests, to extend the doctrine of equitable estoppel to the debtor or obligor himself because he has issued an undertaking which creates an apparent liability against himself.

Our conclusion is that there was no estoppel against the plaintiff in favor of the bank. But, notwithstanding this, and that the consideration for the assignment from plaintiff to Hadley failed, and even conceding that the assignment was invalid, still Hadley had a lien upon the policy for the amount paid by him for premiums. The assignment from him to the bank transferred to it all his interests in the policy, which was the amount of the premiums advanced by him. To that amount the bank was entitled to the money on the policy, and to that extent the defendant rightfully paid the money to the bank; and this constituted a defense, pro tanto, to this action. Therefore, according to the findings, the court ought to have deducted from the face of the policy the amount of the premiums paid by Hadley, with interest, and ordered judgment against the defendant only for the balance.

The cause is remanded, with directions to the court below to modify its conclusions of law and order for judgment in accordance with this opinion.

START, C. J. (dissenting).

I dissent. The statute makes all choses in action which were not negotiable by the law merchant so far negotiable that the legal title thereto may be transferred by an assignment thereof, subject to any defense thereto, legal or equitable, that the maker may have. Therefore there is, in legal effect, written upon all nonnegotiable paper, these words: "This instrument is assignable, subject to any defense which the maker may have to it." Now, to conclude, from the fact that the maker of such an instrument is not estopped, because he has issued an undertaking creating an apparent liability against himself, that the payee, who has clothed his assignee with the apparent absolute title thereto, is not equitably estopped from asserting any latent equities as to such title against a bona fide purchaser, is to reason from false premises, because in the former case the proposed purchaser is admonished by the law that, if he buys, he does so subject to any equities the maker may have, but in the latter he is advised that the payee may transfer the absolute legal title by an assignment.

Equally unsound, it seems to me, is the claim that to apply the doctrine of equitable estoppel as between the payee of a nonnegotiable instrument and a bona fide purchaser who parted with his money in reliance upon an absolute assignment of the paper, makes the paper, in effect, negotiable. The application of the doctrine in such a case does not affect the negotiability of the instrument, or give to it any rights other than such as the statute gives, for it is still subject to all defenses valid as to the original parties. In this case the plaintiff conferred upon his assignee the apparent absolute legal title to, and ownership of, the insurance policy, and permitted him to retain it and pay the premiums for 10 years, and then, after the bank had honestly parted with its money in reliance upon such apparent ownership, he seeks to assert a latent equity existing between him and his assignee as to the title. Upon the plainest principles

of justice he ought to be estopped from asserting his equities to the prejudice of the purchaser, and such seems to be the law. Moore v. Metropolitan, 55 N. Y. 41; Bigelow, Estop. 562; Colebrooke, Coll. Sec. §§ 436, 439; Jones, Pledges, § 466.

COLLINS, J. (dissenting).

I agree with Chief Justice START in his dissenting opinion.

The appellant having petitioned for a reargument, the court granted the petition in the following order, filed on April 10, 1899.

PER CURIAM.

In view of the facts that the question involved is an important one, that the precise ground upon which the decision was based was not argued by counsel, and was decided by a divided court:

It is ordered that a reargument be, and hereby is, granted of the single question whether the Security Bank of Minnesota took the policy in suit subject to the equities of the plaintiff. Ordered, further, that the case shall be submitted on briefs, to be filed on or before June 15, next.

The following opinion was filed on July 11, 1899:

PER CURIAM.

After receiving and considering the additional arguments of counsel, Justices MITCHELL and BUCK adhere to the views expressed and the result reached in the opinion of the court heretofore filed, while Chief Justice START and Justice COLLINS adhere to the views expressed in their dissent, and are in favor of reversal, on the grounds therein stated. Justice CANTY, while still adhering fully to the position taken in the original opinion of the court upon the so-called doctrine of latent equities, is of opinion that the plaintiff, by reason of his conduct in allowing the policy, accompanied by an assignment absolute in form, to remain for 11 years in the possession of Hadley without taking any active measures to recover it, and in neglecting during all that time to pay the premiums necessary to keep it alive, is estopped by his laches and abandonment from now asserting any rights to or under the policy, or attempting to avail himself of its benefits which have been preserved by the expenditures of another. While Chief Justice Start and Justice Collins are in favor of a reversal on the broader ground already stated, they also concur in the view of Justice Canty, that the case should be reversed on the ground that plaintiff is equitably estopped by his laches and abandonment from claiming the proceeds of the policy. The court is unanimously of opinion that the policy, being valid in its inception, was assignable to any one.

It follows that the opinion of the court, either unanimously or by a majority, is that:

1. The policy was assignable by plaintiff to Hadley, and by Hadley to the Security Bank.

2. The assignment from Hadley to the Security Bank would be subject to the equities of the plaintiff, in the absence of facts creating an equitable estoppel against him; and the mere fact that the assignment from plaintiff to Hadley was absolute in form would not create such an estoppel.

3. But the laches of plaintiff, and his practical abandonment of the policy by neglecting for 11 years to take active measures to recover possession of it, or to keep it alive by paying the premiums on it, but allowing it to lapse unless Hadley saw fit to pay the premiums at his own expense, would estop him from now claiming any rights under or benefits from the policy, as against Hadley or the bank.

If the findings of the trial court on the latter point were clear and positive there would be nothing to do but to order judgment for the defendant. But it is not clear from the findings, especially in view of the latter part of the so-called fifteenth finding, how far they were intended to go, or what was the precise ground upon which the court ordered judgment for the plaintiff. Therefore, under the circumstances, we are of opinion that the proper disposition of the appeal is to reverse, and order a new trial of the cause in accordance with this opinion. It is so ordered.

TALTY
vs.
FREEDMAN'S SAVINGS AND TRUST COMPANY.

(93 U. S. 321.)

Error to the Supreme Court of the District of Columbia.

This was replevin by the plaintiff to recover a collateral security pledged to one Kendig, a broker, and by him sold to the defendant. Under the instructions of the court below, the jury found a verdict for the defendant; judgment was rendered thereon, and the plaintiff sued out this writ of error. The facts are fully set forth in the opinion of the court.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This was an action of replevin, prosecuted by the plaintiff in error. The judgment was against him. The bill of exceptions discloses all the evidence given by both parties. The facts lie within a narrow compass, and, except as to one point, which in our view is of no consequence in this case, there is no disagreement between them.

Talty had a claim against the city of Washington for work and materials, amounting to $6,096.75. He submitted it to the proper authority, and received the usual voucher. On the 4th of January, 1872, the claim was approved by the commissioners of audit, and a certificate to that effect was given to him. On the 6th of that month he employed Kendig, a broker, to negotiate a loan for him. With that view he placed in Kendig's hands his own note for $3,000, having sixty days to run, with interest at the rate of ten per cent per annum, payable to his own order, and indorsed by him in blank. He also placed in the hands of

Kendig, to be used as collateral, his claim against the city, indorsed in blank also. The same day Kendig negotiated the loan and paid Talty the amount of the note less the discount. Kendig sold the claim against the city to the defendant for ninety-six cents on the dollar. The money was paid to him. The purchase was made in good faith, and without notice of any right or claim on the part of Talty. With the proceeds of this sale Kendig took up the note. A few days before its maturity, Talty called on Kendig and offered to pay the note, and demanded back the collateral. Kendig declined to accede to the proposition. He insisted that the understanding between him and Talty was that he was to receive no commission for negotiating the loan, but that he was to have instead the right to sell or take the claim against the city, if he chose to do so, at ninety cents on the dollar. He offered to pay Talty for the claim, making the computation at that rate, and deducting the amount of the note. This Talty refused, and insisted that Kendig had no authority with respect to the claim but to sell, in the event of default in the payment of the note at maturity. Each party testified accordingly. Subsequently, and after the maturity of the note, Talty demanded from the defendant in error the vouchers relating to the claim. The defendant refused to give them up, and this suit was thereupon instituted. The marshal took them under the writ of replevin, and delivered them to the plaintiff.

No tender was made by Talty to the defendant in error, nor to Kendig, and nothing was said by him upon the subject of paying his note to either, except the offer of Kendig, as before stated.

After receiving back the collateral, Talty was paid the full amount of it by the commissioners of the sinking fund of the city. The only dispute between the parties as to the facts was that in relation to the authority of Kendig touching the claim.

Upon this state of the evidence the court instructed the jury to find for the defendant, and to assess the damages at the value of the claim. This was done, and judgment was entered upon the verdict. The instruction was excepted to.

Before entering upon the examination of the merits of the controversy, it may be well to consider for a moment the situation of the several parties. Talty has received and holds the proceeds of his note and the full amount of the collateral. Kendig holds the note and the amount of the collateral, less four per cent. The defendant in error, the bona fide purchaser of the claim, is out of pocket the amount paid for it to Kendig, and has the burden of this litigation and the security afforded by the replevin bond of Talty.

The question to be determined is, whether a tender to the defendant in error by Talty of the amount due on his note before bringing this suit was indispensable to entitle him to recover.

Kendig was not a factor with a mere lien. He was a pledgee. The collateral was placed in his hands to secure the payment of the note. It was admitted by Talty that Kendig was authorized to sell it if the note were not paid at maturity. Kendig had a special property in the collateral. He was a pawnee for the purposes of the pledge. Judge Story says (Bailm. sects. 324-327), "The pawnee may by the common law deliver over the pawn to a stranger for safe custody without consideration; or he may sell or assign all his interest in the pawn; or he may convey the same interest conditionally, by way of pawn, to another person, without in either case destroying or invalidating his security. But if the pawnee should undertake to pledge the property (not being negotiable securities) for a debt beyond his own, or to make a transfer thereof as if he were the actual owner, it is clear that in such case he would be guilty of a breach of trust, and his creditor would acquire no title beyond that held by the pawnee."

"Whatever doubt may be indulged in, in the case of a mere factor, it has been decided, in the case of a strict pledge, that, if the pledgee transfers the same to his own creditor, the latter may hold the pledge until the debt of the original owner is discharged."

Numerous authorities are cited in support of these propositions. The subject as to the point last mentioned was learnedly examined in Jarvis's Adm. v. Rodgers, 15 Mass. 369. That was the case of a repledge by the first pledgee. The rule of the text as to the rights of the sub-pledgee was distinctly affirmed.

The case of Lewis v. Mott, 36 N. Y. 395, was in some of its leading points strikingly like the case before us. There, Brown had placed certain collaterals in the hands of Howe to secure the payment of two promissory notes of Brown held by Howe; Howe sold the notes and collaterals to Varnum; Brown offered to pay Varnum the amount of the notes, and demanded the collaterals; Varnum refused to give them up, and Brown sued for them. The court said, "It must be conceded that Varnum, by the purchase of those securities from Howe, acquired the lien and interest of Howe, whatever that may have been; and the plaintiff's assignee, to have entitled himself to a re-delivery of these securities, must have tendered the amount of the lien. There was simply an offer to pay Varnum the amount due upon these notes. It was unattended with any tender of the amount due, and was insufficient to extinguish the lien and thus entitle Brown to the return of the notes. . . . The offer to pay is not the equivalent for an actual tender. Bateman v. Pool, 15 Wend. 637; Strong v. Black, 46 Barb. 222; Edmonson v. McLeod, 16 N. Y. 543." See also Baldwin v. Ely, 9 How.

580; Merchants' Bank v. The State Bank, to Wall. 604.

The English law is the same. In Donald v. Suckling, Law Rep. 1 Q. B. 585, the case was this: A. deposited debentures with B. as security for the payment of a bill indorsed by A. and discounted by B. It was agreed, that, if the bill was not paid when due, B. might sell or otherwise dispose of the debentures. Before the maturity of the bill, B. deposited the debentures with C., to be held as security for a loan by him to B. larger than the amount of the bill. The bill was dishonored, and, while it was unpaid, A. sued C. in detinue for the debentures. It was held that A. could not maintain the suit without having paid or tendered to C. the amount of the bill. The case was elaborately considered by the court. See also Moore v. Conham, Owen, 123; Ratcliffe v. Davis, Yelv. 178; Johnson v. Cumming, Scott's C. B. n. s. 331.

A tender to the second pledgee of the amount due from the first pledgor to the first pledgee extinguishes ipso facto the title of the second pledgee; but that there can be no recovery against him without tender of payment is equally well settled. Donald v. Suckling, supra; Jarvis's Adm. v. Rodgers, supra; s. c. 13 Mass. 105.

But it is suggested that the note was in the hands of Kendig, and that Talty could not, therefore, safely pay the amount due upon it to the holder of the collateral. The like fact existed in Donald v. Suckling. It is not adverted to in the arguments of counsel, nor in the opinions of the judges in that case. It could not, therefore, have been regarded by either as of any significance. The answer here to the objection is obvious. The note, a few days before its maturity, was in the hands of Kendig. There being no proof to the contrary, it is to be presumed to have remained there. This suit was commenced after it matured. Talty might then have paid the amount due upon it to the defendant in error, and could thereupon have defended successfully in a suit on the note, whether brought by Kendig or any indorsee taking it after due. He might also, after making the tender, have filed his bill in equity, making Kendig and the savings-bank defendants, and thus have settled the rights of all the parties in that litigation. Having sued at law without making the tender, it is clear he was not entitled to recover.

The instruction given by the court to the jury was, therefore, correct.

The proceeding and judgment were according to the local law regulating the action of replevin in the District of Columbia.

In the discussion here our attention was called only to the question of tender: nothing was said as to the rule of damages laid down by the court below.

There is another question, arising upon the record, and that is, whether the defendant in error, being a bona fide purchaser, did not, under the circumstances, acquire the absolute ownership of the claim. Story on Agency, sect. 127; Addis v. Baker, 2 Anst. 229; McNiel v. The Tenth National Bank, 46 N. Y. 325; Fatman v. Lobach, 1 Duer, 524; Weirick v. The Mahoning County Bank, 16 Ohio, 297; Fullerton v. Sturgess, 4 Ohio St. 529.

But as the point has not been argued, we express no opinion upon the subject.

Judgment affirmed.

DONALD vs. SUCKLING.
(L. R 1 Q. B. 585.)

Declaration. That the defendant detained from the plaintiff his securities for money, that is to say, four debentures of the British Slate Company, Limited, for £200 each, and the plaintiff claimed a return of the securities or their value, and £1000 for their detention.

Plea. That before the alleged detention, the plaintiff deposited the debentures with one J. A. Simpson, as security for the due payment at maturity of a bill of exchange, dated 25th August, 1864, payable six months after date, and drawn by the plaintiff, and accepted by T. Saunders, and endorsed by the plaintiff to and discounted by Simpson, and upon the agreement then come to between the plaintiff and Simpson, that Simpson should have full power to sell or otherwise dispose of the debentures if the bill was not paid when it became due. That the bill had not been paid by the plaintiff nor by any other person, but was dishonoured; nor was it paid at the time of the said detention or at the commencement of this suit; and that before the alleged detention and the commencement of this suit, Simpson deposited the debentures with the defendant to be by him kept as a security for and until the repayment by Simpson to the defendant of certain sums of money advanced and lent by the defendant to Simpson upon the security of the debentures, and the defendant had and received the same for the purpose and on the terms aforesaid, which sums of money thence hitherto have been and remain wholly due and unpaid to the defendant; wherefore the defendant detained and still detains the debentures, which is the alleged detention.

Demurrer and joinder.

SHEE, J. (After stating the pleadings.) This plea sets up a right to detain the debentures, founded on a bailment of pawn by the plaintiff to Simpson, under which Simpson, if the bill should not be paid, had a right to sell the debentures, paying the overplus above the amount of the bill and charges to the plaintiff,—that is, to sell on the plaintiff's account and for his and Simpson's benefit,—and a repawn of them by Simpson as a security for a loan to him by the defendant.

It must be taken against the defendant, that the debentures were pledged to him by Simpson before the plaintiff had made default; it must be taken, too, that the advance for which the debentures were pledged to the defendant by Simpson was

of a greater amount than the debt for which Simpson held them; it is consistent with the facts pleaded, either that it was repayable before or repayable after the maturity of the plaintiff's bill, and that the debentures were pledged by Simpson along with other securities, from which they could not at Simpson's pleasure, or on tender by the plaintiff of the sum for which they had been pledged to Simpson, be detached; and therefore that Simpson had put it out of his power to apply them by sale or otherwise to the only purpose for which possession of them had been given to him, viz., to secure the payment of his debt and the release of the plaintiff, by the sale of them, from liability on the bill which Simpson had discounted for him.

Whether this pledge to the defendant by Simpson was such a conversion by him of the debentures as destroyed his right of possession in them, and revested the plaintiff's right to the possession of them freed from the original bailment, is the question for our decision.

The contention that a pawnee is entitled to exercise over the chattel pawned to him a power so extensive as the one which this plea sets up, was before the case of Johnson v. Stear, if it be not now, wholly unsupported by authority.

A pawn is defined by Sir William Jones to be "a bailment of goods by a debtor to his creditor, to be kept by him till his debt is discharged"; and by Lord Holt to be "a delivery to another of goods or chattels to be security to him for money borrowed of him by the bailor"; and by Lord Stair "a kind of mandate whereby the debtor for his creditor's security gives him the pawn or thing impignorated, to detain or keep it for his own security, or in the case of not-payment of the debt, to sell the pledge and pay himself out of the price, and restore the rest, or restore the pledge itself on payment of the debt; all of which is of the nature of a mandate, and it hath not only a custody in it, but the power to dispone in the case of not-payment"; and by Bell "a real right or ius in re, inferior to property, which vests in the holder a power over the subject, to retain it in security of the debt for which it is pledged, and qualifies so far and retains the right of property in the pledger or owner."

In the Roman civil law, as in our own law (see Pigot v. Cubley), the bailment of pawn implied what in this bailment is expressed, a mandate of sale on default of payment. Without it, or without, as in the Scotch and French law, a right to have a pledge sold judicially for payment on default made, the security by way of pledge would be of little value. The pawnee is said by Lord Coke, in his Commentaries on Littleton, to have a "property"; and in Southcote's case to have a "property in and not a custody only," of the chattel pawned; by which Lord Holt understands Lord Coke to mean a "special property," consisting in this, "that the pawn is a security to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him"; or in the words of Fleming, C. J., in Ratcliff v. Davis, "a special property in the goods to detain them for his (the pawnee's) security," that is, not a property properly so called, but the jus in re, that is, in re alienâ, of the Roman lawyers; the opposite, as Mr. Austin says, to property; but a right of possession against the true owner, and under a contract with him until his debt is paid, and a power of sale for the reciprocal benefit of the pawnee and pawnor on default of payment at the time agreed upon.

Mr. Justice Story says, that "the pawnee may by the common law deliver the pawn into the hands of a stranger without consideration, for safe custody, or convey the same interest conditionally by way of pawn to another person, without destroying or invalidating his security, but that he cannot pledge it for a debt greater than his own; that if he do so he will be guilty of a breach of trust, by which his creditor will acquire no title beyond that of the pawnee; and that the only question which admits of controversy is, whether the creditor shall be entitled to retain the pledge until the original debt (that is, the debt due to the first pawnee) is discharged, or whether the owner may recover the pledge in the same manner as if the case was a naked tort without any qualified right in the first pawnee." So much of this passage as is stated to be clear law, viz., that the pawnee may deliver the chattel pawned to a stranger for safe custody without consideration, or convey the same conditionally (i. e., it may be presumed, on the same conditions as those on which he holds it), by way of pawn to another person for a debt not greater than his own, without destroying or invalidating his security, has no application to the case before us: inasmuch as the pawn by Simpson to the defendant was not for safe custody, nor without consideration, nor conditionally, nor for a debt not greater than the debt due by the plaintiff to Simpson, and because the power given to the pawnee by this bailment to dispose of the debentures by sale or otherwise, should his debt not be paid, might probably be considered, at least after default made, to enlarge the ordinary right of a pawnee over the chattel pawned. There is nothing in the passage which affords any countenance, except by way of query, to the position, that a pawnee, who, as in this case, has placed the chattel pawned out of the pawnor's power, and out of his own power to redeem it by payment of the amount for which it was given to him as a security, and who has deprived himself of the power of selling it for the payment of the pawnor's debt, can by so doing shield the creditor to whom he repawns it from an action of detinue at the suit of the real owner. Mr. Justice Story indeed says, "that if the pledgee voluntarily and by his own act places the pledge beyond his power to restore it, as by agreeing that it may be at-

tached at the suit of a third person, that will amount to a waiver of the pledge." It would be difficult to reconcile any other rule in respect of the pledging by pledgees of the chattels pawned to them with the well-established doctrine of our courts and the courts of the United States of America in respect of the pledging by factors of the goods entrusted to them. Factors, like pledgees, have a mandate of sale,—sale irrespectively of default of any kind is the object of the bailment to them; they have a special property and right of possession against all the world except their principal, and against him if they have made advances on the security of his goods entrusted to them; to give effect to that security they may avail themselves of their mandate of sale; but if they place the goods out of their own power by pledging them, although it be for a debt not exceeding their advances, the pawnee from them (except under the Factors Acts) is defenceless, in trover or detinue, even to the extent of his loan, against the true owner.

Why it should be otherwise between the true owner and the pawnee from a pawnee of the true owner's goods, no reason was adduced during the argument before us, nor indeed was it possible to adduce any reason, seeing that in all the decisions on pledges by factors the relation between a factor who has made advances on the goods entrusted to him and his principal has been held not distinguishable or barely distinguishable in its legal incidents from the relation between pawnee and pawnor; a factor being, as Mr. Justice Story says, "generally treated in juridical discussions as in the condition of a pledgee."

The case of Johnson v. Stear, is a clear authority for holding, that Simpson, in dealing with the debentures in the way which he must be taken on this plea to have done, was, as the defendant also was, guilty of a conversion of them; and unless that case is also an authority binding upon us for the doctrine, that the conversion by a pawnee of the thing pawned is not such an abuse of the bailment of pawn as annuls it, but that there remains in him, and in an assignee from him, and in an assignee from his assignee, and so on toties quoties, without limit as to the number of assignments or the consideration for them, an interest of property in the pawn which defeats the owner's right of possession, the plaintiff is entitled to our judgment.

As I read the case of Johnson v. Stear, and the case of Chinery v. Viall, and Brierly v. Kendall, on the authority of which it proceeded, the judgments of the majority of the learned judges of the Court of Common Pleas, in the first of them, and the judgments of the Court of Exchequer, and of the Court of Queen's Bench, in the second and the third, are based on the principle that, in an action to recover damages for a conversion it is not an inflexible rule of law that the value of the goods converted is to be taken as the measure of damages; that when a suitor's real cause of action is a breach of contract he cannot by suing in tort entitle himself to a larger compensation than he could have recovered in an action in form ex contractu; and therefore that when a verdict is obtained against an unpaid vendor for the conversion of the thing sold by him, or against an unpaid pawnee for the conversion of the thing pledged to him, he is entitled to be credited, in the estimate by the jury of the damages to be paid by him, for the value of such interest or advantage as would have resulted to him from the contract of sale or the contract of pawn if it had been fulfilled by the vendee or pawnor.

That this was the ratio decidendi in these cases seems to me clear from the facts of Chinery v. Viall, and Brierly v. Kendall, which raised no question between the litigant parties in any respect analogous to the question which we in this case have to decide. In Chinery v. Viall, the plaintiff who was the vendee of forty-eight sheep, for five only of which he had paid, under a bargain which entitled him to delivery of the whole lot before payment, brought his action against the vendor for a conversion by parting with the sheep to another purchaser. If the defendant's interest in the unpaid balance of the agreed price of the sheep had not been credited to him in the amount of damages, the plaintiff who had only paid for five of them would have pocketed the full value of the forty-three which had been converted.

In Brierly v. Kendall, an action of trespass, there was a loan of the defendant to the plaintiff secured by bill of sale of the plaintiff's goods, in which was a reservation to the plaintiff of a right to the possession of the goods until he should make default in some payment. Before any default the defendant took the goods from the plaintiff and sold them. For this wrong he was liable in trespass; but the measure of damages was held to be, not the value of the goods, but the loss which the plaintiff had really sustained by being deprived of the possession. The wrongful act of the defendant did not annihilate his interest in the goods under the bill of sale; and such interest was considered in measuring the extent of the plaintiff's right to damages.

These cases are manifestly not in conflict with, if indeed they at all touch, the principle relied upon against the plea which is here demurred to, that, if the pawnee converts the chattels pawned to him, the bailment is determined and the right of possession revested in the true owner of them.

In Johnson v. Stear, the defendant, a pawnee of dock warrants, had anticipated by a few hours only the time at which under his contract with the owner of them he might have sold and delivered them; he had applied before the time of action brought the proceeds of their sale to the discharge of the plaintiff's debt to him, or he held them specially applicable to that purpose, and the plaintiff, had he sued the defendant in contract for not keeping the pledge until default made,

could not have proved that he had sustained any damage. The Chief Justice, speaking for himself and two of his learned brothers, did indeed say, that "the deposit of the goods in question with the defendant, to secure repayment of a loan to him on a given day, with a power to sell in case of default on that day, created an interest and a right of property in the goods which was more than a mere lien; and the wrongful act of the pawnee did not annihilate the contract between the parties nor the interest of the pawnee in the goods under that contract"; but he cannot be understood to have meant by the words "interest and right of property in the goods," and by the words "more than a mere lien" other than "a special property," as defined by the authorities before referred to by me, viz., a real right or jus in re, a right of possession until default made, a right of retention or sale after default made; nor, as I think, to have intended more, by the words, "the wrongful act of the pawnee did not annihilate the contract between the parties," than that the contract, in the breach of which consisted the tort of which the plaintiff complained, must still be considered to subsist, at least for the purpose of being referred to for the measure of the damage sustained by the pawnor and the damages to be recovered by him.

The case before us differs, as I think, in essential particulars, as respects the principle upon which damages would have been measurable, had the action been in trover, from the case in the Common Pleas. The defendant, as assignee of the pawnee, could not surely have set up in mitigation of damages an interest derived by him from the pawnee before default made by the pawnor; the pawnee by the express terms of the bailment to him, not having the right to dispose of the debentures by sale or otherwise until after default made. Besides, it is impossible to shut one's eyes to the broad distinction between the case of the sale a few hours too soon of a pawn, which, as in the case of Johnson v. Stear, the pawnor "had no intention to redeem," —the proceeds of the sale being devoted before action brought to discharge of the debt for which the pawn had been given as a security,—and the abuse of a pawn by the pawnee in wrongfully, for his own purposes, placing out of his power, and out of the pawnor's power, to redeem the pawn, should he have the means to do so.

By the contract of bailment between the plaintiff and Simpson the proceeds of the sale of the debentures, which are the subject of this suit, had been specifically appropriated to the payment of the plaintiff's bill in the event of his not being able to meet it with other means. Simpson held the debentures in trust, should the bill not be paid, to sell them on the plaintiff's account, or allow the plaintiff, to sell them or raise money on them to pay his bill. Instead of that, Simpson, before default made by the plaintiff, converted them to his own use, obtaining their agreed value in pledge from the defendant, and imposing upon the plaintiff the burthen of making other provision to meet his bill. By this act of Simpson the plaintiff, in my judgment, did in fact sustain damage, and at the maturity of the bill, if not before, to the full amount of the current saleable value of the debentures. I am at a loss to see how the conduct of Simpson, in thus dealing with the debentures, and how the title of the defendant, claiming under him, are to escape the operation of the rule, that if the pawnee, except conditionally (an exception for which the authority is but slender), parts with the possession of the pawn, he loses the benefit of his security, Ryall v. Rolle; Reeves v. Capper; Johnson v. Stear, per Williams, J.; or the operation of the maxim, nemo plus juris ad alium transferre potest quam ipse habet.

For these reasons, as it seems to me, the case of Johnson v. Stear ought not to govern our decision. It could not be followed by us as an authority in favour of the defendant without inattention to its true principle, viz., that between the parties to a contract, the measure of damages for a breach of the contract must be the same, whether the form of action be ex contractu or ex delicto, and that in such a case, general rules applicable to the latter form, the only one competent for the redress of injuries purely tortious, are not to be strained to the doing of manifest injustice. It is open also, in a right estimate of it as an authority for the case in hand, to this observation:—The interest of a plaintiff in the damages recoverable by him for a tort, which is in its true nature a breach of contract, is restricted by the implied stipulations of the contracting parties to the amount which, in the conscience of a jury, may suffice to give him an adequate compensation. The action of detinue for a chattel, of which the bailment has been abused, against a person not party to the contract of bailment, is not based upon a breach of contract, and not within the rules applicable to actions of tort which are based on breaches of contract. In detinue the plaintiff sues, not for the value tantamount of the thing detained from him, but for the return of the thing itself, which may to him have a value other and higher than its actual value; and only for its value if the thing cannot be delivered to him, and for damages for its detention and his costs of suit. A judgment to recover the value only has been reversed for error: Peters v. Heyward; the integral undiminished thing itself, unaffected by countervailing lien or abatement of whatever kind, being the primary object of the suit. In an action of trover for the conversion by the pawnee of the subject of the bailment, the plaintiff, according to the judgment of the majority of the Court in Johnson v. Stear, is entitled only to recover the amount, in money, of the damage which he proves himself to have sustained; in an action of detinue for the recovery from the assignee of the

pawnee of the chattel pawned, and of which the pawn has been abused and forfeited, the plaintiff is entitled to recover the chattel itself, because it was a term of the contract of pawn, that if the pawn should be abused by the pawnee his right to the possession of it should cease; and the defendant can have derived no right of possession from one whose own right of possession was determined by his attempt to transfer it.

Unless, therefore, we were prepared to hold, in disregard of the clearly expressed opinion of Story and Mr. Justice Williams, that detinue can in no case lie for an unredeemed pawn, however much the bailment of it may have been abused, we are not at liberty to apply the ratio decidendi in Johnson v. Stear, to the case before us.

It raises a strong presumption against the defence set up in this plea, that nothing bearing the slightest resemblance to the right of possession, which it claims for the assignee of a pawnee, is to be found in the copious title of the Digest, "De pignoribus et hypothecis; et qualiter ea contrahantur, et de pactis eorum," or in the five following titles of the contract of pawn and hypothec and its incidents, or in the title "De pigneratitiâ actione, vel contrâ," or in the works of any English, French, or Scotch jurist.

The dictum of the majority of the Court in the case of Mores v. Conham, that the pawnee has such an interest in the pawn as he may assign over, was not the point decided in that case; nor, as it seems to me, a point essential to its decision; the point decided being, that the surrender by the plaintiff of a chattel pawned to him by a third person was a good consideration for a promise by the defendant to pay the debt for which it had been given as security. It does not seem to follow from that decision that the surrenderee thereby acquired such an interest in the pawn as would enable him to defend an action of detinue at the suit of the true owner, the reunion of whose rights of property and possession was, unless they meant to rob him, the real object of the transaction. The inference, drawn from this very obscure and superficially reasoned case in favour of the defendant's plea, is wholly irreconcilable with the doctrine of Domat, the highest authority on all questions depending, as this question does, upon the rules and principles of the Roman civil law, that the bailments of "hypothèque" and "gage" last only as long as the thing hypothecated is in the hands of the person charging it, or the thing pawned in the hands of him who takes it for his security, and with the doctrine of Erskine, a jurist of nearly equal eminence, that "in a pledge of moveables the creditor who quits the possession of the subject loses the real right he had upon it."

I think that the bailment to Simpson was determined by the pledge by him to the defendant under the circumstances stated in the plea; that both of them have been guilty of a conversion; that the plaintiff might, as Mr. Justice Williams said in the case of Johnson v. Stear, lawfully, should the opportunity offer, resume the possession of the debentures, and hold them freed from the bailment; and may, the defendant being remitted to his remedy against Simpson, and Simpson to his remedy upon the bill, recover them, or their full value, if they cannot be delivered to him, in this action of detinue.

MELLOR, J. (After stating the declaration and plea.) To this plea the plaintiff demurred, and upon demurrer, I think that we must assume that the pledging of the debentures by Simpson to the defendant took place before default was made by the plaintiff in payment of the bill of exchange at maturity, and that we must also assume that the money for which the debentures were pledged by Simpson, as a security to the defendant, was of larger amount than the amount of the bill of exchange discounted for the plaintiff by Simpson. The question thus raised by this plea is, whether a pawnee of debentures, deposited with him as a security for the due payment of money at a certain time, does, by repledging such debentures and depositing them with a third person as a security for a larger amount, before any default in payment by the pawnor, make void the contract upon which they were deposited with the pawnee, so as to vest in the pawnor an immediate right to the possession thereof, notwithstanding that the debt due by him to the original pawnee remains unpaid. If the affirmative of this proposition be maintained, the result seems primâ facie to be disproportionate to any injury which the pawnor would be likely to sustain from the fact of his debentures having been repledged before default made. Still, if the principles of law, as laid down in decided cases, satisfactorily support the proposition above stated, this Court must give effect to them. There is a well recognised distinction between a lien and a pledge, as regards the powers of a person entitled to a lien and the powers of the person who holds goods upon an agreement of deposit by way of pawn or pledge for the due payment of money. In the case of simple lien there can be no power of sale or disposition of the goods, which is inconsistent with the retention of the possession by the person entitled to the lien; whereas, in the case of a pledge or pawn of goods, to secure the payment of money at a certain day, on default by the pawnor, the pawnee may sell the goods deposited and realize the amount, and become a trustee for the overplus for the pawnor; or, even if no day of payment be named, he may, upon waiting a reasonable time, and taking the proper steps, realize his debt in like manner. It is said by Mr. Justice Story that "the foundation of the distinction rests in this, that the contract of the pledge carries an implication that the security shall be made effectual to discharge the obligation; but, in the case of a lien, nothing is sup-

posed to be given but a right of retention or detainer, unless under special circumstances." The question thus arises, is the right of retention in case of a lien, either by a custom or contract, otherwise different from a deposit, by way of pledge for securing the due payment of money, than in the incidental power of sale in the latter case on condition broken? In other words, on a contract of pledge, is it implied that the pledgee shall not part with the possession of the thing pledged until default in payment; and, if so, is that of the essence of the contract, so that the violation of it makes void the contract?

In the case of Legg v. Evans, an action of trover having been brought against the defendants, as sheriffs of Middlesex, to recover the value of some pictures and picture frames, the defendants justified under an execution against the goods and chattels of the plaintiff, to which the plaintiff replied setting up a lien in respect of work done upon such goods and chattels, which had been delivered to him in the way of his trade by one Williams, and further set up an agreement between the plaintiff and Williams, that the plaintiff should draw and endorse certain bills of exchange for the use of Williams, and should have a right to hold the said goods for securing the payment by Williams of the amount of the said bills of exchange; and he alleged that the said money and bills of exchange then remained wholly unpaid. The Court of Exchequer held, on demurrer to the replication, that it was a good answer to the plea; and Parke, B., is reported to have said: "If we consider the nature of a lien and the right which it confers, it will be evident that it cannot form the subject-matter of a sale. A lien is a personal right which cannot be parted with, and continues only so long as the possessor holds the goods. It is clear, therefore, that the sheriff cannot sell an interest of this description, which is a personal interest in the goods"; and farther on he said, "Here the interest cannot be transferred to any other individual, it continues only as long as the holder keeps possession of the subject-matter of the lien, either by himself or his servant." In that case there was superadded to the lien in respect of work done an agreement that the person entitled to the lien should have a right to hold the said goods and chattels for securing the payment of the bills of exchange therein mentioned, and which then remained wholly unpaid. That case was treated as a simple case of lien or right "to hold," to secure the payment, not only of the amount due for work done on the goods by Williams, but also of the bills drawn and endorsed by him. It is, therefore, an authority to the effect that in the case of lien, even to the secure payment of money advanced, there is no implication of any power to sell or otherwise dispose of the subject-matter of the lien, because retention of possession by the party entitled to the lien is an essential ingredient in it.

It appears, therefore, that there is a real distinction between a deposit by way of pledge for securing the payment of money, and a right to hold by way of lien to secure the same object. In Pothonier v. Dawson, cited in argument in Legg v. Evans, Gibbs, C. J., said: "Undoubtedly, as a general proposition a right of lien gives no right to sell the goods. But when goods are deposited by way of security, to indemnify a party against a loan of money, it is more than a pledge. The lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade."

It appears to me that considerable confusion has been introduced into this subject by the somewhat indiscriminate use of the words "special property," as alike applicable to the right of personal retention in case of a lien, and the actual interest in the goods created by the contract of pledge to secure the payment of money. In Legg v. Evans the nature of a lien is defined to be a "personal right which cannot be parted with;" but "the contract of pledge carries an implication that the security shall be made effectual to discharge the obligation." In each case the general property remains in the pawnor; but the question is, as to the nature and extent of the interest, or special property, passing to the bailee, in the two cases. Mr. Justice Story, in his Treatise on Bailments thus describes the right and interest of the pawnee: "He may, by the common law, deliver over the pawn into the hands of a stranger for safe custody, without consideration, or he may sell or assign all his interest in the pawn, or he may convey the same interest, conditionally, by way of pawn, to another person, without in either case destroying or invalidating his security; but if the pawnee should undertake to pledge the property (not being negotiable securities) for a debt beyond his own, or to make a transfer thereof to his own creditor as if he were the absolute owner, he would be guilty of a breach of trust, and his creditor would acquire no title beyond that held by the pawnee. The only question is, whether the creditor should be entitled to retain the pledge until the original debt was discharged, or whether the owner might recover the pledge in the same manner as in the case of a naked tort, without any qualified right in the first pawnee."

In M'Combie v. Davis it appeared that a broker had for a debt of his own pledged with the defendant certain tobacco of his principal's, upon which he had a lien, and in an action brought by the principal against the defendant in trover for the tobacco, Lord Ellenborough being of opinion "that the lien was personal and could not be transferred by the tortious act of the broker pledging the goods of his principal," the plaintiff obtained a verdict; and upon motion for a new trial Lord Ellenborough said that "nothing could be clearer than that liens were personal, and could not be

transferred to third persons by any tortious pledge of the principal's goods;" but he afterwards added "that he would have it fully understood that his observations were applied to a tortious transfer of the goods of the principal by the broker undertaking to pledge them as his own, and not to the case of one who, intending to give a security to another to the extent of his lien, delivers over the actual possession of the goods, on which he has the lien, to that other, with notice of his lien, and appoints that other as his servant to keep possession of the goods for him."

It would, therefore, seem that in the case of a broker or factor for sale, before the Factors Acts, although he had no power to pledge his principal's goods, except to the extent of his own lien, with notice of the extent of his interest, yet where he pledged the goods on which he had a lien tortiously, neither the factor nor his pawnee could retain them even for the payment of the amount of the original lien. The case of M'Combie v. Davies shews that the factor's or broker's lien, although simply a right to retain possession as between him and his principal, might be transferred and made a security to a third person, provided he professed to assign it only as a security to the like amount as that due to himself. Still the character of the transaction is that of lien, and not of deposit by way of pledge; and although the goods were entrusted to the broker for sale, and up to the time of sale remained in his hands upon a personal right to retain them for advances, yet he could not pledge them, and if he did, the act was an essential violation of the relation betwixt him and his principal, and entitled the latter at once to the recovery of the value of the goods in trover. "But the relation of principal and factor, where money has been advanced on goods consigned for sale, is not that of pawnor and pawnee," as was said by the Court in Smart v. Sandars

There would therefore appear to be some real difference in the incidents between a simple lien, like that in Legg v. Evans and the lien of a broker or factor before the Factors Act, and the case of a deposit by way of pledge to secure the repayment of money, which latter more nearly resembles an ordinary mortgage, except that the pawnor retains the general property in the goods pledged which the mortgagor does not in the case of an ordinary mortgage. A lien, as we have seen, gives only a personal right to retain possession. A factor's or broker's lien was apparently attended with the additional incident, that to the extent of his lien he might transfer even the possession of the subject-matter of the lien to a third person, "appointing him as his servant to keep possession for him." In a contract of pledge for securing the payment of money, we have seen that the pawnee may sell and transfer the thing pledged on condition broken; but what implied condition is there that the pledgee shall not in the meantime part with the possession thereof to the extent of his interest? It may be that upon a deposit by way of pledge, the express contract between the parties may operate so as to make a parting with the possession, even to the extent of his interest, before condition broken, so essential a violation of it as to revest the right of possession in the pawnor; but in the absence of such terms, why are they to be implied? There may possibly be cases in which the very nature of the thing deposited might induce a jury to believe and find that it was deposited on the understanding that the possession should not be parted with; but in the case before us we have only to deal with the agreement which is stated in the plea. The object of the deposit is to secure the repayment of a loan, and the effect is to create an interest and a right of property in the pawnee, to the extent of the loan, in the goods deposited; but what is the authority for saying that until condition broken the pawnee has only a personal right to retain the goods in his own possession?

In Johnson v. Stear, one Cumming, a bankrupt, had deposited, with the defendant 243 cases of brandy, to be held by him as a security for the payment of an acceptance of the bankrupt for 62l. 10s., discounted by the defendant, and which would become due January 29, 1863, and in case such acceptance was not paid at maturity, the defendant was to be at liberty to sell the brandy and apply the proceeds in payment of the acceptance. On the 28th January, before the acceptance became due, the defendant contracted to sell the brandy to a third person, and on the 29th delivered to him the dock warrant, and on the 30th such third person obtained actual possession of the brandy. In an action of trover, brought by the assignee of the bankrupt, the Court of Common Pleas held that the plaintiff was entitled to recover, on the ground that the defendant wrongfully assumed to be owner, in selling; and although that alone might not be a conversion, yet, by delivering over the dock warrant to the vendee in pursuance of such sale, he "interfered with the right which the bankrupt had on the 29th if he repaid the loan"; but the majority of the Court (Erle, C. J., Byles and Keating, J. J.) held that the plaintiff was only entitled to nominal damages, on the express ground, "that the deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with a power to sell in case of default on that day, created "an interest and a right of property in the goods, which was more than a mere lien; and the wrongful act of the pawnee did not annihilate the contract between the parties nor the interest of the pawnee in the goods under that contract." From that view of the law, as applied to the circumstances of that case, Mr. Justice Williams dissented, on the ground "that the bailment

was terminated by the sale before the stipulated time, and consequently that the title of the plaintiff to the goods became as free as if the bailment had never taken place." Although the dissent of that most learned judge diminishes the authority of that case as a decision on the point, and although it may be open to doubt whether in an action of trover the defendant ought not to have succeeded on the plea of not possessed, and whether the plaintiff's only remedy for damages was not by action on the contract, I am nevertheless of opinion that the substantial ground upon which the majority of the Court proceeded, viz. that the "act of the pawnee did not annihilate the contract, nor the interest of the pawnee in the goods," is the more consistent with the nature and incidents of a deposit by way of pledge. I think that when the true distinction between the case of a deposit, by way of pledge, of goods, for securing the payment of money, and all cases of lien, correctly so described, is considered, it will be seen that in the former there is no implication, in general, of a contract by the pledgee to retain the personal possession of the goods deposited; and I think that, although he cannot confer upon any third person a better title or a greater interest than he possesses, yet, if nevertheless he does pledge the goods to a third person for a greater interest than he possesses, such an act does not annihilate the contract of pledge between himself and the pawnor; but that the transaction is simply inoperative as against the original pawnor, who upon tender of the sum secured immediately becomes entitled to the possession of the goods, and can recover in an action for any special damage which he may have sustained by reason of the act of the pawnee in repledging the goods; and I think that such is the true effect of Lord Holt's definition of a "vadium or pawn" in Coggs v. Bernard; although he was of opinion that the pawnee could in no case use the pledge if it would thereby be damaged, and must use due diligence in the keeping of it, and says that the creditor is bound to restore the pledge upon payment of the debt, because, by detaining it after the tender of the money, he is a wrongdoer, his special property being determined; yet he nowhere says that the misuse or abuse of the pledge before payment or tender annihilates the contract upon which the deposit took place.

If the true distinction between cases of lien and cases of deposit by way of pledge be kept in mind, it will, I think, suffice to determine this case in favour of the defendant, seeing that no tender of the sum secured by the original deposit is alleged to have been made by the plaintiff; and considering the nature of the things deposited, I think that the plaintiff can have sustained no real damage by the repledging of them, and that he cannot successfully claim the immediate right to the possession of the debentures in question.

I am therefore of opinion that our judgment should be for the defendant.

BLACKBURN, J. [After stating the pleadings.] The plea does not expressly state whether the deposit with the defendant by Simpson was before or after the dishonour of the bill of exchange; and as against the defendant, in whose knowledge this matter lies, it must be taken that it was before the bill was dishonoured, and consequently at a time when Simpson was not yet entitled by virtue of his agreement with the plaintiff to dispose of the debentures. We cannot construe the plea as stating that Simpson agreed to transfer to the defendant, as indorsee of the bill, the security which Simpson had over the debentures, and no more. We must, I think, as against the defendant, construe the plea as stating that Simpson deposited the debentures, professing to give a security on them for repayment of a debt of his own, which may or may not have exceeded the amount of the bill of exchange, but was certainly different from it. And it is quite clear that Simpson could not give the defendant any right to detain the debentures after the bill of exchange was satisfied, so that a replication that the plaintiff had paid, or was ready and willing to pay the bill would have been good. The defendant could not in any view have a greater right than Simpson had. But there is no such replication; and so the question which is raised on this record, and it is a very important one, is, whether the plaintiff is entitled to recover in detinue the possession of the debentures, he neither having paid nor tendered the amount for which he had pledged them with Simpson. In detinue the plaintiff's claim is based upon his right to have the chattel itself delivered to him; and if there still remain in Simpson, or in the defendant as his assignee, any interest in the goods, or any right of detention inconsistent with this right in the plaintiff, the plaintiff must fail in detinue, though he may be entitled to maintain an action of tort against Simpson or the defendant for the damage, if any, sustained by him in consequence of their unauthorized dealing with the debentures.

The question, therefore, raised on the present demurrer is, whether the deposit by Simpson of the debentures with the defendant, as stated in the plea, put an end to that interest and right of detention till the bill of exchange was honoured, which had been given to Simpson by the plaintiff's original contract of pledge with him.

There is a great difference in this respect between a pledge and a lien. The authorities are clear that a right of lien, properly so called, is a mere personal right of detention; and that an unauthorized transfer of the thing does not transfer that personal right. The cases which established that, before the Factors Acts, a pledge by a factor gave his pledgee no right to retain the goods, even to the extent to which the factor was in advance,

proceed on this ground. In Daubigny v. Duval, Buller, J., puts the case on the ground that, "a lien is a personal right and cannot be transferred to another." In M'Combie v. Davies, Lord Ellenborough puts the decision of the Court on the same ground, saying that "nothing could be clearer than that liens were personal and could not be transferred to third persons by any tortious pledge of the principal's goods." Story in his Treatise on Bailments, ss. 325, 326, and 327, is apparently dissatisfied with these decisions, thinking that a factor, who has made advances on the goods consigned to him, ought to be considered as having more than a mere personal right to detain the goods, and that a pledgee from him ought to have been considered entitled to detain the goods until the lien of the factor was discharged. This is a question which can never be raised in this country, for the legislature has intervened, and in all cases of pledges by agents, within the Factors Acts, the pledge is now available to the extent of the factor's interest.

But, on the facts stated on the plea, Simpson was not an agent within the meaning of the Factors Acts; and we have to consider whether the agreement stated to have been made between the plaintiff and him did confer something beyond a mere lien properly so called, an interest in the property, or real right, as distinguished from a mere personal right of detention. I think that both in principle and on authority, a contract such as that stated in the plea, pledging goods as a security, and giving the pledgee power in case of default to dispose of the pledge (when accompanied by an actual delivery of the thing), does give the pledgee something beyond a mere lien; it creates in him a special property or interest in the thing. By the civil law such a contract did so, though there was no actual delivery of possession; but the right of hypothec is not recognized by the common law. Till possession is given the intended pledgee has only a right of action on the contract, and no interest in the thing itself: Howes v. Ball. I mention this because in the argument several authorities, which only go to shew that a delivery of possession is, according to the English law, necessary for the creation of the special property of the pawnee, were cited as if they determined that possession was necessary for the continuance of that property.

The effect of the civil law is thus stated by Story, in his Treatise on Bailments, s. 328: "It enabled the pawnee to assign over, or to pledge the goods again, to the extent of his interest or lien on them; and in either case the transferee was entitled to hold the pawn, until the original owner discharged the debt for which it was pledged. But beyond this, the (second) pledge was inoperative and conveyed no title, according to the known maxim, nemo plus juris ad alium transferre potest quam ipse haberet."

In England there are strong authorities that the contract of pledge, when perfected by delivery of possession, creates an interest in the pledge, which interest may be assigned. This was the very point decided by the Court in Mores v. Conham, where the Court say that the pawnee is responsible "if he misuseth the pawn; also he hath such interest in the pawn as he may assign over, and the assignee shall be subject to detinue if he detains it upon payment of the money by the owner." It is true that one judge, Foster, J., dissented on this very point. That may so far weaken the authority of the decision; but it shews that there could be no mistake in the reporter, and no oversight on the part of the majority, but that it was a deliberate decision.

It is laid down by Lord Holt in his celebrated judgment in Coggs v. Bernard, that a pawnee "has a special property, for the pawn is a securing to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him," language certainly seeming to indicate an opinion that he has an interest in the thing, or real right, as distinguished from a mere personal right of detention. And Story in his Treatise on Bailments, s. 327, says: "But whatever doubt may be indulged as to the case of a factor, it has been decided," that is, in America, "that in case of a strict pledge, if the pledgee transfers the same to his own creditor, the latter may hold the pledge until the debt of the original owner is discharged."

In Whitaker on Lien, published in 1812, p. 140, the law is laid down to be, that the pawnee has a special property beyond a lien. I do not cite this as an authority of great weight, but as shewing that this was an existing opinion in England before Story wrote his treatise. But there is a class of cases in which a person having a limited interest in chattels, either as hirer or lessee of them, dealing tortiously with them, has been held to determine his special interest in the things, so that the owner may maintain trover as if that interest had never been created. But I think in all these cases the act done by the party having the limited interest was wholly inconsistent with the contract under which he had the limited interest; so that it must be taken from his doing it, that he had renounced the contract, which, as was said in Fenn v. Bittleston, operates as a disclaimer of a tenancy at common law, or as it is put by Williams, J., in Johnson v. Stear, he may be said to have violated an implied condition of the bailment. Such is the case where a hirer of goods, who is not to have more than the use of them, destroys them or sells them; that being so wholly at variance with the purpose for which he holds them, that it may well be said that he has renounced the contract by which he

held them, and so waived and abandoned the limited right which he had under that contract. It may be a question whether it would not have been better if it had been originally determined that, even in such cases, the owner should bring a special action on the case, and recover the damage which he actually sustained, which may in such cases be very trifling, though it may be large, instead of holding that he might bring trover, and recover the whole value of the chattel without any allowance for the special property. But I am not prepared to dissent from these cases, where the act complained of is one wholly repugnant to the holding, as I think it will be found to have been in every one of the cases in which this doctrine has been acted upon. But where the act, though unauthorized, is not so repugnant to the contract as to shew a disclaimer, the law is otherwise. Thus, where the hirer of a horse for two days to ride from Gravesend to Nettlested deviated from the straight way and rode elsewhere, it was held that the hirer had a good special property for the two days, and although he misbehaved by riding to another place than was intended, that was to be punished by an action on the case, and not by seizing the gelding: Lee v. Atkinson. This certainty was a much more equitable decision than if a rough rule had been laid down that every deviation from the right line, however small, was to operate as a forfeiture of the right to use the horse for which the hirer had paid; and it may be reconciled to the decisions already referred to, because the wrongful use, though wrongful, was not such as to shew a renunciation of the contract with the owner of the horse. Now, I think that the subpledging of goods, held in security for money, before the money is due, is not in general so inconsistent with the contract, as to amount to a renunciation of that contract. There may be cases in which the pledgor has a special personal confidence in the pawnee, and therefore stipulates that the pledge shall be kept by him alone, but no such terms are stated here, and I do not think that any such term is implied by law. In general all that the pledgor requires is the personal contract of the pledgee that on bringing the money the pawn shall be given up to him, and that in the meantime the pledgee shall be responsible for due care being taken for its safe custody. This may very well be done though there has been a subpledge; at least the plaintiff should try the experiment whether, on bringing the money for which he pledged those debentures to Simpson, he cannot get them. And the assignment of the pawn for the purpose of raising money (so long at least as it purports to transfer no more than the pledgee's interest against the pledgor) is so far from being found in practice to be inconsistent with or repugnant to the contract, that it has been introduced into the Factors Acts, and is in the civil law (and according to Mores v. Conham in our own law also) a regular incident in a pledge. If it is done too soon, or to too great an extent, it is doubtless unlawful, but not so repugnant to the contract as to be justly held equivalent to a renunciation of it.

The cases of Bloxam v. Sanders and Milgate v. Kebble are cases of unpaid vendors, and therefore are not authorities directly applicable to a case of pledge. But the position of a partially unpaid vendor, who irregularly sells the goods which have only been partially paid for, is very analogous to that of a pledgee; and in Milgate v. Kebble, Tindall, C. J., is reported to have used language that seems to indicate that in his opinion a pledgor could not have maintained trover any more than the vendee in that case.

But the latest case, and one which I think is binding on this Court, is that of Johnson v. Stear; and I think that the decision of the majority of the Court of Common Pleas in that case is an authority, that at all events there remains in the pawnee an interest, not put an end to by the unauthorized transfer, such as is inconsistent with a right in the pawnor to recover in detinue. In that case the goods had been pledged as a security for a bill of exchange, with a power of sale if the bill was not paid at maturity. The pledgee sold the goods the day before he had a right to do so. The assignees of the bankrupt pledgor brought trover, and sought to recover the full value of the goods without any reduction. Williams, J., thought that they were so entitled, giving as his reason, "that the bailment having been terminated by the wrongful sale, the plaintiff might have resumed possession of the goods freed from the bailment, and might have held them rightfully when so resumed, as the absolute owner against all the world." And if this was correct, the present plaintiff is entitled to judgment. But the majority of the Court decided that "the deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with power to sell in case of default on that day, created an interest and a right of property in the goods which was more than a mere lien; and the wrongful act of the pawnee did not annihilate the contract between the parties, nor the interest of the pawnee in the goods under that contract." This can be reconciled with the cases above cited, of which Fenn v. Bittleston is one, by the distinction that the sale, though wrongful, was not so inconsistent with the object of the contract of pledge as to amount to a repudiation of it, though I own that I do not find this distinction in the judgment of Johnson v. Stear. It may be that the conclusion from these premises ought to have been, that the defendant was entitled to the verdict, on the plea of not possessed in trover, unless the Court thought fit to let the plaintiff, on proper terms, amend by substituting a count for the improper sale; but this

point as to the pleading does not seem to have been presented to the Court of Common Pleas. The fact that they differed from Williams, J., shews that after consideration they meant to decide, that the pledge gave a special property, which still continued; and though I have the highest respect for the authority of Williams, J., I think we must, in a court of co-ordinate jurisdiction, act upon the opinion of the majority, even if I did not think, as I do, that it puts the law on a just and convenient ground. And as already intimated, I think that unless the plaintiff is entitled to the uncontrolled possession of the things, he cannot recover in detinue.

For these reasons, I think we should give judgment for the defendant.

MELLOR, J., read the judgment of

COCKBURN, C. J. The question in this case is, whether, when debentures have been deposited as security for the payment of a bill of exchange, with a right on the part of the depositee to sell or otherwise dispose of the debentures in the event of nonpayment of the bill,—in other words, as a pledge,—and the pawnee pledges the securities to a third party on an advance of money, the original pawnor, the bill of exchange remaining unpaid, can treat the contract between himself and the first pawnee as at an end, and, without either paying or tendering the amount of the bill of exchange, for the payment of which the security had been pledged, bring an action of detinue to recover the thing pledged from the holder to whom it has been transferred.

I think it unnecessary to the decision in the present case to determine whether a party, with whom an article has been pledged as a security for the payment of money, has a right to transfer his interest in the thing pledged (subject to the right of redemption in the pawnor) to a third party. I should certainly hesitate to lay down the affirmative of that proposition. Such a right in the pawnee seems quite inconsistent with the undoubted right of the pledgor to have the thing pledged returned to him immediately on the tender of the amount for which the pledge was given. In some instances it may well be inferred from the nature of the thing pledged,—as in the case of a valuable work of art,—that the pawnor, though perfectly willing that the article should be intrusted to the custody of the pawnee, would not have parted with it on the terms that it should be passed on to others and committed to the custody of strangers. It is not, however, necessary to decide this question in the present case. The question here is, whether the transfer of the pledge is not only a breach of the contract on the part of the pawnee, but operates to put an end to the contract altogether, so as to entitle the pawnor to have back the thing pledged without payment of the debt. I am of opinion that the transfer of the pledge does not put an end to the contract, but amounts only to a breach of contract, upon which the owner may bring an action,—for nominal damages if he has sustained no substantial damage; for substantial damages, if the thing pledged is damaged in the hands of the third party, or the owner is prejudiced by delay in not having the thing delivered to him on tendering the amount for which it was pledged. We are not dealing with a case of lien, which is merely the right to retain possession of the chattel, and which right is immediately lost on the possession being parted with, unless to a person who may be considered as the agent of the party having the lien for the purpose of its custody. In the contract of pledge, the pawnor invests the pawnee with much more than the mere right of possession. He invests him with a right to deal with the thing pledged as his own, if the debt be not paid and the thing redeemed at the appointed time.

It seems to me that the contract continues in force, and with it the special property created by it, until the thing pledged is redeemed or sold at the time specified. The pawnor cannot treat the contract as at an end, until he has done that which alone enables him to divest the pawnee of the inchoate right of property in the thing pledged, which the contract has conferred on him.

The view which I have taken of this case, and which I should have arrived at independently of authority, is fully borne out by the decision of the majority of the Court of Common Pleas in the case of Johnson v. Stear. There, goods, which had been pledged as security for the payment of a bill of exchange, having been sold before the falling due of the bill, the Court held, on an action of trover being brought to recover the goods, that, although the owner was entitled to maintain an action against the pawnee for a breach of contract in parting with the goods, yet that the contract itself was not put an end to by the tortious dealing with the goods by the pawnee, so as to entitle the owner to bring an action to recover the goods as if the contract never had existed. This decision appears to me to be a direct authority on the present case, and to be binding upon us. It is true that Mr. Justice Williams dissented from the other three judges constituting the court, holding that the contract was put an end to, and the plaintiff remitted to his absolute right of ownership by the conversion of the goods by the pawnee. But however I may regret to differ from that very learned judge, I concur, for the reasons I have given, with the majority of the Court of Common Pleas in holding, that a pawnor cannot recover back goods (and the same principle obviously would apply to debentures) pledged as security for the payment of a debt or bill of exchange, until he has paid or tendered the amount of the debt.

I am therefore of opinion that our judgment should be in favour of the defendant.

Judgment for the defendant.

THE COMMERCIAL BANK OF NEW ORLEANS v. MARTIN et al.

(1 La. Ann. 344.)

Appeal from the Commercial Bank of New Orleans, Watts, J.

The judgment of the court was pronounced by

SLIDELL, J. The plaintiff concedes that two of the notes sued upon in this case are prescribed. A third note originated under the following circumstances: On the 3d August, 1837, the Commercial Bank discounted for Brander, McKenna & Wright, a note drawn by Dickens, Webb & Co., and endorsed by Brander, McKenna & Wright, and by the defendants. This note became due, and was protested for non-payment, on the 3d March, 1838. On the 18th June, 1838, the bank discounted a note of Brander, McKenna & Wright, endorsed by the defendants for $3,230, "to take up," as is said by the witness, the note of Dickens, Webb & Co. The note for $3,377.93 now sued upon, which is drawn and endorsed in like manner as the preceding, is the renewal of the note discounted the 18th June, 1838, and bears at its foot the following memorandum—to "renew Dickens, Webb & Co."

Soon after the maturity of the note of Dickens, Webb & Co., but at what precise time is not shown, Martin, one of the defendants, called upon the bank and requested it to place this note of Dickens, Webb & Co., in the hands of an attorney in Alabama, to whom the Mechanics and Traders Bank, who also held a note of the same parties and under like circumstances as regards the defendants, had, on the same day, as Martin represented, transmitted their note. The bank refused to send it to the same attorney, but said they would transmit it to the attorneys usually employed in Alabama by the plaintiffs. On the 19th July, 1838, the plaintiffs transmitted the note for suit to its attorneys in Alabama, who received it on the 20th July, 1838, and brought suit returnable at the next ensuing term of the United States Court. An examination of the acts of Congress satisfies us that the November term, 1838, of the United States Court in Alabama, to which Dickens, Webb & Co. were cited, and in which court both suits were brought, was the earliest term after the month of June, 1838, when, according to the testimony, the note in question became, as urged by the defendant, a collateral security to the claim now sued upon. It appears that the note put in suit by the Mechanics & Traders Bank was brought to judgment at April term, 1839. The plaintiffs' attorneys recovered judgment at the fall term, 1839, and a writ of fieri facias was seasonably issued, and was returned "no property."

The defendants contend that they have been discharged; that the judgment should have been obtained, and a fieri facias issued as soon in this case, as in the suit of the Mechanics & Traders Bank, who collected their debt; and also that a ca. sa. should have been issued. Upon these grounds they obtained a favorable judgment from the court below.

We think the court erred. If, under the anomalous contract which is here presented, the note of Dickens, Webb & Co. is to be considered a collateral security for the renewed note of Brander, McKenna & Wright, and its subsequent renewals, which is the interpretation invoked by the defendants, and the one most favorable to them, there is still no legal defense. If we look to the request of the defendants, it was complied with. The bank did not give Martin, Pleasants & Co. the control of the note, nor send it to their attorney; but sent it, in good season, to the attorneys whom it usually employed in its own business, and whom, in the absence of contrary evidence, we may farily presume to have been competent and faithful. If, on the other hand, we look to the duty of the bank, as mere pledgees, that duty has been fairly performed. The care must be that of a prudent administrator—in the French text, "un bon pére de famille." So in the Roman law: Ea igitur, quæ diligens paterfamilias in suis rebus præstare solet, a creditore exiguntur. He is not subjected to the requisition of the most exact diligence. Pothier, Nantissement, chap. 11, art. 11, § 32, 33, 34. 2 Kent, p. 579. The bank was obliged to act through attorneys at law in Alabama, and it did for the defendants, and at their request, what it would have done in its own affairs. The duty of a pledgee cannot be considered as more onerous and stringent than that of an agent, and the law is well settled that where, in the course and from the nature of the business, it becomes necessary to employ sub-agents by reason of their particular profession or skill, the agent will not, in such cases, be responsible for the negligence or misconduct of the sub-agent, if he has used reasonable diligence in his choice as to the skill and ability of the sub-agent. See Story on Agency, p. 190. Paley on Agency, pp. 9, 45, and Baldwin v. Bank of Louisiana, ante p. 13. It is not pretended that in this case, an improper choice was made; nor is there even any reason for charging the attorneys employed in Alabama with neglect of duty. Many circumstances beyond his control might have prevented the most diligent attorney from bringing a cause at once to trial, and, in the absence of proof of negligence, we have no right to presume it because another attorney got judgment one term earlier.

It is further contended by the defendants that, the bank should have pushed the execution of the judgment to a ca. sa. The case of Flowers v. McMicken, 2 Mart. N. S. 132, cited by the defendants, if recognized in its full extent, does not cover the present case. There the defendant's contract was that he would be responsible for a note drawn for another, if the plaintiff should, without success, use all necessary steps for its collection from the maker, without delay. In addition to the consideration that the bank had entrusted the business to the attorneys in Alabama, we cannot construe the duty of a mere pledgee so strictly as to say that, he is bound, without the pledgor's request, to incarcerate the debtor, whose obligation is given in pledge. If the pledgors desired to deal thus harshly, they

might very easily have taken the weapons of the law into their own hands by paying their creditor, or at least have intimated their desire for such a course. No such request is shown; nor is it proved that the defendants have sustained any damage, by the not resorting to this extreme remedy.

As regards the debt secured by the Nailor note, we are not prepared to say that the court erred. That note remains entirely unaccounted for, though Nailor, as is proved, was solvent for a considerable time afterwards. The plaintiffs have either collected it, or lost its amount by negligence.

It is therefore agreed that, the judgment of the court below be reversed, so far only as relates to so much of the suit of the plaintiffs as claims the recovery of the amount of the note for $3,377.93, due the 3d July, 1840, and in the petition particularly described; and it is further decreed that, upon said note there be judgment in favor of the said Commercial Bank of New Orleans, against the said Martin, Pleasants & Co. and against John Martin, —— Pleasants, and Hugh Wilson, partners of said firm, in solido, for the sum of $3,377.93, with interest thereon, from the 3d day of July, 1840, until paid, and the costs in both courts.

A. H. LOUGHBOROUGH, ADMINISTRATOR, ETC., OF EUGENE CASSERLY, DECEASED, APPELLANT, vs. HENRY P. McNEVIN ET AL., RESPONDENTS, J. F. EAGAN, INTERVENOR AND RESPONDENT.

(74 Cal. 250; 14 Pac. 369; 15 Pac. 773)

Appeal from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of Department Two.

THORNTON, J. The judgment and order appealed from are affirmed for the reasons given in the decision by Department Two, filed June 27, 1887.

SHARPSTEIN, J., SEARLS, C. J., McFARLAND, J., TEMPLE, J., and PATERSON, J., concurred.

The following is the opinion of Department Two, above referred to:—

THORNTON, J. The plaintiff's intestate, some time prior to October, 1876, lent defendant Henry P. McNevin a sum of money, for which he received as security some shares of stock. On the 19th of July, 1877, McNevin assigned to defendant L. P. Drexler his interest in the stock above mentioned, in consideration that Drexler would assume the payment of his debts due to Casserly on said stock. This assignment Drexler accepted, and on the 21st of the same month informed Casserly of such assignment. On receiving this notice, Casserly, on the same day, declared his willingness to deliver the stock to Drexler upon receiving the money secured by it. On the 22d of September, 1877, Drexler made a legal tender to Casserly of the amount due to him on the stock, and demanded a delivery of it. Casserly made no objection to the tender, admitted that it was correct and sufficient, but refused to accept the money and deliver the stock, on the ground that process of garnishment in the matter of an order for money against Henry P. McNevin in favor of defendant Teresa E. McNevin had been served on him September 1, 1877. On the 28th of September, 1877, six days after the tender was made and refused, this action was commenced by Casserly. Henry P. McNevin, Teresa E. McNevin, and Drexler were made defendants to the action. The object of the action was to have an account taken of the amount due by McNevin to him, that the money found due him be adjudged to be paid to him by Teresa E. McNevin or Drexler, as either shall be found entitled thereto, and in default of payment, that the defendants be foreclosed of all right of redemption, etc., for a sale, etc. H. P. McNevin answered, stating that he had, on the 19th of July, 1877, sold and assigned the stock to Drexler in good faith, for the consideration of eleven thousand dollars, paid him by his vendee. T. E. McNevin answered, denying that Drexler ever purchased the stock of Henry P. McNevin, denied that there was due to Casserly from H. P. McNevin any sum greater than $9,837.27, secured as above mentioned, and stated that she claimed a lien upon the stock under executions issued in the action brought by her against Henry P. McNevin, by means of which the stock was attached. The executions mentioned were issued on orders made in the action just above mentioned. In the same action, an order was made, which was served on Casserly on the sixteenth day of September, 1877, directing him not to pay over or transfer any property held by him belonging to H. P. McNevin.

Drexler, in his answer, set up the assignment to him, the notification to Casserly of this assignment, the tender to Casserly and its refusal by him, as they are set forth herein, and averred his willingness and readiness to pay, and then offered to pay into the court the amount due Casserly, as the court should direct, upon Casserly's delivering to him the stock held by him as security.

J. F. Eagan, on the 18th of February, 1879, filed a complaint in intervention, in which he averred an assignment to him by Drexler of the stock held by Casserly as security, and also of all claim for damages by Drexler for the conversion of the stock thereinafter mentioned. He then goes on to aver the facts showing a conversion by Casserly, which are the facts above set forth by Drexler in his answer, and the further fact that Casserly refused, upon the tender made him in September, 1877, to accept the said amount tendered, and deliver the stock to Drexler. Casserly demurred to the complaint of Eagan, which was overruled. He then answered the complaint last

mentioned, denying the conversion averred.

The cause was tried, and judgment rendered against Casserly in favor of Eagan for the sum of $15,225, and costs. Casserly moved for a new trial, which was denied. This appeal is prosecuted from the judgment and order above mentioned.

Casserly held the stock as a pledge. He so states in his complaint; and under section 2924, Civil Code, having it in his possession, as it was personal property, it was a pledge whether the title passed to him or not.

The lien of a pledgee is extinguished when a tender of the amount due on the debt is made according to law and its refusal by the pledgee. (McCalla v. Clark, 55 Ga. 53; Ratcliff v. Vance, 2 Mill Const. 239.) Upon such tender being made and refused, the pledgor is entitled to the property pledged, and certainly when, on or after such tender, a demand is made for the pledge, which is refused, a conversion takes place. (See cases just above cited.) The refusal to deliver the pledged property on demand is an exercise of dominion over the property of another in defiance of the other's right, which is a conversion. (Dodge v. Meyer, 61 Cal. 420, 421.) Such conversion is wrongful, and extinguishes the lien, under section 2910, Civil Code. (See Rodgers v. Grothe, 58 Pa. St. 414; Davis v. Bigelow, 62 Pa. St. 242; Lawrence v. Maxwell, 53 N. Y. 19.)

Was the tender in this case made in accordance with law? It was of the whole amount—principal and interest—due to Casserly. The demand made at the same time that the stock pledged be delivered to him, conceding it to be a condition, was one which he had a right to impose, as it was concurrent with the payment of the money in accordance with Casserly's promise in his letter of July 21, 1877, to Latham and King, the agents of Drexler, that on payment of the money, he would transfer the stock, which latter was communicated by Latham and King to Drexler. The announcing of such condition did not vitiate his tender. It is so declared in section 1498, Civil Code. (See Wheelock v. Tanner, 39 N. Y. 481.)

The tender was made in time. The code (sec. 1490, Civ. Code) provides that where an obligation fixes the time for its performance, an offer of performance must be made at that time, within reasonable hours, and not before nor afterward. But where an obligation does not fix the time of performance, an offer of performance may be made at any time before the debtor, upon a reasonable demand, has refused to perform. (Sec. 1491, Civ. Code.) The obligation of McNevin was to repay the advances after a reasonable time, whenever he should be thereunto requested by the plaintiff. This was served in the complaint and not denied in the answer. The time of performance was not then fixed by the obligation. A request to pay, which is tantamont to a demand, was made by Casserly of McNevin on or about the 26th of June, 1877, and refused. The tender could not have then been made after this demand except for section 1492, Civil Code, which provides as follows:—

"Where delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due, but without prejudice to any rights acquired by the creditors, or any other person in the mean time."

We are of opinion that the tender is good under this last section, as the interest offered was compensation for the delay.

It is said that the plea of tender by Drexler is insufficient for the reason that he did not bring the money into court. We think the plea is sufficient without bringing the money into court. This is so held in Kortright v. Cady, 21 N. Y. 343, 354, 366; 78 Am. Dec. 145. The authorities referred to in the cases just cited in the opinions of Davis, J., and Comstock, C. J., sustain this rule. The plea here is in accordance with section 1495, Civil Code, and it is expressly provided by section 1504, Civil Code, that an offer of payment duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as performance thereof. One of these incidents is the discharge or extinction of the lien. The rule laid down in Kortright v. Cady is the same. (21 N. Y. 353, 366; 78 Am. Dec. 145.)

The tender was not objected to by Casserly when made. The lien having been extinguished, Drexler was entitled to the possession of the stock. Casserly then had no right to withhold it from Drexler.

We cannot see how an attachment by Teresa McNevin, a third person, with whom Drexler had no connection or privity, could justify the plaintiff's intestate in his detention of the stock.

The stock was the property of Drexler when it was attached, subject to the lien for the debt due to Casserly, and the attachment of it as the property of H. P. McNevin gave him no right to detain it from Drexler, when a proper tender had been made and refused.

The answer of Drexler was in effect an action to redeem. In such action, whether the right is enforced by an action of trover or by a bill pure and simple to redeem, the pledgee will be responsible to the pledgor for depreciation in the value of the pledged property, after a tender of the amount due and the refusal by the pledgee. (Griswold v. Jackson, 2 Edw. Ch. 461; Jackson v. Griswold, 4 Hill, 522; Hathaway v. Fall River National Bank, 131 Mass. 14; Hancock v. Franklin Ins. Co., 114 Mass. 155.) Eagan's complaint in the intervention set forth the right to redeem, as well as

did the answer of Drexler, and in fact more fully by stating a case of conversion. The action of trover is a very usual mode of enforcing a redemption of a pledge. (See Jones on Pledges, sec. 561.)

We are of opinion that the complaint in intervention by Eagan was regular and within the statute. (Code Civ. Proc., sec. 386.)

We find no error in the record, and the judgment and order are affirmed.

McFarland, J., and Sharpstein, J., concurred.

Rehearing denied.

LEARNED-LETCHER LUMBER CO. v. FOWLER.

(109 Ala. 169; 19 South. 396.)

Appeal from the City Court of Anniston.

Tried before the Hon James W. Lapsley.

The appellee, G. W. Fowler, brought this action before a justice of the peace, against the appellant, the Learned-Letcher Lumber Company, claiming one hundred dollars due by account for lumber sold to the defendant. The justice rendered a judgment for the plaintiff, and the defendant appealed to the City Court. In that court the defendant pleaded, (1) the general issue, (2) payment, (3) set off, claiming $354.00 due for goods, wares and merchandise sold by defendant to plaintiff; and the following special plea: "(4.) A plea of set off, viz: That plaintiff was indebted to the defendant in the sum of $102.00 at and before the institution of the suit, due by a contract in writing in words and figures as follows:

Rent Contract. Anniston, Ala., July 19, 1893.

I, G. W. Fowler, agree to rent from the Learned-Letcher Lumber Company three head of oxen, described as follows: One dark red, one black and white, one yellow and white. I agree to pay for the use of the oxen $1.00 per day. I also agree to feed and take good care of these oxen and return them to the Learned-Letcher Lumber Co. in as good condition as they are now in. These cattle are those purchased by the Learned-Letcher Lumber Co. from W. J. Higgins.

G. W. Fowler.

Witness: O. T. Letcher.'

And the defendant avers that the plaintiff had the use of the said oxen under the contract 102 days, and is, and was at the institution of the suit, indebted to defendant in the sum of $102 on account thereof, which said sum defendant offers to set off against plaintiff's demand and asks judgment for the excess." Issue was joined, and the trial was had on these pleas.

The plaintiff testified that the defendant was indebted to him for lumber sold to the amount of $396.90, and that he had received sundry payments, amounting to $297.56, leaving a balance still due him of $99.34. The testimony for the defendant tended to show that defendant had received from plaintiff lumber amounting to $392.09, and had sold goods, etc., and made payments thereon, amounting to $350.74., and, in addition to this amount, the defendant claimed that the plaintiff owed $102 under the contract set out above, which was offered in evidence. The evidence for the defendant showed that the plaintiff had the oxen under the contract for 102 days, from July 19, 1893 to October 30, 1893.

Upon the examination of the plaintiff, in rebuttal, he was asked: "What was the arrangement between you and O. T. Letcher about the cattle, when they were delivered?" The defendant objected to this question, because it called for immaterial evidence, and sought by parol testimony to vary the terms of the written instrument. The court overruled this objection, and to this ruling the defendant duly excepted. The plaintiff then answered "that the cattle were bought by him from Higgins, and the defendant advanced the money to pay for them; that he was to repay the $40 paid to the defendant, at the rate of $1 per day, and that, when the $40 was paid, the cattle should be his; that this all occurred on July 15, 1893; and that when he signed the rent contract, which was several days afterwards, O. T. Letcher had said that it was an agreement that he and F. R. Letcher had fixed up to protect the Learned-Letcher Company in case anything should happen before plaintiff had paid for the oxen.' Defendant moved to exclude this answer, on the ground that the writing was the best evidence of the contract, and the testimony was not admissible to vary the terms of the written contract. The court overruled the motion, and allowed the testimony to go to the jury, and the defendant excepted. Plaintiff's counsel asked plaintiff: "How many days he used the cattle?" Defendant objected to the question, because it called for immaterial evidence. The court overruled the objection, and defendant excepted. The plaintiff then answered that he used them about six weeks, but kept them until October 28th, when he delivered them to defendant. Defendant moved to exclude this statement as immaterial, incompetent, and irrelevant. The court overruled the motion, and defendant excepted. The testimony for the defendant further tended to show that there was no agreement that, upon the payment of $40 by the plaintiff, the oxen should belong to him; but that the plaintiff was to pay $1 per day, as provided in the written contract.

In its oral charge to the jury, the court instructed them as follows: "The rent contract means that the plaintiff was to pay defendant $1.00 per day for the oxen for the days that he used them, and you will charge the plaintiff with $1.00 per day for the days that the evidence shows that he used them." To this portion of the charge the defendant duly excepted. The defendant requested the court to give the following charges in writing, and duly excepted to the refusal of the court to give each of them: "(1) If the jury believe the evidence, they will allow defendant a credit

for the use of the oxen for the time he had them under the contract in evidence." "(2) If the evidence shows that the plaintiff had the oxen for 102 days, and used them, or could have used them, all the time, then the defendants are entitled to a credit for the number of days he used them or could have used them." "(3) If the jury believe from the evidence that the plaintiff agreed to pay the defendant $1.00 per day for the use of the oxen, then he would be liable to the defendant for $1.00 per day while he kept them, and this amount should be added to the other credits that are admitted by the plaintiff."

There were verdict and judgment for the plaintiff for $53.60, and the defendant appeals.

BRICKELL, C. J. The contract in reference to the oxen is styled a "rent contract," and the promise of the maker is to "rent" the oxen. This verbal inaccuracy must be disregarded in the interpretation of the contract. In its true significance, technical and ordinary, "rent" is compensation for the possession and use of lands or of things corporeal. "Hire" pertains to things personal, and is the reward or compensation to be yielded for their possession or use. It is, of consequence, plain that the word "rent' was by the parties intended to bear the meaning of "hire." Hiring is a known species of bailment, and one of its distinguishing characteristics is that it is never gratuitous,—it is always for a reward or compensation.—Story on Bailments, § 8. The relation between the parties created by the contract was that of bailor and bailee. The duration of the bailment—the term of the hiring of the oxen—is not expressed; it was, therefore, subject to termination at the will of bailor and bailee; neither could insist, against the election of the other, that it should continue. As to the liabilities and duties of the bailee, the contract contains two separate, distinct stipulations. The first is that the hirer shall pay $1.00 per day for the use of the oxen. The second is, that he shall feed and take care of them, returning them to the bailor in as good condition as they were in when received. The contract of itself separates and distinguishes the stipulations. The one is not to make pecuniary compensation during the continuance of the bailment, but only for the days the oxen were used or employed. If the bailment continued for any length of time, there would be of necessity, as the parties knew, days when the oxen could not be used, or would not be used. Therefore, the pecuniary compensation was limited to days in which there was use of them. But, whether in use or idle, the oxen must be cared for and fed so long as the bailment continued; and, therefore, this duty of the bailee was not limited, like the pecuniary compensation, to the days of the use. This was the construction given the contract by the city court in its instruction to the jury, and there is no error in the instruction given, or in the refusal of the instruction requested.

We do not deem it necessary to consider the assignments of error relating to the admission of evidence. The evidence, if improperly admitted, could not have worked injury to the appellant, for it is apparent the controversy between the parties depended wholly upon the contract, and the construction was dependent on the terms of the writing, was matter of law, upon which it was the exclusive province of the court to pass.

Let the judgment be affirmed.

JAMES W. HORNE & WIFE
vs.
WILLIAM MEAKIN & ANOTHER.
(115 Mass. 326.)

Tort with a count in contract to recover damages for an injury to the female plaintiff, by being thrown from the defendants' carriage. Trial in the Superior Court before Putnam, J., who allowed a bill of exceptions in substance as follows:

The case was submitted to the jury only upon the amended count in tort hereafter mentioned. It appeared in evidence that on Saturday, June 29, 1872, the father of James Horne, one of the plaintiffs, who lived in Canton, went to the defendants, who keep a livery stable in Canton, and engaged a horse and carriage for his son, to be used in a funeral procession for the next day. The deceased was the husband of a sister of the plaintiff, James. The plaintiffs, their child, and its grandmother rode in the carriage on Sunday from the house to the graveyard, and, on their return home, after stopping on the way at the house of a friend to get a glass of water, the horse became frightened at some object and ran away. The carriage was broken, and the female plaintiff was thrown out and injured. Notice was thereupon sent to one of the defendants, who came and took home his horse and carriage.

The father testified that as agent of his son, who had requested him to hire a horse for him to go to the funeral, he went to the defendants' stable and engaged a horse for his son, kind and gentle, to go in a funeral procession with his family on the next day, Sunday.

The plaintiff James testified that he did not send his father to these defendants to engage the team. The father testified further that he went on Sunday to the stable and got the team, which was delivered to him by one of the defendants, the same one of whom he had engaged the horse and carriage, and the same team which he had engaged the day previous, and drove it to his son's house, when his son took it, and went with his family to the funeral; that the man told him the horse was good and gentle, and would stand without hitching. The plaintiff, James, testified that on the way home the horse became frightened from some cause unknown to

him, and ran at great speed across two railroad tracks, and the carriage then upset and threw them out; that he was used to driving a horse, and exercised due care. The plaintiffs also offered evidence tending to show that the horse had run away the day previous and on other occasions before and after the accident, that he was easily frightened, and would run away apparently without any reason, and that he was not a suitable horse to be let for the purpose indicated. The plaintiffs also offered evidence of the insecurity of the carriage.

The defendants offered evidence conflicting with that of the plaintiffs, and also tending to show that they had contracted with the father on Saturday, for a horse for him, but not for his son, and a different horse from the one which the plaintiffs had; that the father came on Sunday and asked for the horse which had been engaged, and while they were harnessing him, the father took a horse and carriage standing in the yard, which had been engaged by another person, supposing that it was the one intended for him, and without the knowledge or consent of the defendants, or any of their servants; that when the horse engaged by the father was got ready, they brought him out, and found that the father had driven off with the wrong horse. The defendants offered further evidence tending to show that the horse which the father took was kind and gentle, and also suitable for the purpose, and often had been driven by ladies; that the carriage had just been repaired; and this was the first time it had been out of the stable since its repair, and that it was in good order, and suitable for the purpose, and contended that the immediate cause of the overturning of the vehicle, was owing to the unevenness of the highway, or to the want of skill and proper care of plaintiffs, and through no fault of the defendants, or their horse, or carriage. There was also some evidence tending to show that the horse was frightened by a dog, and that the female plaintiff also took hold of the reins and her husband's arm, and that the horse was not properly managed.

After the plaintiffs' evidence was in, the court ruled at the request of the defendants, that the plaintiffs could not maintain their action on the original count in contract, or the count in tort; that they could recover in tort, on a count properly framed, and that the plaintiffs might amend their count in tort upon proper terms in conformity with this opinion.

The court intimated the form in which the amended declaration should be drawn, which was substantially as it was afterwards drawn, and, as it would take time to draw such an amendment, the court suggested that the trial had better proceed, and the amendment might afterwards be filed. No objection or exception was taken to this by the counsel for the defendants. The amended count was however in fact not filed or shown to the defendants' counsel, until the day after the verdict.

The court instructed the jury, upon the whole evidence, that, the defendants being public stable-keepers in the town of Canton, if the plaintiff, James W. Horne, hired of them, through his father, a horse and carriage for the purpose of taking himself and his family to the funeral, they were bound to furnish him with a horse and carriage reasonably safe for such a purpose; that if the horse was not a safe horse, but was accustomed to run away without any apparent cause, and the plaintiff was himself a careful driver, and exercised due care on this occasion, and the accident would not have happened except for the fault of the horse in the particular named, the plaintiff could recover in this action, upon the amended count which was to be filed, for the injury occasioned to his wife. To these instructions, and to others given in explanation of them to the jury, no exception was taken.

The defendants then requested the court to rule: 1. That the accident occurring on the Lord's day, the plaintiffs could not recover. The court declined so to rule.

2. That the plaintiffs to recover, must show that the horse was not a suitable one to be let under the circumstances. [And, if the jury find he was unsuitable, the plaintiffs cannot recover unless they prove that the defendants knew the horse was thus unsuitable.] The court gave all of this ruling but the portion in brackets, but declined to give that part, and ruled that whether the defendants knew or not that the horse was unsuitable, was immaterial, and of no consequence under the amended count.

3. That if the jury find that the horse was let to the father, and the credit given to him, the plaintiffs cannot recover damages in this action. The court so ruled, and added the words, "unless the jury find it was hired by the father for the use of the son, and that the defendants knew that it was to be used by the son to take his wife and family to the funeral."

4. If the jury find that the highway was defective, and this was the principal cause of the accident, and the accident occurred through no fault of the defendants, the plaintiffs cannot recover against the defendants. The court so ruled with the addition of the words, "or of the horse," after the words, "no fault of the defendants."

5. That upon the evidence disclosed in this case, the plaintiffs cannot recover on the count in tort. The court so ruled, but ruled, that the plaintiffs might recover upon the amended count in tort.

6. If the jury find that the horse started by being suddenly frightened by a dog, or that the accident happened by any defect in the railroad tracks or highway, the plaintiffs cannot recover. The court gave this ruling with the addition of the words, "And through no viciousness of the horse" after the word "highway."

7. If the jury find that the father took the horse designed for another, or without the consent of the plaintiffs, they cannot recover. The court so ruled, but added the

words, "Unless the jury find that the defendants knew of the mistake, and could have notified the plaintiffs of the mistake and did not do so."

There was no evidence in the case that the defendants did or did not notify the plaintiffs, or of any effort to notify the father, who lived in the village.

The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions to the rulings and refusals to rule, so far as they conflict with the rulings asked for.

DEVENS, J. The objection made by the defendants that the amended count upon which the plaintiffs seek to recover was not filed until after verdict, and therefore that the plaintiffs cannot maintain their verdict, cannot be sustained. It was arranged, without objection by the defendants, when it was found that some amendment of the plaintiffs' declaration was necessary, that such amendment should be made and filed thereafter, and the trial proceeded. Upon the declaration as it was to be amended, and upon the issue to be raised thereby, the presiding judge charged and the jury passed. From the instructions of the court as they appear upon the bill of exceptions, it is evident that when they were given it was fully understood that the amendment had not been in point of fact filed, and no exception was taken by the defendants to thus proceeding without the declaration. It is entirely competent for the court to permit amendments even after verdict, taking care that none are thus allowed by the filing of which the just rights of parties can be injuriously affected; and in the present case it is not shown or suggested that the amendment, as filed by permission of the court, presents any issue except that which had been passed upon by the jury. Gen. Sts. c. 129, § 41. Emery v. Osgood, 1 Allen, 244.

The exceptions alleged to the instructions must also be overruled. 1. The fact that the accident occurred on the Lord's day did not necessarily prevent the plaintiffs from recovering, and it was not a violation of the Lord's day act for the husband to hire a horse for the purpose of attending the funeral of his brother-in-law, accompanied by his wife, nor for her so to attend.

2. It was the duty of the defendants to furnish a suitable horse for the purpose for which it was hired, and a part of their contract that they would do so. If they have negligently furnished one which was unsuitable, and injury has been occasioned thereby, it is not a defence that they did not know that the horse was unsuitable.

3. It was also correctly ruled that if the contract was made by the father for his son, and the purpose for which the horse was to be used by the son (that of taking his wife and family to the funeral of his brother-in-law) was known to the defendants, then upon proof of other necessary facts, an action of tort might be maintained for the injury to the wife.

4. The addition made by the judge to the fourth request was necessary, in order that the jury should understand that the defendants were to be held responsible for damages arising from the unsuitableness of the horse, in accordance with his ruling which the defendants have objected to by their second exception.

5. The fifth request is disposed of by what has been already said as to the right of the judge to permit the amended count to be filed.

6. If the court considered that the tendency of the sixth instruction as requested was to draw the attention of the jury from the point upon which the case seemed to rest, it was proper, after giving it, to add, "and through no viciousness of the horse," as even if the injury was occasioned by the combined causes of the viciousness of the horse, and sudden fright or the defective way, the defendants would be responsible.

7. The last instruction requested was properly modified by the judge. It appears by the bill of exceptions that the parties lived in the same village. Even if the father took the horse by mistake, yet if the defendants knew of the mistake, and could with reasonable effort have notified the plaintiffs of it, and failed to do so, it must be inferred that they assented to any responsibility they might be subjected to, if injury was occasioned by the fact that the horse taken was unsuitable for the purpose for which one had been hired.

Exceptions overruled.

FOWLER v. LOCK.

(L. R. 7 Com. Pl. 272.)

The first count of the declaration stated that the defendant was a proprietor of cabs and horses, and was accustomed to let the same out for hire, and was possessed of a horse which was of a vicious and unmanageable disposition, dangerous, and not fit to be, and had never before been, driven in a cab; that the defendant, well knowing the premises, let the same out to hire to the plaintiff for the purpose of being harnessed to a cab and being therein driven by the plaintiff in the way of his, the plaintiff's, occupation of a cab-driver, for reward to the defendant in that behalf, and fraudulently and wrongfully concealed from the plaintiff the fact of the horse being vicious, unmanageable and dangerous, not fit to be, and that it had never before been, driven in a cab; that the plaintiff had no notice or knowledge of that fact; and that, by reason of the premises, the horse, whilst so hired as aforesaid, and after the same had been harnessed to a cab for the purpose of being, and whilst being, driven therein by the plaintiff in the way of his said occupation as aforesaid, kicked, plunged, reared, and became unmanageable, and bolted and ran away and up an embankment, and overturned the cab; whereby the plaintiff was injured and prevented from following his occupation, &c.

Second count, that, in consideration that the plaintiff would hire of the defendant a horse of the defendant for the purpose of being harnessed to a cab and being therein driven by the plaintiff in the way of his occupation as a cab-driver, for reward to the defendant in that behalf, the defendant promised to let the same to the plaintiff on hire for the purpose and on the terms aforesaid, and that the horse was reasonably fit and proper for the purpose of being driven by the plaintiff; that the plaintiff accordingly hired and the defendant let to hire to the plaintiff the said horse for the purpose and on the terms aforesaid; yet the horse was not then reasonably fit and proper for the purpose aforesaid, and after the same had been harnessed to a cab for the purpose of being driven, and whilst being driven therein by the plaintiff as aforesaid, kicked, &c., as in the first count.

Pleas, 1, to the first count, not guilty; 2, to the second count, that the defendant did not promise, as alleged; 3, to the second count, that the horse was at the time of the making of the supposed promise, reasonably fit and proper for the purpose in the second count alleged. Issue thereon.

The cause was tried before Byles, J., at the second sitting for Middlesex in last Michaelmas Term. The plaintiff is a cab-driver. The defendant is a cab-proprietor carrying on his business in Gray's Inn Road. On the 24th of June last the plaintiff, who had before driven cabs belonging to the defendant, applied to him for a cab and horse for the day, and the defendant agreed to supply them to him upon the usual terms, viz. that the plaintiff should at the end of the day hand over to the defendant 18s. of the day's earnings, retaining all over that sum for himself,—the day's food for the horse being supplied by the defendant, and the owner having no control over the driver after leaving the yard. The first horse which was offered to the plaintiff refused to go beyond the gate of the stable-yard; the second lay down in the road three or four times before he had got a mile from home; and then the defendant, pointing to a grey mare,—a well-bred animal, rising five years, fresh from the country, having just been purchased at Horncastle Fair for 26l.,—said: "That is a likely one; you may try her if you like." The grey was accordingly harnessed to the cab, and the plaintiff started with her; but in a short time she kicked and plunged and the plaintiff lost all control over her, and ultimately the cab was upset and the plaintiff injured. There was evidence that it was usual, before putting fresh horses to cab work, for the defendant to try them in a gingle, which in this case had not been done.

The defendant and his foreman were called; the former stated that, before the horses were put to, he told the plaintiff that they were all fresh horses; and both of them swore that they considered the grey a reasonably fit horse for a cab: and it was submitted that there was no evidence to sustain either count of the declaration; that it was not shewn that the defendant was aware of the vicious disposition of the mare; and that the plaintiff, being the servant of the defendant, could not maintain an action against his master for an injury sustained by him whilst in his service, in the absence of evidence of some act of negligence of the master which conduced to it.

The learned judge directed a verdict to be entered for the defendant upon the first count; and upon the second he left it to the jury to say whether the horse was reasonably fit for a cab, and whether the accident was attributable to the vice of the horse or to the plaintiff's carelessness or want of skill.

The jury found that the horse was not reasonably fit to be driven in a cab, and that the accident was attributable to the horse; and they accordingly found for the plaintiff on the second count, damages 50l.

FRANCIS, in Michaelmas Term last, pursuant to leave reserved at the trial, obtained a rule nisi to enter a verdict for the defendant or a nonsuit, on the ground that the plaintiff was the servant of the defendant, and there was no hiring or letting of the horse, as alleged in the second count; or that, if there was such hiring or letting, there was no implied promise that the horse was reasonably fit and proper for the purpose as alleged; or for a new trial, on the ground that the verdict was against the weight of evidence,—the plaintiff to be at liberty, on the argument of the rule, to contend that the judge was wrong in telling the jury that there was no evidence to support the first count.

Jan. 19. COLLINS shewed cause, and contended that, although the cab-owner is liable to the public for any negligence on the part of the driver,—Powles v. Hider, —it did not follow that the driver was his servant; that the true relation between them was that of bailor and bailee; that the owner could sue the driver for the stipulated hire; and that there was an implied warranty on the part of the owner, as in the case of any other bailment for hire, that the horses he let out were reasonably fit for the work. He cited Story on Bailments, § 332; Addison on Contracts, 3rd ed. 431-2; Oliphant on Horses, 2nd ed. 54; Chew v. Jones. He also contended that there was some evidence to go to the jury on the first count, of the defendant having fraudulently concealed from the plaintiff the fact that the mare had never been tried in harness.

Jan. 20. FRANCIS, in support of the rule, contended, upon the authority of Morley v. Dunscombe, Dynen v. Leach, and Powles v. Hider, that the relation between the defendant and the plaintiff, under the circumstances proved, was that of master and servant, and consequently that, in the absence of evidence of personal misconduct on the part of the owner, he was not liable for any injury which the

driver might sustain whilst in his employ; that the arrangement as to the division of the day's earnings was merely a mode of paying wages, resorted to for the purpose of guarding against the idleness or the fraud of the driver; and that the relation of the parties could not be different inter se and as between one of them and the public. He also relied upon the following sections of the Hackney Carriage Acts, as shewing that the legislature contemplated the relation of master and servant between the cab-proprietor and the driver:—1 & 2 Wm. 4, c. 22, s. 20; 6 & 7 Vict. c. 86, ss. 21, 23, 24, 27, 28. He further cited Story on Bailments § 390, Chitty on Contracts, 9th ed. 418, Bigge v. Parkinson, and Sutton v. Temple, to shew that there was no implied warranty on the part of the master under the circumstances.

Cur. adv. vult.

May 4. The Court being divided in opinion, the following judgments were delivered:—

GROVE, J. In this case the two questions which remained to be decided were,—first, was the plaintiff the servant of the defendant in such sense that, within the decided cases on that subject, he, the plaintiff, could not recover in respect of injuries sustained in the ordinary course of his employment,—secondly, supposing the relation of master and servant in that sense did not exist, but that the relation was analogous to that of bailor and bailee, was there an implied contract by the former that the thing hired was reasonably fit for the purpose for which it was hired.

The evidence at the trial was that the plaintiff was the driver of a cab, and the defendant the cab-owner. The cabman in these cases pays 18s. a day, taking the risk of profit or loss upon himself. If he does not bring home or pay the 18s., he is not allowed to drive again; or, in the words of the defendant, "No money, no cabs." During the day the cabman is free to do what he likes with the horse and cab, provided he does not ill use them or misconduct himself to the public. On the occasion in question, the defendant, who supplied cab and horse, supplied first a horse which could not be made to go further than the exit of the stable-yard, secondly a horse which lay down three or four times, and thirdly, the horse which caused the injury to the driver in question by violent kicking and bolting.

There was evidence that the third horse was what is called "green," i. e. fresh from the country, and untried, and that it was usual in such cases to try the horse first in what is called a gingle.

The learned judge held that there was no evidence of knowledge to support the first count, and left the case to the jury reserving the question above mentioned. The jury found for the plaintiff, damages 50l. With this verdict the learned judge was not dissatisfied; and this Court held on the argument that he was right as to the want of evidence of scienter.

It was contended on behalf of the defendant, on the authority of the cases of Morley v. Dunscombe and Powles v. Hider, that the plaintiff was the servant of the defendant, and that, within the decisions on the subject, the master was not liable to the servant for injuries sustained in the ordinary course of service. On the other hand, it was argued on behalf of the plaintiff that those were cases where a third party, viz. one of the public, was injured; and that, although the cab-owner might, by reason of statutable provisions and responsibilities to tne public, be liable to a person injured when riding in the cab, yet that they were not in point as to the relations of cab-owner and cab-driver; and that these were to each other as bailor and bailee on a contract of hiring. It was further contended for the defendant that, even if the latter relation was the true one, there was no implied promise by the cab-owner that the horse supplied was reasonably fit for the purpose for which it was used, and, if so, the defendant was not liable.

On both these reserved questions, I am of opinion that the judgment should be for the plaintiff.

The non-liability of master to servant in cases where a stranger would be liable, appears to be founded on the servant's undertaking or subjecting himself to the ordinary risk of his service, the "dangers" of which "he is just as likely to be acquainted with as the master." These latter words are used in the judgment of the Court of Exchequer delivered by Lord Abinger in the leading case on the subject, Priestley v. Fowler, in which case the injury was occasioned by the breaking down of the overloaded van; and the judgment went on to say: "The plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail, would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others employed under the same master, than any recourse against his master for damages could possibly afford." In Dynen v. Leach, where the injury was by the slipping of a clip to which a sugar-mould was attached, Bramwell, B., says,—and similar expressions fell from other members of the Court,—"The workman is as well acquainted as the master with the nature of the machinery, and voluntarily uses it." These criteria, I do not think apply to the present case. The cabman could not know the qualities of the different horses he was or might be from day to day supplied with; nor was he the cab-owner's servant, in the sense of taking upon himself perils the na-

ture or extent of which he had no reasonable means of ascertaining.

In Powles v. Hider, relied on for the defendant, where the question was more fully entered into than in Morley v. Dunscombe, the judgment proceeds on the relation to the public of the cab-owner. It says: "Looking to the position of the proprietor and the driver of a cab under the circumstances proved, and to the Acts of Parliament which regulate their respective duties, we are of opinion that the driver is to be considered the servant or agent of the proprietor, with authority to enter into contracts for the employment of the cab, on which the proprietor is liable." After discussing the question of wages, to which I shall presently refer, the judgment proceeds to contrast that case with the hiring of a job-carriage, "where the hirer becomes bailee, and can in no sense be considered the servant of the proprietor." It then considers the provision of the statute 1 & 2 Wm. 4, c. 22, s. 20, viz. that every hackney-carriage shall at all times have upon it a plate with the Christian name and surname of the proprietor of such carriage. The Court goes on to say, "and the cab in question had upon it a plate with the name and surname of the defendant as the proprietor. The proprietor who applies for and accepts a license to which such a condition is annexed, and employs his cab under it, must be considered to hold himself out to the world as the proprietor; and he must incur the liabilities of the proprietor to all who use the cab with the authority of the driver in the ordinary course of dealing." After referring to 6 & 7 Vict. c. 86, it says, "It would be most inconvenient and unjust towards the public if an action such as the present, brought against one who proclaimed himself to be the actual proprietor of the cab when it was engaged by the plaintiff, could be defeated by evidence of a secret agreement between the proprietor and the driver with respect to the remuneration of the driver and the proprietor, in which the earnings of the cab are to be divided between them."

I think it sufficiently appears from the above that what the Court had under its consideration in that case was the relation and responsibility of the cab-proprietor to the public; and that it had not in view the nature of the contract between the cab-owner and driver or cabman. Indeed, this seems to be excluded by that part of the judgment last quoted. The Court, it is true, considered the payment of a fixed sum as a mode of compensation for the cabman's labour: and no doubt this may be so; but the payment by the person who uses the horse and carriage to the proprietor of it, though not inconsistent with such a view, cannot, I think, be regarded as evidence of a contract of service, but rather (primâ facie, at least,) as more consistent with that of a contract of hiring.

In this case, therefore,—where the cabman is under no control as to his movements by the cab-owner, where he may make special bargains to the public, where he does not and cannot reasonably be expected to know the risks he encounters, where he primâ facie pays instead of receives, where he is not carrying out his master's orders, where the perils are unknown to him and change from day to day, where there is no notice of dismissal, but only a refusal to supply cab and horse on non-payment, and where there are no correlative duties beyond those of bailor and bailee, and statutable duties of each respectively to the public,—I feel obliged to come to the conclusion that the cabman is not the servant of the cab-owner in the sense (to use the term above quoted) of rendering the latter exempt from liability to the former in cases where a party not bearing the relation of master to servant would be liable.

It remains for me to consider the second point, i. e. assuming the relation of the parties to be in the nature of that of bailor and bailee, is there an implied contract by the former that the thing supplied is reasonably fit for the purpose for which it is hired. I am of opinion that there is.

Even in the case of master and servant, the House of Lords has held, in appeals from Scotland, that the master is bound to take all reasonable precautions for the safety of his workmen, and is liable for accidents occasioned by his neglect towards those whom he employs: and the law of England is there stated (obiter) to be the same as that of Scotland: Paterson v. Wallace; Brydon v. Stuart.

In Chew v. Jones, it is laid down at nisi prius, by Pollock, C.B., that, "if a horse or carriage be let out for hire for the purpose of performing a particular journey, the parties letting warrant that the horse or carriage, as it may be, is fit and proper and competent for such journey." He says, however, further on: "It is not the case of a bailee, but of a contract in which the plaintiff impliedly warrants that his horse is fit to do a certain journey."

In the judgment of Lord Abinger in Sutton v. Temple, it is said: "If a carriage be let for hire, and it breaks down on the journey, the letter of it is liable and not the party who hired it. So, if a party hire anything else of the nature of goods and chattels, can it be said that he is not to be furnished with the proper goods,—such as are fit to be used or the purpose intended? Undoubtedly, the party furnishing the goods is bound to furnish that which is fit to be used. In every point of view the nature of the contract is such that an obligation is imposed on the party letting for hire to furnish that which is proper for the hirer's accommodation." Smith v. Marrable, which was the case of letting a house infested with bugs, and where the Court said that there was an implied condition on letting a house that it was reason-

ably fit to be inhabited, was distinguished from the case then under consideration, and therefore so far upheld. The words first quoted from this judgment seem exactly to meet the present case: and I am consequently of the opinion that, where there is a hiring of goods, not agreed to as specific chattels, and where, as here, the person hiring has no reasonable means of ascertaining their quality, the hirer is bound to supply such as are reasonably fit for the purpose.

My judgment is therefore on both points for the plaintiff, and that the rule should be discharged.

BYLES, J. I also am of opinion that the rule to enter nonsuit should be discharged.

It may be useful to consider in what relation the parties would have stood to each other before the Hackney Carriage Acts were passed, or in places where they do not apply. Suppose that in a country town, in the time of Charles I., the owner of a horse and cart contracted to allow another man to have the entire and exclusive personal use and control of them, at so much a week or so much a day, for the purpose of carrying, for the driver's profit, passengers or goods within the limits of the town, but without reserving to himself (the owner) any right to direct where the horse and cart should go, provided they were used within the prescribed limits and were returned within the agreed time,—what in that case would have been the nature of the relation between the parties? I should have thought it would not have been that of master and servant, but would have been that of bailor and bailee. The contract would fall within that class of bailments called "Locatio, i. e. contractus quo de re fruendâ vel faciendâ pro certo pretio convenit." It may not be necessary to the existence of a bailment of this sort that the possession of the chattel should vest in the bailee; it is enough if he have only the use and enjoyment of it. It would in either view still be a bailment, though he should be obliged to use it within the prescribed limits, and to drive it himself personally, and not to allow any one else to do so.

Such I should have thought would have been the relation existing between the parties in this case, but for some expressions used by Lord Campbell in the case of Powles v. Hider, which expressions, however, not being necessary to the decision of the case, are perhaps extrajudicial; for, it must be recollected that the case of Powles v. Hider was decided on the Hackney Carriage Acts there cited, and on the relation created by those Acts as between the proprietor and the public. Here, on the contrary, we are dealing with the rights and liabilities of the proprietor and driver inter se. The driver, as between the cab-owner and himself, seems to me to have the complete and exclusive control and disposition of the vehicle within a certain district, and not to be a servant of the proprietor, and therefore by the terms of the contract entitled to be furnished with a suitable, at least with a quiet or manageable, horse.

But, even on the supposition that the relation existing between these parties inter se was not analogous to that of bailor and bailee, but was that of master and servant, I think, nevertheless, that there was evidence of the defendant's liability; for, in this case, there was the personal interference and superintendence of the master, the now defendant, in the supply of the horse, and therefore evidence of his personal negligence causing injury to his servant, by sending that servant out with an untried, vicious, and dangerous horse, not reasonably fit and proper for the work; the master having had the means of knowing the horse's character, and the servant having had no such opportunity.

In Ormond v. Holland Lord Campbell and Crompton, J., both state, as a qualification to the general rule laid down in Priestley v. Fowler, that the master is liable if there be personal negligence on his part.

Moreover, it has been held, and very recently in this Court in Warren v. Wildee, that a master is liable to his servant if he expose the servant to unreasonable risk, and the servant be thereby injured, and that this is a question which ought to be left to the jury.

WILLES, J. In this case the plaintiff, who was a cabman driving a horse and cab provided by the defendant, a cab-master, the cabman keeping the earnings of the cab, and paying so much a day to the cab-master, upon the terms usual in the trade, and which were of the same character as those commented upon in Powles v. Hider, was hurt in consequence of the horse running away; and he brought his action for damages.

The declaration contained two counts. One count alleged that the defendant knowingly supplied an unfit horse: this, however, was rightly negatived at the trial, and the verdict thereupon is for the defendant. The other count was upon an alleged implied contract by the defendant with the plaintiff, upon an alleged bailment of hire of the cab and horse, that the horse was fit for the purpose, which in fact he was not. Upon this count the plaintiff had a verdict, subject to the opinion of the Court upon a point reserved; and the question which we have to determine is, whether this contract was to be implied from the employment.

The character of the relation between the parties was much considered in Powles v. Hider, which decided that the cab-master was answerable to third persons for the acts of the cab-driver, as his servant or agent, and that the cabman was not the bailee or hirer of the cab, in which case he, and not the cab-master, would have been liable. In delivering the judgment of the Court, Lord Campbell distinctly stated this to be the opinion at which they had arrived; and in deciding this case against the defen-

dant we should seem directly to overrule the reasoning of the Court of Queen's Bench. The passage in Lord Campbell's judgment runs as follows:—"If the defendant be right in his contention that, in point of law, the cab and horses must be considered as let to hire to Young, the driver, for fifteen hours, in consideration of the sum of 14s. 6d., and that Young must be considered the bailee and entitled to make what use he pleased of them during that time, Young could not render the defendant liable on any contract into which he entered for the use of the cab, and the plaintiff, being without remedy against the proprietor, could only sue Young, the driver and bailee. But, looking to the position of the proprietor and the driver of a cab under the circumstances proved, and to the Acts of Parliament which regulate their respective duties, we are of opinion that the driver is to be considered the servant or agent of the proprietor, with authority to enter into contracts for the employment of the cab, on which the proprietor is liable. There can be no doubt that this would be so if the driver were engaged at fixed wages, accounting to the proprietor for all the earnings of the cab. But, must not the actual arrangement between them be equally considered a mode by which the proprietor receives what may be estimated as the average earnings of the cab, minus a reasonable compensation to the driver for his labour? To stimulate the industry and zeal of the driver, he is allowed to pocket all the earnings of the cab above a given sum; but it is from the earnings of the cab that this sum is paid; and it is evidently calculated on both sides that the earnings of the cab will exceed this sum, which varies, according to the season of the year. This is quite different from hiring a job-carriage or a carriage and horses to be driven by the hirer or his servant, where the hirer becomes bailee, and can in no sense be considered the servant of the proprietor."

That case has remained ever since to the present day the unquestioned guide of the Courts, both as to the decision and as to the reasoning upon which it was founded; and the relation between the parties as thereby established was, that the cabman drove the cab for the cab-master as a person employed by him, at his risk, and that the payment of the fixed sum was part of a mode of paying wages out of the earnings of the cab, arranged so as to secure to the master a fair return and to the driver a fair rate of wages dependent upon his diligence. The possibility that the cabman might become liable to pay the fixed sum though he did not use the cab, or though he made less than the stipulated sum, was looked upon as a remote possibility not contemplated by the parties, who were considered to have bargained with reference to the average earnings. In such an engagement the cabman himself is to drive, which is a confirmatory fact to shew that the engagement is personal with him for his service; and it is anticipated that he will, in return for such service, make as much as will pay him fair wages over and above what is secured for the master.

The question is somewhat like that which has arisen in case of servants of a partnership receiving a share of the profits, with this distinction, that, whether in the case of a servant or in the case of a partner contributing his labour as against capital advanced by another to the earning of joint profit, whether fixed or not, an agency is created in respect of which the contributor of the capital is a principal or co-adventurer, and the contributor of the labour is a servant or other co-adventurer, each taking his share in profit and risk. A person standing in such a position as employer or co-adventurer is, according to a well-known rule, only answerable for fraud or misconduct, and the person employed by him takes the ordinary risks of the employment.

It would be a remarkable hardship to hold that the cab-master is not a letter out of the cab, but a principal, and liable for the cab-driver as his servant or agent as regards third persons, and yet that he is not an employer, but an independent letter to an independent hirer, as between him and the cabman, so as to be liable to the latter as upon a warranty which is not implied between master and servant or agent, or between co-adventurers.

The legislation upon the subject of hackney cabs has been relied upon as justifying us in putting this double face upon the transaction; but the effect of that legislation is, to recognize and stamp upon the transaction the character of an employment in which the cabman is a servant, and to make the proprietor liable for him as such. The cabman is aware, or ought to be, that he enters into such a bargain as makes him in point of law the driver of the cab-master; and, in acting upon that employment, he acquires no greater right against his employer than if he were the coachman of a private gentleman, whose claim under like circumstances would at once have been rejected: Priestley v. Fowler.

The class of exceptional cases in which a master has been held liable for injuries caused to his servant by improper and dangerous implements or materials used in his service, is limited to those in which the master has known of the defect (the servant being ignorant of it) and has shewn a reckless disregard of the safety of the servant, as in Williams v. Clough, Roberts v. Smith, where there was proof that the master knew of the dangerous character of the materials. To say that such a liability existed in this case, would be to depart from the declaration, which contains no count to raise the question, and to import a question not submitted to the jury, and to overrule Hammack v. White, where it was held that trying a newly-purchased horse in the street was not evidence of neg-

ligence even as against an ordinary passer-by.

It is unnecessary to give an opinion, and I offer none, upon the question whether there is an absolute warranty of fitness as between letter and hirer, in the case of an ordinary bailment of hire. It is enough to say that in the present case there can be no such warranty, because there was no such bailment.

If the cab-owner had been guilty of knowingly sending out an unfit horse with a driver who was not aware of the fact, there would have been a case of liability; but this state of facts was negatived at the trial. The remaining alleged ground of liability is therefore within the ordinary risk of the employment which the plaintiff undertook.

My learned Brothers Byles and Grove are of a different opinion, and therefore these scruples of mine are of small weight; but I have not been able to get rid of them. In accordance with the judgment of the majority of the Court, the rule to enter a nonsuit or a verdict for the defendant must be discharged.

Rule discharged.

GEORGE W. GRAVES AND OTHERS vs. CURTIS MOSES AND OTHERS.

(13 Minn. p. 335.)

Appeal by defendants from an order of the district court, Olmsted county, denying a new trial.

BERRY, J. The complaint in this case alleges that the plaintiffs let to hire and delivered to the defendants, to be driven and used by them, a stallion, mare, harness, and carriage, and that the defendants so immoderately drove and improperly cared for the mare that she became sick and died. The complaint is not as clear and definite as it might be, but the action is evidently based upon the alleged contract of the defendants, and damages are asked for its breach. This appears to be the construction put upon the complaint by the counsel for both parties. Among the engagements of a party taking a thing to hire are to use it well, to take care of it, to return it, and to pay the price of hire. Edw. Bailm. 312; Harrington v. Snyder, 3 Barb. 381. And even if these engagements are not express, the law implies them; and a breach of any of them is a breach of the contract between the letter to hire and the hirer. The party injured is entitled to recover such damages as are the natural and proximate consequences of a breach of contract. 2 Greenl. Ev. § 256. If the hirer, in a case like this at bar, fails to pay for the use of the thing hired, to use it well, to take due care of it, for all these failures the letter to hire is entitled to damages. If the bad usage or want of care produce the death of a horse hired, as alleged in this case, the value of the horse may be recovered. And as the party injured "can charge the delinquent party only for such damages as by reasonable endeavors and expense he could not prevent," (2 Greenl. Ev. § 261; Sedg. Dam. 94, 95,) he is required, in case a horse let to hire be made sick by the misconduct or neglect of the hirer, to use all reasonable exertions to cure him and prevent his death. The expense to which he is put, and the trouble and attention which he is obliged to bestow for this purpose, are occasioned by the breach of the hirer's engagement, and are natural and proximate damages resulting from it, and for these also he is entitled to recover. Vanderslice v. Newton, 4 N. Y. 133. And although the complaint is certainly open to criticism, we think it substantially sets out all these grounds of damages, general and special. It appears that the mare having fallen sick on the road, the defendants left her at one "Woodard's," 12 miles out of Rochester, (where the team was let and the plaintiff resided,) and that one of the plaintiffs went to "Woodard's" to see her on two occasions, and on the last brought her home. One of the plaintiffs, being on the stand, was asked: "What was it worth for yourself and team going to Woodard's?" The question was objected to as irrelevant, but we think it was properly asked. The plaintiffs had the right, and perhaps it was their duty, to go and see the mare, and to attend to her and to bring her home. This was part of the care and attention and expense which are set up as ground for special damages in the complaint. As to the objection made to this question, as well as others, on the ground that the mare is valued in the complaint at $350, while the whole amount of damages claimed is only $350, and that, therefore, no damage is claimed for anything but the value of the mare, it is possible that this discrepancy might have been considered below in a motion to make the complaint more definite and certain, but we shall not consider it here. It is plain enough that the plaintiffs were seeking damages beyond the value of the mare, though they may not have asked for it by the most accurate pleading. One of the plaintiffs' witnesses was asked as to the value of the use of the stallion, wagon, and harness per day, and the question was objected to as irrelevant. We do not perceive how this question could have prejudiced the defendants. If the plaintiffs were satisfied with a part of the price for the use of the team let, the defendants have no reason to complain because the whole price is not demanded. George C. Cook, a witness called by defendants, testified in substance that he had kept a livery stable in Rochester nine years, and had known the mare in question ever since she had been brought there. He was then asked to "state whether or not this mare was a proper animal to be used and let for the purposes of a livery stable, and to be driven off on a hunting excursion." The court excluded the testimony sought to be introduced, on the ground that the

witness did not "show himself sufficiently acquainted with the mare." We think this was right. The witness might have known the mare by sight, to use a popular expression, and yet have no means of forming an opinion upon the subject of the inquiry.

There are several other reasons why the question was properly excluded. The answer sets up no other unfitness of the mare for the purposes for which she was hired except that she was sick, so that an inquiry as to general unfitness was too broad, and outside of the issues. For the purpose of showing that Hammond, one of the defendants, was no party to the contract of hiring, the defendants' counsel proposed to prove that he (Hammond) was invited by the defendant Moses to go on the excursion as his friend and guest, and that on giving the invitation Moses asid to him: "Go with me on this fishing excursion as my friend. It shall not cost you a cent. I have already engaged a team of Graves to go, and there is a seat for you." The evidence was excluded, but we are of opinion that it should have been admitted. This action is upon an alleged contract, and Hammond cannot be held for the breach of it unless he was a party to the contract. As there appears to be no direct evidence of an actual hiring by him, but his character as a hirer is left to be inferred from the fact that he accompanied the other defendants, and took charge of the team, we think it was proper for him to rebut this inference by showing that he went as a guest of other parties, who were the actual hirers of the team. Hammond had already testified that he had nothing to do with the hiring or procuring of the team, and the testimony excluded was corroborative of Hammond's testimony, and tended to explain how it was that he went on the excursion and took charge of the team, without being a party to the contract of hiring. The court charged the jury that "the plaintiffs would also be entitled to recover what you shall find from the evidence to be the value of the use of the team while defendants had it and the value of plaintiffs' service in going to Woodard's twice, and the value of the service done by plaintiffs in taking care of the mare while sick, including the value of the service by the farriers on the day before she died." If the services were performed and expenses incurred in making reasonable exertions to cure the mare and prevent her death, this is in accordance with the views expressed in the early part of this opinion.

The court further instructed the jury that "if they should find from the evidence that the defendants undertook to take special and extra care of the mare, then the defendants are chargeable with such extra diligence, and if they failed to bestow such diligence, and in consequence of that neglect the mare died, then the jury will find a verdict as before directed;" that is, for the plaintiffs, for the value of the mare, etc. As there is no allegation in the complaint that the defendants agreed to take special or extra care of the mare, nor any claim for damage for want of such care, and, as claimed by the plaintiffs' counsel, the plaintiffs on the trial appear to have relied upon the implied obligations of the defendants, we think this instruction was not called for by the case. The same remark is applicable to that part of the charge which related to driving the team to a place different from that which it was hired to go. As we give a new trial on the other grounds, it is unnecessary to inquire whether the two instructions last referred to were calculated to mislead the jury or not. The exception to all the above instructions, with others with which no fault is found here, was taken in the mass. Of course this is not the proper way to except to instructions, but upon this point we will not dwell.

The defendant Hammond requested the court to charge the jury as follows: "If the jury find from the evidence that defendant Hammond had nothing to do with the hiring of the team, but was simply the guest of one of the other defendants, and accompanying the other defendants as a friend, by invitation, then he is not responsible for any injury to the team."

The court refused the instruction as asked, but gave the same to the jury with these words added: "Unless caused by his own carelessness or negligence." The defendants excepted to the refusal, and to the charge as given, and we are of opinion that the court erred, and that the exceptions were well taken.

This action is brought upon the contract of hiring, and it is for the breach of the obligation which the law imposes upon a hirer that a recovery is sought. If Hammond was not a party to the contract he is not liable for its breach, and in an action upon the contract his carelessness and negligence, though producing damage to the plaintiffs, are unimportant.

The order refusing a new trial is reversed.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY vs. THE NEW JERSEY ELECTRIC RAILWAY COMPANY.

(60 N. J. L. 338; 38 Atl. 828.)

On rule to show cause.

Argued at November Term, 1896, before Beasley, Chief Justice, and Justices Van Syckel, Garrison and Lippincott.

The opinion of the court was delivered by

LIPPINCOTT, J. In this case the action is brought by the New York, Lake Erie and Western Railroad Company by its receiver against the defendant to recover damages sustained by the locomotive engine and cars of the plaintiff, in a collision between the locomotive engine and an electric car of the defendant company,

at a crossing over a public highway, at Singac, in Passaic county, on September 2d, 1895. The locomotive and some of the cars of the train belonged to the plaintiff company, and by it had been hired by the day, and from day to day, for use, to the New York and Greenwood Lake Railway Company, which latter company was, with its own engineer, fireman and employes, running the same over and upon its own roadbed and rails at such highway crossing at the time and place of collision.

The defendant was a street electric railway company, running along and upon the Little Falls road, which is a public highway, from Paterson to Passaic and Rutherford. The tracks of the New York and Greenwood Lake railway cross this highway at Singac. At the same point the electric car tracks of the defendant company cross the tracks of the plaintiff railroad company, and the collision between the electric car and the locomotive, whilst both were in the act of making this crossing, caused the damage to the locomotive and cars of the plaintiff.

The cause was tried at the Passaic Circuit, together with the case of the New York and Greenwood Lake Railway Company against the defendant, for damage to the tracks of the railroad, and to other cars owned by it, before the same jury, and the evidence is the same as to both cases except as to damages. Both cases were argued in this court at the November Term, 1896, the former case upon a rule to show cause why the verdict, which was for the defendant in that case, should not be set aside, which rule was discharged at the February Term, 1897, upon an opinion of the court rendered at that term. Ante p. 52. In that case this court, in its opinion, held that there existed no error of the trial court in the admission or rejection of evidence or in its instruction to the jury, nor was the verdict against the evidence or the weight thereof, nor contrary to the charge of the court.

In the cause now in hand the trial justice directed the jury to return a special verdict. The jury were directed to find by their verdict, first, whether the collision or accident occurred by reason of the negligence of the employes of the defendant in charge of and operating the electric car of the defendant company; secondly, whether the negligence of the employes of the New York and Greenwood Lake Railway Company, the bailee of the plaintiff company, of the locomotive and some of the cars of the train, contributed to the collision or accident; and thirdly, what amount of damages had the plaintiff suffered.

The jury by their special verdict found negligence of the employes of the defendant company causing the accident; also that the negligence of the employes of the New York and Greenwood Lake Railway Company contributed thereto; and also that the plaintiff company had suffered damage to the amount of $1,475.

On this verdict the postea was framed, and the motion now is for judgment thereon.

The right of the plaintiff to recover against the defendant is denied on the ground, first, that under the verdict finding that the contributory negligence of the New York and Greenwood Lake Railway Company having concurred and co-operated with the negligence of the defendant in causing the injury, that therefore the action should be alone against that company, and that for such injury action only can be had against the New York and Greenwood Lake Railway Company, which was the bailee of the plaintiff of the locomotive and cars, and that it cannot be maintained against the defendant, although its negligence contributed to the injury.

This contention involves the question of the right of the bailor against a third party as wrongdoer in relation to the subject-matter of a bailment for hire for use.

There is no question but that for the injury to the actual possession of the bailee, action against a third party will lie only at the suit of the bailee, and the general current of authority appears to be that the bailee can include in such suit damages for the entire injury to the subject of the bailment, but no case is found which denies the right of the bailor to sue and recover for the permanent injury to the property even before the expiration of the bailment.

One who has a fixed reversionary interest in property has a right to sue one who is not in possession thereof for an injury to such property which will depreciate its value when it comes to his hands, and is entitled to recover damages to the extent of such depreciation. The owner of a reversionary interest in personal property has the same right of action for an injury thereto as in the case of real property. Sherm. & R. Negl., § 119.

The bailor, when he makes a bailment for hire, parts with the right of possession to the chattel, and it has been held that he cannot, during the existence of the bailment, maintain an action of trespass for its asportation, or trover for its mere conversion, or replevin to recover back its possession, against any third person, but it seems to be the accepted doctrine, at present, that if any permanent injury be done to the chattel, he may maintain a special action on the case against a third party for injury done by such third party to the reversionary interest, and this seems to be, both by reason and authority, the rule, whether an action might or might not be maintained by the bailee against such party for trover, trespass or replevin, to control the immediate possession. Pol. Torts 432.

A person who has let a chattel out to hire may nevertheless sue a third party for damages in respect to the permanent injury to the reversionary interest. Add. Torts 410.

In Mears v. London, &c., Railway Co., 11 C. B. (N. S.) 850; S. C., 103 Eng. Com. L. 849, the case was that a barge was let to hire. The defendant, who was not the bailee, was engaged in raising a boiler out of the barge when the boiler negligently fell, destroying the barge. The court held that the plaintiff, who was the owner of the barge, had the right to sue a third party whose negligence caused the injury, and laid down the rule that although the owner could not bring an action when there had been no permanent injury to the chattel, where there is such permanent injury the owner might maintain an action against the person whose wrongful act had caused the injury.

The general rule appears to be that the owner of a chattel, which is out on hire for an unexpired term, may maintain an action against a third person for a permanent injury thereto. This seems to be the rule whether the bailment has expired or not. Howard v. Farr, 18 N. H. 457; White v. Griffin, 4 Jones (N. C.) 139; Railroad Company v. Kidd, 7 Dana (Ky.) 245; Hawkins v. Phythian, 8 B. Mon. (Ky.) 515.

A bailor need not look alone to his bailee for a wrong by a third party in connection with the bailee as respects the contract of bailment. If a bailee assumes to pledge or sell the bailed goods as his own, such an act amounts to a conversion and the bailor may immediately bring an action of trover or replevin against the third party in whose possession the property is found. Story Bailm. (9th ed.), § 413.

In Enos v. Cole, 53 Wis. 235, the right of the action of trespass against a third party, to whom the bailee had improperly sold the goods bailed, was distinctly recognized.

Whether the bailment in the case in hand had expired or not, it seems, can make very little difference. This bailment, or hire of this locomotive and car, was presumably by the bailor at its will.

A bailment may be determined by the mere efflux of time, as where the chattel is bailed for a stated period. Here the bailment was not for any stated period. It may be determined by the accomplishment of the object for which the thing was bailed, as where the chattel is hired for a particular purpose, or is pledged until the loan is repaid. It may be dissolved by mutual agreement at any time. And either party, as has been said, where the bailment is not for any particular time, may terminate it at will. It may be terminated by the total or partial destruction of the subject-matter of the bailment, as where a chattel is lost or is destroyed. It may be also terminated where the bailee disposes of it contrary to the terms of the bailment. In this case the bailment was terminated at the time of the injury, for then it was no longer, under the evidence, fit and suitable for the use which the contract of bailment contemplated. Whilst a mere misuse might not terminate the bailment, yet when, by the negligence of the bailee, either alone or in conjunction with the negligence of a third party, it is no longer fit and suitable for the uses for which it was hired, both by reason and all the authorities, the contract of bailment is at an end.

It would seem to be clear that, under general principles, a bailor can maintain an action for injury to the property bailed, at the hands of a third party, who is a wrongdoer in relation thereto, especially wherever the injury is of a permanent character. Therefore, the contention of the defendant that the right of action was alone against the bailee must fail.

But the right to recover is secondly denied upon the ground that the contributory negligence of the New York and Greenwood Lake Railway Company, the bailee of the locomotive and cars, is a bar to recovery by the plaintiff company, which was the bailor of the same, and that the contributory negligence of the bailee is imputable to the plaintiff as bailor, and, therefore, prevents a recovery. It is contended that in law the bailee could have included the injuries to the locomotive and cars in his action against the defendant, and that its contributory negligence would have been a complete defence to the action, and this being so that this same contributory negligence can be successfully set up against the plaintiff, who is the owner of the property, or in other words that the possession by the bailee involves the bailor in all the consequences of the default of the bailee, however much the act of wrong-doing by the third party might be the joint cause of injury to the chattels in the possession of the bailee.

The reason of this contention, as it appears to the court, is not apparent or well founded.

It need only be said that a bailment is a contract which is interpreted by the same rules as other contracts. The bailor and bailee are just as independent of each other in regard to the subject-matter as the contract by its terms permits them to be. It is the delivery of the thing in trust for some special object or purpose upon a contract express or implied to conform to the object or purpose of the trust. Story Bailm. (8th ed.) 4. This is evidently true as to a bailment for hire to use—locatio rei. If not a part of the express contract the law impliedly engages to allow the full use and enjoyment of the chattel by the bailee, to the extent of the use and enjoyment of the object of the hiring and for the time hired. This right of the bailee is quite independent of any control by the bailor, but there is also the right of the bailor to have the thing used with care and moderation; to have it applied to the use for which it is hired and no other; to have it used with reasonable care for its preservation, and to have redelivery when the use to which it is to be devoted is completed or performed, or the bailment has otherwise expired. The bailee is responsible to the

bailor for injuries to the subject of the bailment by reason of the negligence of the bailee, and of his servants in the course of his employment, occasioning injury to the property. The general property remains in the bailor, and the bailee only has a special interest for the express or implied objects of the bailment.

Under these general principles now well established as governing the contract of bailment, it would be entirely too artificial to say that no right of action existed by the bailor against a third party as a wrongdoer for injury by negligence or otherwise to the chattel which was the subject of the bailment. It is not an answer that the bailee has his right of action for the full injury against the wrongdoer, for the bailee may never choose to seek such a remedy, nor can he be compelled to do so, nor can it be said with any greater reason that the bailor must resort alone to the bailee for redress for the injury, for it may have occurred in spite of the exercise of the full degree of care required of the bailor, as in case of theft by the servants of the hirer, for which he is not, generally speaking, liable unless there are some circumstances which impute to him a want of due diligence. Vere v. Smith, 1 Vent. 121; S. C., 2 Lev. 5; Story Bailm. (8th ed.), §§ 38, 407. The servants of the bailee are responsible to the bailor for their malfeasances, not because they are the servants of the bailee, but because they are active wrongdoers to the bailment. Lane v. Cotton, 12 Mod. 488; Story Bailm. (8th ed), § 405; Story Ag., §§ 309-320. The care or diligence required to be exercised depends upon the nature of the subject and it rises in proportion to the demand for it, and when the required care is exercised the bailee is no longer responsible to the bailor.

Therefore, there is nothing in the relation of the bailor and bailee which of itself can prevent the bailor from seeking out the third party as the wrongdoer, and imposing upon him the liability for the results of his conduct to the subject of the bailment. It would seem, upon reason, that there could exist no objection to the joint liability of the wrongdoer and the bailee, when the joint negligent act of both caused the injury.

But the defendant distinctly contends that the negligence of the bailee or its servants in the operation of this locomotive and train of cars by reason of this bailment, contributing to the injury, is imputable to the bailor and prevents a recovery on the part of the bailor against the defendant as a third party, who is a joint wrongdoer with the bailee. This joint negligence by the special verdict is found to have been the cause of the collision and injury, and, therefore, the case must be considered with the fact of the contributing negligence of the bailee established.

In a contract of bailment of things for hire, the bailor is not responsible to a third party for injuries occurring to such third party by reason of the negligent use of the thing hired by the bailee, nor for the negligence of the servants of the bailee in respect thereto. The bailee does not stand in the place of the bailor nor represent him in such relation as to render the bailor liable for such injuries, nor are the servants of the bailee the servants of the bailor or in any sense acting for him, and the contract of bailment is in so far entirely an independent one, and the liabilities of the bailor and bailee to third parties are essentially independent of each other.

In this case it cannot be contended that the plaintiff company would have been responsible to the defendant if the negligent use of the locomotive by the servants of the New York and Greenwood Lake Railway had occasioned an injury to the defendant's car at this crossing. This negligence, however much the occasion of the injury to the defendant, could not have rendered the plaintiff company responsible so long as, in this case, no act or conduct of the plaintiff company was in question. It did not, in fact, advise, encourage or permit in the hands of its bailee the negligent use of this locomotive.

The contributory negligence of a third person can only be set up in a defence when it is legally imputable to the plaintiff, and its existence must depend upon some connection or relation between the plaintiff and the third person from which such legal responsibility may arise. It is a general rule that it is no justification of the misconduct of the defendant that some third person, a stranger, was also in the wrong. The negligence of the servant in the course of his master's employment is imputable to the master, and so as between agent and principal. But the negligence of one passenger in a car standing alone, inflicting injury upon another passenger, is not imputable to the railroad company, a common carrier of passengers. There must exist concurring negligence, in some respect, in the railroad company. Sheridan v. Brooklyn, &c., 36 N. Y. 39; Cannon v. Midland and Great Western Railway Co., L. R., 6 Ir. App. 199. If the defendant be negligent, the fact that the negligence of others co-operated or concurred with it in effecting the wrong does not affect the question or measure of liability. Mott v. Hudson River Railroad Co., 8 Bosw. 345; Atkinson v. Goodrich Transportation Co, 60 Wis. 141.

It may be deemed to be settled in this state that the employes or servants of a bailee are not the servants of the bailor in any such relation as to make the bailor liable to third parties for their negligence or misconduct in relation to the thing bailed. As where A hired a coach and horses with a driver from B, to take his family on a particular journey, and in the course of the journey, in crossing the track of a railroad, the coach was struck by a passing train and A was injured. In an

action by A against the railroad company for damages it was held that the relation of master and servant did not exist between the plaintiff and the driver, and that the negligence of the driver, co-operating with that of the persons in charge of the train which caused the accident, was not imputable to the plaintiff as contributory negligence to bar his action. It was further held that for whatever purpose the negligence was invoked, whether as an action for injury done by the driver, or as contributory negligence to bar the action by the passenger, against the third person for an injury sustained, the negligence to be imputed to the passenger must be such as arises in some manner from his own conduct.

The negligence of the driver, without some co-operating negligence on his part, cannot be imputed to the passenger in virtue of the simple act of hiring. New York, Lake Erie and Western Railroad Co. v. Steinbrenner, 18 Vroom 161; Bennett v. New Jersey Railroad Co., 7 Id. 225.

There is no perceivable distinction between the case in hand and the cases last cited. Both rest upon a contract of bailment for the hire of a thing for use, and although a contract mutually beneficial to each of the parties, they are so independent of each other that the negligence of one cannot be imputable to the other.

It is only when the contributory negligence is of such a character and the third person is so connected with the plaintiff that an action might be maintained against the plaintiff for damages for the consequences of such negligence, then when the plaintiff brings the action, that negligence is, in contemplation of law, the plaintiff's negligence, and it is justly imputed to him.

This relation does not exist between the bailor and bailee under the ordinary contract of bailment.

The case of Hawkins v. Phythian, 8 B. Mon. (Ky.) 515, is a case very similar in the application of the principles of law to the one in hand; in this case the plaintiff hired a slave to A, who allowed him to go with B; while B had the slave, he put him on a restive horse which threw the slave and killed him. The plaintiff sued A and B together. The verdict was allowed to stand against B, although it was set aside as to A, by reason of an erroneous instruction of the court to the jury.

The cases cited by the defendant in his argument are mainly based on the doctrine laid down in Thorogood v. Bryan, 8 C. B. 114, in which the deceased intestate, while alighting from the omnibus in which he was a passenger, was knocked down by the defendant's omnibus and received injuries from which death ensued. The court held, in that case, that if the want of care on the part of the driver of the omnibus in which the deceased was riding in not driving up to the curb to put the deceased down, had been conducive to the injury, the plaintiff could not recover, although the defendant's driver had been guilty of negligence.

It is sufficient to say that this doctrine has been thoroughly disapproved in this state in the case of New York, Lake Erie and Western Railroad Co. v. Steinbrenner, 18 Vroom 161. Before the Steinbrenner case had been decided, Chief Justice Beasley, in the case of Bennett v. New Jersey Railroad Co., 7 Vroom 225, had repudiated the doctrine. It has now been overruled in England in the Bernina case, L. R., 12 Pro. Div. 58. The Supreme Court of the United States, in the case of Little v. Hackett, 116 U. S. 366, also repudiates it.

There is a line of cases in which the peculiar contractual relations between a shipper of goods and the common carrier thereof locatio operis mercium vehendarum, who is liable to the shipper against all events except the acts of God or the public enemy, or the natural wear and tear of the article shipped, and responsible for all the consequences of his conduct as an insurer against loss except from such excepted causes, which hold the carrier alone responsible for injury. The shipper, according to such authorities, cannot recover against a third party for negligence in the care of such goods or injuries to them.

The distinction between the relation which exists in law between the shipper and the common carrier of goods and the bailment for hire of a chattel for use is so obvious as not to need discussion. The carriage of goods is, by all legal writers, classed as a different contract of bailment having peculiarities, and governed by principles characteristic of the relation quite apart from the contract of bailment of chattels for hire.

The cases cited by the defendant are Vander Plank v. Miller, 1 Moo. & M. 169; Simpson v. Hand, 6 Whart. 311; Transfer Company v. Kelly, 36 Ohio St. 86; Arctic Fire Insurance Co. v. Austin, 69 N. Y. 470. These cases are all cases which arise under the contract of bailment for the carriage of goods and chattels, not by a special, but by a common carrier.

He is treated as an insurer against all but the excepted perils (Jones Bailm. 101), and the shipper cannot look beyond him for liability, and this rule is said to be grounded upon public policy.

I cannot perceive that whether, in respect to this action, the duty of the defendant and the bailee were joint or separate can make any difference. If the same duty of care was due and owing to the plaintiff, then a common neglect of that duty would render them both liable as joint tort-feasors. If the duty to plaintiff was a separate one which was neglected to be performed by each of them, although the duties were diverse and disconnected, and the negligence of each was without concert, if such neglects concurred and united in causing the injury, the tort still is equally joint and the tort-feasors are

subject to a like liability. Matthews v. Delaware, Lackawanna and Western Railroad Co., 27 Vroom 34.

The bailee was bound to use reasonable care and diligence in the preservation of the property from injury. The defendant, in the operation of the electric car, was bound to exercise reasonable care in avoiding injury to the property of which the plaintiff was the owner.

It would seem that the intervention of the negligence of the bailee could not shield the defendant from the injury caused by its own negligence. Both might have been selected as joint tort-feasors, or the action could be maintained against either.

The conclusion reached is that the plaintiff had the right to sue either or both these companies for the injuries arising from their negligence to the locomotive and cars of the plaintiff, and it is not a defence to the action that the accident was contributed to by the negligence of the other. Each is liable upon its own negligence, and the negligence of the bailee is not imputable to the plaintiff as a shield to the defendant against recovery.

Judgment must be entered on postea for the damages found by the jury.

THE MAYOR AND COUNCIL of COLUMBUS, PLAINTIFFS IN ERROR, vs. ELIZABETH HOWARD, ADMINISTRATRIX, DEFENDANT.

(6 Ga. 213.)

Trover, in Muscogee Superior Court. Tried before Judge Alexander, November Term, 1848.

Elizabeth Howard brought suit against the City Council of Columbus. The declaration contained two counts. The first, in trover, for a certain negro slave, Braden; the second, in case, setting out that she had hired a certain negro, Braden, to the City Council, for the year 1844, to be employed, specifically, in working the streets of said City, in cleaning and repairing the same; that the Council placed the said negro to do other work, to wit: "to work upon, by and under the precipitous bank at the mouth of the sewer or drain of said City," and that by the breaking and falling off of said bank the slave was killed.

Counsel for defendants below demurred to the first count in the declaration, which demurrer was overruled by the Court, and the defendants excepted.

Upon the trial, plaintiff offered Washington Toney as a witness, who swore that he was a member of the City Council in the year 1844; that he knew, officially, of the death of plaintiff's negro, Braden, who was hired by Council. After the negro was killed, Council took action upon the subject, and admitted that he was the property of Mrs. Howard, and was killed at the sewer, in their employment; that the action consisted in appointing a committee, of which he was chairman, to confer with the attorney of Council, Mr. Wiley Williams, upon the propriety and justice of paying for the boy.

To this testimony as to the admissions of Council, defendants' counsel objected, which objection was overruled by the Court, and defendants excepted.

Witness further testified, that he saw the negro soon after the injury, and just before his death, near the place; that the place where the injury was inflicted was pointed out to him, and the broken fragments which had fallen down; that the negro died soon and violently from the injury there incurred; that the bank resembled a platform projecting over, and the space through which it fell was some ten feet, more or less, and the portion that fell off would weigh about two thousand pounds; that the consistency of the soil, as he recollected, was of a fine, sandy and argillaceous loam, easily crumbled; he observed the traces of a trench, some twelve feet long and about four inches deep, at the line marking the slide, which appeared to be freshly dug; this trench was immediately above the pieces of the fallen bank, and was pointed out to him at the time.

Peterson Thweatt testified, that as agent of Mrs. Howard, he hired the negro to the Council, to work on the streets; the negro was worth $600 or $650; that after the negro was killed, he as agent, applied for payment of his value from the City Council, who refused, on consultation with their attorney; some of them, however, being favorable to its payment.

For the defendants, John J. McKendree testified, that in 1844, he was a member of Council and hired the negro, Braden, from P. Thweatt; that he did not hire him to work on the streets exclusively; that the City work consisted in working on the streets, digging ditches, filling up holes, working on the abutments of the bridge, and doing every thing which Council ordered, conducive to the health, comfort and convenience of the City, and that he would not have hired the negro if it were not to do the work of the City generally; that previous to the death of this negro, so far as he knew, Council had never done any work on a sewer, or the abutments of the bridge, or in pulling down old walls left after fires, but had only worked on the streets and on one ditch.

John Quin testified, that he was a member of Council for the year 1844, and Chairman of the Committee on Streets; that the boy Braden was directed to work on the sewer by the City Council; that the sewer was in one of the streets, and that the City hands worked upon the river banks, and upon ditches, and upon water-drains, during that year; that Council never made any admissions, but to act upon the proposition to settle, made through Thweatt, so far as he knew.

E. C. Bandy and J. M. Hughes testified, that they were Marshal and Deputy Marshal for the year 1844, and were present when

the boy Braden was killed; he and seven or eight others were at work on the sewer, grading the bank or ravine at the mouth of the sewer, which was about twenty feet deep and very large; that the earth there was stiff clay at the top, so much so that they had to drive in gluts to break it off to grade it; that while Braden and one other hand were throwing dirt out of the way, suddenly a piece broke loose from above, and in falling caught Braden while he was stooping down to scoop up the dirt with a spade; that when the mass broke loose it fell as quick as lightning.

The Court charged the Jury, that if the defendants had the negro in their employment as contemplated by the contract of hire, and if, while in such employment, said negro was killed without any neglect on the part of said defendants, or their agents, that then the defendants were not liable, and if such was not the case, then the defendants were liable.

The Jury returned a verdict for the plaintiff for $800.

Whereupon, defendants moved for a new trial.

1st. Because the verdict is contrary to the evidence and the charge of the Court.

2d. Because the Court erred in admitting the evidence of witness Toney, as to the admissions of Council.

Which motion was overruled and defendants excepted.

And upon these several exceptions error has been assigned.

By the Court.—LUMPKIN, J. delivering the opinion.

1. Was the Circuit Court right in refusing to strike out the count in trover in the declaration?

The object of pleading is for both parties to state their cases—the claim of one and the defence of the other. The rules of pleading are founded, undoubtedly, in reason and good sense, and accuracy and justice were their object. They were intended, however, for a comparatively ignorant age, and like all things human, they are susceptible of improvement, and should, undoubtedly, be adapted to the advanced state of the age and of modern jurisprudence. Whatever of good sense they contained should be preserved; their subtlety and prolixity should be abandoned.

The first and great rule of pleading should be, to compel the litigant parties to disclose fully, plainly and distinctly, the real nature of their respective pretensions. And I feel constrained to admit, that the fiction in trover fails to convey any very definite idea or information upon the subject of the action. The very same words, as might be readily shown, would apply equally to a dozen different causes of action. And yet the Legislature has not seen fit to administer the proper corrective.

Previous to 1847, they had had the subject matter of this proceeding directly under consideration, and made no change in the plan of declaring. In 1847, the Legislature prescribed a form of action for the recovery of personal property; still it was not made obligatory on parties plaintiff to adopt it. It was left to their option. They contented themselves with providing that no departure from the "prescribed form" should work a nonsuit, provided the plaintiff, in following the new form, should plainly and distinctly set forth his cause of action.

It is obvious, therefore, that no Court is at liberty to compel a party to abandon the old form, the Legislature itself having refrained from going so far.

2. Next, as to the competency of the admissions made by members of the City Council. Counsel for the defendants sought to exclude them, under the rule of evidence which protects overtures made between litigating parties, with a view to an amicable adjustment; but the acknowledgments here made and attempted to be proven, do not fall within that rule. The rule itself is founded in public policy. There should be no discouragement to compromising disputes, for fear that if not completed, the party making advances may be injured. Independent facts, however, admitted during the treaty for a compromise, may be given in evidence as confessions. This limitation or exception is laid down in Starkie, Phillips and Greenleaf, and has been recognized in reported cases. Marsh vs. Gold, 2 Pick. 285. Sanborn vs. Wilson, 4 N. Hamp. R. 508. Hyde vs. Stone, 7 Wendall, 354. Hartford Bridge Co. vs. Granger, 4 Conn. R. 142. Fuller vs. Hampton, 5 Conn. R. 417. Delogny vs. Rentoul, 2 Martin's Loui. Rep. 175. Hamblett vs. Hamblett, 6 New Hamp. R. 342, '43. 1 Moody & Malk. 466. Per Lord Kenyon, 1 Esp. 143. Anthon's Rep. 190. 4 Cowen, 635. In Slack vs. Buchanan, Lord Kenyon went so far as to hold, that he would receive evidence of all admissions, such as the party would be obliged to make in answer to a bill in Equity, rejecting none but such as are merely concessions for the sake of making peace and getting rid of a suit. Peake's Cases, 5, 6. It was ruled in the same case, that admissions made before an arbitrator are receivable in a subsequent trial of the cause, the reference having proved ineffectual. See, also, Gregory vs. Howard, 3 Esp. 113.

It will be seen, by reference to the testimony, that the admissions were made merely because they were facts; that there was nothing confidential in them, and that they had no reference whatever to a compromise, there being no treaty proposed or pending for any such purpose.

3. A verdict having been rendered for the plaintiff, a motion was submitted for a new trial:

1st. Because the finding was contrary to evidence and the charge of the Court: and

2d. Because the Court erred in admitting the evidence of Washington Toney as to the admissions of the City Council.

The application being refused, defendants, by their counsel, excepted.

We have already disposed of the second ground, in the motion for a new trial. It only remains, therefore, to inquire whether the verdict was contrary to the evidence and the charge of the Court. The Court charged the Jury, that if the defendants had the negro in their employment, as contemplated by the contract of hire, and he was killed without any neglect on their part, that then they were not liable, otherwise they were.

It is not complained that the law of the case was not correctly stated. But assuming that to be true, a re-hearing is asked, because the verdict is contrary to the charge. Surely it will not be pretended that there was not some proof of negligence, and if so then the verdict was not contrary to the charge.

4. The law, we apprehend, is this; there is, on the part of the hirer of property, an implied obligation not only to use the thing, be it servant or horse, or anything else, with due care and moderation, but also not to apply it to any other use than that for which it was hired. If a horse is hired as a saddle horse, the hirer has no right to use the horse in a cart, or to carry loads as a beast of burden. So, if a carriage and horses are hired for a journey to Boston, the hirer has no right to go with them on a journey to New York. So, if horses are hired for a week, the hirer has no right to use them for a month. So, if a negro is hired to work on the streets of the City of Columbus, the City Council have no right to employ him in blasting wells, pulling down old walls, or levelling dangerous and precipitous embankments, although the work be within the limits of the streets, as delineated in the map of the town.

5. And it may be generally stated, that if the thing is used for a different purpose from that which was intended by the parties, or in a different manner, or for a longer period, the hirer is not only responsible for all damages, but if a loss occurs, although by inevitable casualty, he will generally be responsible therefor. Such misuse is deemed, at the Common Law, a conversion of the property, for which the hirer is generally held responsible to the letter, to the full extent of the loss. Story on Bailments, § 413. 1 Cow. 322. Jones on Bailments, 68. 2 Lord Raymond, 915. 12 Pick. 136. 3 Pick. 492. 5 Mass. R. 104. 1 Const. Rep. S. C. 121.

6. The question has been much mooted, what degree of care or diligence is required of the hirer, while using the property for the purpose, and within the time for which it was hired. Sir William Jones considered that the contract being one of mutual benefit, the hirer was bound only for ordinary diligence, and of course was responsible only for such. Jones on Bailments, 86, 87, 120. And this opinion appears to be now settled, upon principle, to be the true exposition of the Common Law. 2 Kent Com. Lect. 40. 3 Cowp. Rep. 4. 13 Johns. 211. 2 Brod. & Bing. 359. 7 Cowen R. 497. Gilpin, 579, 585, 586. He ought, therefore, to use the thing, and to take the same care in the preservation of it, which a good and prudent father of a family would take of his own. Hence the hirer of a thing, being responsible only for that degree of diligence which all prudent men use, that is, which the generality of mankind use, in keeping their own goods of the same kind, it is very clear he can be liable only for such injuries as are shown to come from an omission of that diligence; or, in other words, for ordinary negligence. If a man hires a horse, he is bound to ride it moderately, and to treat it as carefully as any man of common discretion would his own, and to supply it with suitable food; and if he does so, and the horse, in such reasonable use, is lamed or injured, he is not responsible for any damages. Story on Bailments, 391, 392. 4 Barn. & Ald. 21. 3 Esp. R. 79. 5 Miller's Louisia. R. 7, 9.

Now, test the verdict by either of these principles, and we are satisfied that it was warranted by the testimony. The Jury were authorized to find, that there was a special contract of hiring, and that the death of the slave resulted from his being used for a different purpose from that intended by the parties, or else, that the loss ensued from gross negligence on the part of the Council. The want of discretion in our slave population is notorious. They need a higher degree of intelligence than their own, not only to direct their labor, but likewise to protect them from the consequences of their own improvidence. From the testimony of Toney, it is manifest that, considering the locality and nature of the soil, &c. the situation of the slave was one of imminent risk and exposure. We are, therefore, satisfied with the verdict.

Let the judgment be affirmed.

GREGORY vs. STRYKER.

(2 Denio 628.)

Error from the Schoharie common pleas, to review a judgment of that court in a cause commenced by Stryker against Gregory in a justice's court and determined in the common pleas on appeal. The action was trespass for a wagon, and the defendant, who was a constable, justified the seizure of it under an execution against one Rose; and the question was whether the wagon when taken by the defendant belonged to the plaintiff or Rose. Rose carried on the business of blacksmithing and was indebted to the plaintiff in a considerable sum. The plaintiff was the owner of an old wagon which Rose agreed to repair for him on account of the debt. The iron work was done at the shop of Rose, who procured the wood work and painting to be done by another person on his account, and charged the whole to the plaintiff. The old wagon, except the iron, was

worth but little; none of the wooden part was used in the reparation except the tongue and evener. When finished the wagon was worth $90, and Rose's account for repairs amounted to $78.50. The defendant took the wagon in the possession of Rose immediately after it was completed and sold it on the execution. The court below charged the jury that where an article is left to be repaired, it remains the property of the former owner when completed, although the repairs exceed the value of the article as it existed before they were put upon it, and that if it be taken by another the owner is entitled to recover its value including the new materials used in the repairs; and that this was the rule of law, although the discrepancy between the worth of the article when sent to the mechanic and its value when repaired, was as great as the proof showed it to have been in this case. The plaintiff had a verdict upon which the court gave judgment, and the defendant brought error here.

By the Court, BEARDSLEY, J. The principal controversy in this cause is whether the wagon in question when taken by the defendant belonged to the plaintiff or to Rose. The other points were disposed of by the jury under proper instruction from the court.

As the value of the new materials and labor used and employed in repairing or re-constructing the wagon, greatly exceeded that of the old materials used in the operation, it was urged that this was really a contract with Rose to make a new wagon, and not for the repair of an old one, and therefore, as most of the materials were furnished by him, his right of property in the vehicle would continue until its completion and delivery under the contract.

No doubt where a manufacturer or mechanic agrees to construct a particular article out of his own materials, or out of materials the principal part of which are his own, the property of the article, until its completion and delivery, is in him and not in the person for whom it was intended to be made. (1 Cowen's Tr. 2d ed. 289; 2 Kent, 361; Merritt v. Johnson, 7 John. 473; 1 Chitt. Pl. 7 Am. ed. 381; Atkinson v. Bell, 8 Barn. & Cress. 277; 2 Chitt. Com. Law. 270.) But it is equally clear, as a general proposition, that where the owner of a damaged or worn out article delivers it to another person to be repaired and renovated by the labor and materials of the latter, the property in the article, as thus repaired and improved, is all along in the original owner, for whom the repairs were made, and not in the person making them. The agreement in such case is but an every day contract of bailment—locatio operis faciendi: (Story on Bl. 3d ed. § 421, 422, a; 2 Kent. 588:) and the original owner so far from losing his general property in the thing thus placed in the hands of another person to be repaired, acquires that right to whatever accessorial additions are made in bringing it to its new and improved condition.

Nor am I aware that in this class of cases it is at all important what the value of the repairs, actual or comparative, may be. No case is referred to which proceeds on that distinction, nor any writer by whom it is adverted to as material. If we adopt this distinction, what shall be its limit? The general property must be in one party to the exclusion of the other, for surely they are not tenants in common in the thing repaired. Shall we then say that where the value of the repairs falls below that of the dilapidated article on which they were made, the original owner has title to the article in its improved condition, and vice versa, where they exceed it in value, title to the article, as repaired and improved, passes over to the person by whom the repairs were made? Such a rule would certainly be plain enough, and probably might be applied without great difficulty, to any particular case. But it would be found to give rise to a variety of questions never heard of in actions growing out of the reparation of decayed or injured articles; and the rule itself, I am persuaded, has not so much as the shadow of authority for its support. There are a multitude of instances in which the expense of proper repairs greatly exceeds the value of the article on which they are made. It is so in the lowly operation of footing an old pair of boots, and not unfrequently in repairing a broken down carriage. The principle contended by the defendant is not necessary for the security of the mechanic by whom the repairs are made. He has a lien for his labor and materials, and may retain possession until his just demands are satisfied. (Story on Bl. § 440; Cross' Law of Lien, 331, chap. 21; Chitt. on Cont. 5th Am. ed. 544, 5; 1 Cowen's Tr. 295; Moore v. Hitchcock, 4 Wend. 292; Grinnell v. Cook, 3 Hill, 491.) This affords ample protection to the mechanic. And who, let me ask, ever heard that his lien was limited to repairs which in value, fall below that of the original article on which they are made? Yet this limitation must necessarily exist, if the ground assumed by the counsel for the defendant is well taken.

Various cases have arisen in which property in a raw state was delivered by one person to another, upon an agreement that it should be wrought upon and improved by the labor and skill of the bailee, and when thus improved in value should be divided in certain proportions between the respective parties; and in which it was held that the original owner retained his exclusive title to the property until the contract had been completely executed; and this, notwithstanding the labor to be performed by the bailee might be equal or even greater in value than that of the property when received by him. Thus, in Pierce v. Schenck, (3 Hill, 28,) where logs were delivered at a saw mill, under a contract with

the miller that he should saw them into boards and each party should have one half, it was held to be a bailment and not a sale of the logs, and that the bailor retained his general property until the contract was fully executed. The cases of Barker v. Roberts, (8 Greenl. 101,) and Rightmyer v. Raymond, (12 Wend. 51,) as well as many others, are to the same effect. To be sure these are not cases in which old articles were to be improved by repairs put upon them; yet the bailment in each is of the same nature and class, locatio operis faciendi; and as to this question the same principle should apply to both.

If I employ a mechanic to make a new article for me, the right of property while the work is going on, may essentially depend upon the original ownership of the materials used in its construction. If they are his, or chiefly his, we have seen that the property remains in him. If, on the other hand, the materials used were mine, the general property is in me, although he may add some small proportion of his own materials. (Story on Bl. § 423; 1 Cowen's Tr. 289.) The distinction between these cases is, that the first is a contract for the sale of the article in futuro, the latter a pure bailment.

It was not pretended that the real design of the plaintiff and Rose was to have a new wagon made in the name of repairing an old one, and that such a trick was resorted to as a mode of placing the property in the vehicle while being constructed, beyond the reach of the creditors of Rose. We must assume that these parties acted with fairness and meant what they said; that the real object was as expressed, to repair an old wagon, and not to make a new one, although it must be admitted that the process of reparation has resulted in a substantial re-construction of the vehicle. Still the contract was for repairs, and not for a new wagon, which as between the parties to the contract should determine their rights. And as the contract was fair and free from fraud, the defendant, who stands in the place of the creditors of Rose, must abide by his rights. As between the plaintiff and Rose the property was in the former, and his right is the same against this defendant. No error of law therefore occurred on the trial of the cause.

Judgment affirmed.

WILSON v. MARTIN.

(40 N. H. 88.)

Trespass, for taking and carrying away two harnesses. Plea, the general issue. It appeared that the plaintiff, George L. Wilson, was the owner of the harnesses, and that, for the purpose of getting them cleaned and oiled, he carried them to the shop of one Page, who was a saddler and harness-maker by trade, and employed himself, in connection with his business as a saddler and harness-maker, and as a part of the same, in repairing, cleaning, and oiling harnesses. Page performed labor in cleaning and oiling these harnesses, and for that service was entitled to receive of the plaintiff the sum of two dollars. While the harnesses were thus in the possession of Page, and after he had performed the service aforesaid upon them, they were attached by the defendant, Asa Martin, as deputy-sheriff, upon a writ against one Morrison, as the property of Morrison; whereupon Page asserted his lien upon them for his labor done on the harnesses, as aforesaid, and refused to allow them to be taken from his possession by the defendant or anybody else until he was paid for such labor. The harnesses were moved from one room in Page's shop to another, and it was arranged between Page and the defendant that the harnesses should remain in Page's possession until his claim for labor was paid; the defendant agreeing that if it became necessary, or if he should desire to take them away, that he would first pay to Page the amount of Page's claim. While the harnesses remained in this situation, and within some two days after their attachment by the defendant as aforesaid, this suit was brought against the defendant for said harnesses, but not until after the plaintiff had demanded them of the defendant and he had refused to give them up. Page's claim for services has never been paid, and the harnesses remain, and have ever remained in his possession; and his lien on the harnesses for such services has in no way been released or discharged.

The court ruled upon the foregoing facts the plaintiff could not maintain trespass, and a verdict was thereupon taken for the defendant, and judgment is to be rendered thereon, or the same set aside and a new trial granted, as shall be ordered at the law term.

FOWLER, J. The right of lien at common law was originally confined to cases where persons, from the nature of their occupation, were under obligation, according to their means, to receive and be at trouble and expense about the personal property of others; and was limited to certain trades and occupations necessary for the accommodation of the public, such as common carriers, innkeepers, farriers, and the like. But in modern times the right has been extended so far that it may now be laid down as a general rule, to which there are few exceptions, that every bailee for hire, who by his labor and skill has imparted an additional value to the goods of another, has a lien upon the property for his reasonable charges in relation to it, and a right to retain it in his possession until those charges are paid. This includes all such mechanics, tradesmen and laborers, as receive property for the purpose of repairing, cleansing, or otherwise improving its condition. Cowper v. Andrews, Hobart 41; The Case of an Hostler, Yelverton, 67; and see the learned and valuable note of Mr. Justice Metcalf to this case, in his edition of Yelverton, 67, (a,) and the au-

thorities therein collected and commented upon; Green v. Farmer, 4 Burr. 2214; Close v. Waterhouse, 6 East 523, n. 2; 2 Kent's Com. (5th ed.) 635; Grinnell v. Cook, 3 Hill 491, and authorities cited by defendant's counsel passim; Oaks v. Moore, 24 Me. (11 Shep.) 214.

In the case at bar, Page had a lien upon the harnesses in controversy, for the labor and expense he had bestowed in cleansing and oiling them, at his election, and had a right to retain the possession and control of them until his charge in that behalf should be paid. He claimed his lien and asserted his right, and still so claims and asserts his interest in the goods. He has never parted with the possession of the harnesses, and still rightfully holds them against the plaintiff and all the world. By his assertion of his lien, his right to retain the possession of the harnesses, for the payment of his charges, became vested, and must so continue as long as he shall retain that possession. He manifestly did not waive or intend to waive his lien, in consenting to hold the harnesses for the defendant. He only received and agreed to hold them subject to his own lien; and the defendant consented that Page should so receive and hold them, and that he would not as an officer interfere with them until that lien should be discharged; so that the lien was not affected or impaired by the arrangement. Townsend v. Newhall, 14 Pick. 332.

The gist of trespass to personal property is the injury done to the plaintiff's possession. The substance of the declaration is, that the defendant has forcibly and wrongfully injured property in the possession of the plaintiff. To maintain the action, it is absolutely essential that the plaintiff should have had, at the time of the alleged injury, either actual or constructive possession of the property injured. His possession is constructive when the property is either in the actual custody and occupation of no one, but rightfully belongs to himself; or when it is in the care and custody of his servant, agent, or overseer, or in the hands of a bailee for custody, carriage, or other care or service, as a depositary, mandatary, carrier, borrower, or the like, where the bailee or actual possessor has no vested interest or right to the beneficial use or enjoyment of the property, or to retain it in his possession, but the owner may take it into his own hands at pleasure. But, where the general owner has parted with the actual possession, in favor of one who enjoys the exclusive right of present possession and enjoyment, retaining to himself only a reversionary interest, the possession is that of the lessee or bailee, who alone can maintain an action of trespass for a forcible injury to the property. 1 Ch. pl. (7th ed) 188, 195; 2 Gr. Ev., secs. 613, 614, 616, and authorities cited; Clark v. Carlton, 1 N. H. 110; Poole v. Symonds, 1 N. H. 289; Heath v. West, 28 N. H. 101; Moulton v. Robinson, 27 N. H. 550; Marshall v. Davis, 1 Wend. 109; Nash v. Mosher, 19 Wend. 431; Newhall v. Dunlap, 2 Shepl. 180; Gay v. Smith, 38 N. H. 171.

In this case, the plaintiff had parted with his possession of the harnesses, by delivering them to Page, to be cleaned and oiled. Page had cleaned and oiled them, and he thereby acquired, and had asserted the right, to retain them in his possession, even as against the plaintiff, until his charges for the labor and expense bestowed upon them should be satisfied. The plaintiff, then, had neither possession or the right of possession in the harnesses, at the time of the alleged injury to them, and could not maintain trespass. Cowing v. Snow, 11 Mass. 415, and authorities cited above.

It has been urged in argument that, although not liable for the original attachment, the defendant became liable by the subsequent demand of the plaintiff for the harnesses, and his refusal to deliver them up. But, if we are correct in the view, that the lien of Page having been asserted, gave him a vested right to retain the possession of the harnesses until that lien was satisfied or the possession parted with, and the lien had not been satisfied or the possession parted with by Page, as the case distinctly finds, then the plaintiff, at the time of the demand, had no right to the possession of the harnesses, and of course could not be injured by the refusal of the defendant to yield to him what he was not entitled to have.

The plaintiff, having at the time of the alleged injury to the harnesses by the defendant, neither the actual or constructive possession of them, but the same being then and still in the hands of his bailee, who had, and still has a vested right to retain them until the satisfaction of his lien thereon, there must be judgment on the verdict properly taken in the court below for the defendant.

Judgment upon the verdict.

WILLIAM A. RUSSELL
v.
BALTHASER KŒHLER.
(66 Ill. 459.)

Appeal from the Superior Court of Cook county; the Hon. William A. Porter, Judge, presiding.

MR. JUSTICE THORNTON delivered the opinion of the Court:

The defendant claimed, as a set-off to the notes and account sued on, the value of his carriage, which had been entrusted to plaintiff for repairs, and was destroyed by the fire which prevailed in Chicago in October, 1871.

The bailee took the carriage to repair, and as the contract was one of mutual benefit, only ordinary care was required of him. This is defined to be such care as a person of ordinary caution would exercise in regard to the property. No ordinary prudence could guard against or prevent the destruction of property during a calam-

ity so fearful as the fire in Chicago in October, 1871.

As to the existence of any special agreement to repair the carriage in a specified time, the testimony is extremely conflicting There is evidence to sustain the verdict, and there is no sufficient ground to set it aside.

Even if true, that the plaintiff said he would retain the possession of the carriage as security for the defendant's indebtedness to him, this would not make the plaintiff liable for the loss. The defendant, upon demand and tender of any expense incurred in repairing, could have regained the possession. When the carriage was permitted to remain with the manufacturer, the jury had the right to presume that the continued possession with the bailee was with the consent of the owner.

We are of opinion that the verdict was right, and, affirm the judgment.

Judgment affirmed.

JAMES T. MAYNARD & ANOTHER vs. JOHN W. BUCK.

(100 Mass. 40.)

Contract for the value of a pair of steers alleged to have been lost through the defendant's negligence. At the trial in the superior court, before Rockwell, J., the jury found for the plaintiffs; and the judge allowed a bill of exceptions of which the following is the material part:

"It appearing that the defendant was a drover engaged in driving cattle from Brighton to various points between that place and Worcester; that on November 9, 1865, the plaintiffs by their agents intrusted to him a pair of steers to drive from Brighton to Northborough for a stipulated price; that he received the same, marked them by citting in the hair the letter H, and left Brighton, according to his custom, on the afternoon of that day, with a drove of one hundred and twenty-three cattle. The evidence left it uncertain whether the steers were in the drove or had been stolen from the defendant's yard at Brighton before he started. The defendant offered evidence, not controlled by the plaintiff's evidence, tending to show that, at about dusk of said day, as he was proceeding with his drove, assisted by two men and a boy, when he had reached a point near the Boston and Worcester Railroad in Newtonville a passing train of cars frightened and stampeded the drove into the adjoining fields; that, as soon as he could, with the aid of his men, he got the drove back in the road and proceeded to the place where he stopped with it for the night; and that upon counting the drove it was found that nine cattle were missing. The defendant testified that the next morning he proceeded with his drove towards his destination; that he had cattle to deliver at various points, as far as Worcester, at which last place he arrived with the remainder of the drove on Friday evening, November 11; and that early the following morning he returned to seek the lost cattle, found seven of them, but was unable to find the steers in question.

"Upon the question of ordinary diligence, the defendant offered to prove a custom among drovers engaged in driving cattle for hire over this route and other routes from Brighton to points forty or fifty miles out, whenever it happens that one or a small number of cattle stray from a drove and cannot be immediately found, to drive on with the drove to their destination, and then return and seek for such stray cattle. The plaintiffs objected to this evidence; and the judge excluded it. Upon the same question, the defendant also offered to prove what it would cost to feed a drove of cattle of the size of the defendant's said drove; but, on the plaintiffs' objection, the judge excluded the evidence.

"The defendant asked the judge to instruct the jury that, 'in the law of bailments, the measure of ordinary diligence in any particular case is such diligence as men of common prudence ordinarily use, as a matter of fact, engaged in and about the same employment.' The judge declined to give this instruction in that form, but instructed them that 'the defendant was under obligation to take the same care of the cattle as prudent men ordinarily take of their own cattle under the same circumstances.'"

WELLS, J. One question at the trial was, whether the defendant was guilty of a want of ordinary care, in not returning at once to seek the lost cattle, upon discovering that they were missing, instead of proceeding with his drove to its destination. This must be determined with regard to all the circumstances of the case. Among those circumstances are, the difficulty of pursuing a search while the drove in his charge was in mid-route; and the expense of maintaining the drove during the necessary or probable delay. The usual practice, or mode of proceeding ordinarily adopted by drovers under like circumstances, when engaged upon routes of no greater length, from the same point, would have some bearing upon the question of what is ordinary care. It is involved in the comparison indicated by the term "ordinary."

The court are of opinion that the testimony offered by the defendant upon this point was competent, not to prove a custom, in the strict sense of that term, but to show the course of proceeding ordinarily pursued, as bearing upon the question of what is ordinary care. Cass v. Boston & Lowell Railroad Co., 14 Allen 448. The evidence so offered was applicable to a case when the straying cattle "cannot be immediately found"; and it is not expressly stated that any effort to find them immediately was made. But the ruling was apparently given upon general grounds, and not upon any deficiency in the defendant's other evidence which rendered inapplicable that which was offered and refused. For

the exclusion of the testimony so offered, the

Exceptions are sustained.

Upon a new trial, before Reed, J., there was evidence substantially as at the former trial concerning the receipt of the cattle on the morning of Wednesday, November 9, by the defendant at Brighton; and it appeared that when he received them he entered a memorandum of the receipt in a book in which he made similar record of all the cattle which were to compose his drove, and placed them, unwatched, in the furthest of three yards in which the drove was contained; that in the afternoon, half an hour before he was to start, he sent a person to count the number of cattle in that yard, who reported that there were thirteen, which was the number he had placed there; that when he started he first turned the cattle out of the other yards, and as they passd the third yard he let out the cattle which were in it, and when doing so saw that there were a pair of gray steers among them which did not belong to his drove, and accordingly turned them into an adjoining yard, but did not count the rest; that the drove consisted of one hundred and twenty-three cattle, and he had two men and a boy to assist him in driving; that he had reached Newtonville about half past five o'clock, when the stampede was caused by the railroad train; that he gathered the drove again, and went on as far as Newton Lower Falls, where he stopped for the night; that he counted the drove in the morning, and found nine cattle missing, and then proceeded to Worcester where he arrived on Friday evening, November 11, but did nothing towards the recovery of the missing cattle from the time of discovering their loss until Saturday, November 12, when he returned to Brighton and made some search for them, the nature and extent of which he related as a witness. "There was also evidence tending to show that the usual practice or ordinary mode of proceeding of drovers, driving on routes from Brighton forty or fifty miles therefrom, when one or a small number of cattle stray from the drove and cannot be immediately found, was to deliver the rest of the drove before returning to seek for the lost cattle. The witnesses testified in cross-examination that it was the practice to return or send for the lost cattle as soon as consistent with the safety of the rest of the drove. It appeared that the defendant dismissed the boy who assisted him, the first night, and supposed that he returned to Brighton; and that he dismissed one other of his assistants at Framingham some time the following day.

"The plaintiffs contended that the defendant was negligent in leaving his yard unwatched; in not having more persons with a drove of the size and character of his; in approaching the railroad at the time when he approached it; in not taking pains, when he found the gray cattle in his yard, to see whether the others were all there when he started; in not counting them on the road or on reaching his destination after the stampede; and in not sending back word and causing the cattle to be advertised and searched for as soon as the loss was discovered."

The defendant asked for the following instructions to the jury: "1. The defendant was bound to exercise the same degree of care and diligence that men of common prudence engaged in driving cattle for hire over this and similar routes ordinarily exercise with regard to the property intrusted to them. 2. Upon the question whether it was ordinary diligence for the defendant, when cattle were accidentally separated from his drove and were not immediately found, to drive on with his drove to his destination, and then return and seek for the cattle, the jury must inquire what is the usual practice or mode of proceeding ordinarily adopted by drovers under like circumstances, when engaged upon routes of no greater length than this, and from the same point. If that practice or mode of proceeding is similar to that the defendant adopted, then they must find that the defendant bestowed ordinary diligence in that particular. 3. So upon the question whether the defendant ought to have done anything further or different from what he did at Brighton after these cattle were delivered to him and before he started, the jury must inquire whether he did what drovers of common prudence ordinarily do under the like circumstances. If he did do the things that drovers of common prudence engaged in the same business ordinarily do, he was not guilty of such negligence in that particular as will make him liable in this action. 4. Upon the question of what was ordinary diligence in this case, the ordinary course of the defendant's business, the price he received, and all the circumstances of the case are to be taken into account; because the defendant was not obliged to make any outlay disproportionate to the compensation he received, to recover cattle that had strayed from the drove without his negligence. 5. If the jury find that the defendant was negligent in any particular, they must also find that that particular negligence was the cause of the loss, before they can charge the defendant for such negligence in this action."

The judge declined to give these instructions, but among other things instructed the jury "that, if the cattle in question were put into the defendant's hands, and he agreed to drive them for hire to Worcester, he was bound to use the same care in regard to them that men of ordinary prudence would exercise over their property under the same circumstances; that if he failed to exercise such care, and if by reason of such neglect the cattle were lost, the defendant would be liable"; and further said to the jury upon this point, "that the defendant was not an insurer; that his liability was not like that of a

common carrier, (which was to some extent explained to the jury,) but that he was only liable for the results of his want of ordinary care,—for his negligence."

"There was evidence in the case tending to show that the cattle in question were lost from the yard of the defendant in Brighton, and that the defendant at the time of starting with his drove might, with ordinary care, have known this. It was contended upon the evidence, by the plaintiffs, that this was so, and that the defendant did not then exercise ordinary care to ascertain whether they were so lost, and to find them if they were then lost. The judge instructed the jury that it would be a proper course for them to pursue in this investigation, to follow the defendant, in the testimony, from the time the cattle were put into his possession up to the time of his return from his home in search for the cattle, and through the search which he made, in order to ascertain whether at any point of time to which their attention had been called, he had been guilty of any negligence; and spoke of the different points at which it was contended that the defendant had been so guilty, and said to the jury that, in considering the question whether he had been guilty of negligence, they must remember and give due weight to the testimony of drovers and others who had been examined upon the usual mode of procedure and the practice of drovers under like circumstances.

"The judge further instructed the jury, the plaintiffs assenting, that the burden was on the plaintiffs to show negligence, and not upon the defendant to show diligence."

The jury again found for the plaintiffs; and the defendant alleged exceptions, which were argued at October term, 1869.

WELLS, J. The instruction that the defendant "was bound to use the same care in regard to" the cattle, which he undertook to drive for hire, "that men of ordinary prudence would exercise over their own property under the same circumstances," was correct, and in accordance with numerous authorities. Cayzer v. Taylor, 10 Gray, 274. Shaw v. Boston & Worcester Railroad Co. 8 Gray, 45. Shrewsbury v. Smith, 12 Cush. 177. Sullivan v. Scripture, 3 Allen, 564. Giblin v. McMullen, Law Rep. 2 P. C. 317. The degree of care to be required of one who is intrusted with the property of another for reward is not less than that which is to be expected of one who deals with his own property. If the first instruction asked for is based upon a recognition of such an obligation, it is only equivalent to that which was given by the court. But if the comparison with those "engaged in driving cattle for hire" was intended to indicate that one who drives for hire is bound to a less degree of care "because he is an hireling and careth not" for his charge, it asked for a rule which has never been recognized either as good law or good morals. The evidence as to the usual practice or mode of proceeding ordinarily adopted by drovers was held at the previous hearing to be admissible upon the question of ordinary care, because it tended to show what had been found, by the experience of others, to be most judicious or expedient in like emergencies; not because they were drovers for hire as distinguished from owners driving their own cattle.

The defendant further insisted that the jury should be instructed that, "if he did do the things that drovers of common prudence, engaged in the same business, ordinarily do, he was not guilty of such negligence as will make him liable in this action." But this is not the legitimate application of evidence admitted to show the usual practice in similar cases. The usual practice is made up of particular instances of conduct, by the limited number of individuals similarly engaged, within the knowledge of the witnesses who may be called to testify. That which is admissible in evidence is, not the particulars, but what the witnesses state from their knowledge of those particulars to be usual, or the course ordinarily pursued. The character for prudence, of those whose conduct or acts go to make up this usual practice, is not required to be shown. It forms no part of the inquiry. The effect and purpose of the evidence is to aid the jury in forming their judgment of what the party was bound to do, or was justified in doing, under all the circumstances of the case. What had been done by others previously, however uniform in mode it may be shown to have been, does not make a rule of conduct by which the jury are to be limited and governed. It is not to control the judgment of the jury, if they see that in the case under consideration it is not such conduct as a prudent man would adopt in his own affairs, or not such as a due regard to the obligations of those employed in the affairs of others would require them to adopt. It is evidence of what is proper and reasonable to be done, from which, together with all other facts and circumstances of the case, the jury are to determine whether the conduct in question in the case before them was proper and justifiable. We think the instruction asked for, in this particular, was not such as should have been given.

The instruction asked for, to the effect that "the defendant was not obliged to make any outlay disproportionate to the compensation he received, to recover cattle that had strayed from the drove without his negligence," and therefore that the price he received was "to be taken into account" upon the question of due diligence, was inadmissible. The price is undoubtedly graduated by the well known risks of the business, and accepted in view of those risks. The obligation to seek the recovery of straying cattle does not rest upon the ground that that special service is paid for in the consideration of the original contract to which it is incident. It arises because

it is incident to the principal contract, and, as such, is covered by its consideration. When an emergency occurs to bring that obligation into operation and make it onerous, he is not justified in any lack of faithful performance because in that particular event his compensation has proved inadequate to the burden.

The fifth instruction requested is correct, and unobjectionable, if taken to mean only that the jury must find both neglect and that the loss occurred by reason of such neglect. But that instruction was, in effect, given. To have given it in the form asked was unnecessary; and might mislead, by seeming to require the jury to determine, with too much precision, to which particular act or omission the loss should be attributed, when they might think there were several which coöperated to produce the result.

The instruction given as to examining all the defendant's conduct in relation to the cattle, "in order to ascertain whether at any point of time to which their attention had been called he had been guilty of any negligence," could not have been understood to authorize the jury to render a verdict against the defendant on account of any such negligence, unless they also found that the loss was occasioned thereby, as he had already instructed them.

Upon the whole case the court are of opinion that there is no sufficient ground shown for setting aside the verdict.

Exceptions overruled.

ROBERT J. DEAN et al., RESPONDENTS, vs. MARSHALL S. DRIGGS, APPELLANT.

(137 N. Y. 274; 33 N. E. 326.)

Appeal from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made February 19, 1892, which affirmed a judgment in favor of plaintiffs entered upon a verdict, and affirmed an order denying a motion for a new trial.

This was an action to recover damages brought by plaintiffs as transferees of two warehouse receipts issued by defendant.

The plaintiffs are brokers in the city of New York, and the defendant a warehouseman in that city. The defendant on the 28th of March, 1885, issued to one Max Von Angern two warehouse receipts similar in all respects except as to the name of the vessel in which the merchandise was imported and the quantity which was delivered. One of the receipts reads as follows:

"M. S. Driggs & Co.'s Warehouse.

"New York, March 28, 1885.

No. 1394. Marked

BC

1,500 Bbls

Negotiable. Duty Paid.

"Received from Max Von Angern, ex Grimaldo, in store 278-80 South street, to be held by us on storage, and to be delivered to his order on return of this receipt and payment of storage and charges, fifteen hundred barrels Portland cement.

Storage per month 4.

Labor.

"M. S. DRIGGS & CO."

The second receipt named the vessel Ruth as bringing the merchandise, and stated it to be 963 bbls. of cement (Portland). There had been actually delivered to the warehouseman the number of barrels of what was on each barrel described as Portland cement, as stated in the warehouse receipts.

Von Angern having obtained the receipts went with them to the plaintiffs and there executed a note for $3,500, and indorsed the warehouse receipts, and authorized the plaintiffs to deliver the note and the guaranty of payment indorsed thereon by plaintiffs at his request, together with the collateral securities (the warehouse receipts) to the Chemical National Bank of New York, and to receive the proceeds of the discount of such note. The plaintiffs did so and received the moneys from the bank arising upon such discount and delivered them to Von Angern. The note was not paid by Von Angern when due and upon his default the plaintiffs paid the same to the bank because of their guaranty of payment, and took back the note and the warehouse receipts.

At the time when the plaintiffs indorsed the note at Von Angern's request, they testified that they relied in doing so upon the statement contained in the warehouse receipts, that defendant had received the stated number of barrels of Portland cement.

After the note had been paid by the plaintiffs they inquired as to the whereabouts of Von Angern, but were unable to find him and in fact he had absconded. The plaintiffs then went to the warehouse of defendant and there opened and examined a number of the barrels, and the result of the examination was the discovery that the contents of the barrels were not Portland cement. The material which had been packed in the barrels was a hardened substance like clay or mortar, coarse in its grain and different from any cement and practically worthless, while Portland cement was worth from $2.25 to $2.50 per barrel.

The plaintiffs then commenced this action against defendant, and set up the above facts, and that they relied upon the defendant's statement in the warehouse receipts that he had on storage Portland cement, as therein stated. The complaint seems to have been founded also upon some allegations of negligence, in the care of the barrels, on the part of the defendant, so that by his fault the article was rendered worthless; but that allegation was not proved and the case rests upon the other facts alleged. The plaintiffs claimed to have been bona fide purchasers of the warehouse receipts for value, and that the defendant was bound to make good the truth of the statement therein contained that he had Portland cement on deposit, and they claimed damage to the amount of the Von

Angern note ($3,500), which they had paid with interest from the time of such payment.

The defendant denied all carelessness, and set up that he had received on storage from the importer the goods covered by the warehouse receipts referred to, and they had remained and then were on storage with him.

The question whether the article deposited was or was not Portland cement was litigated at the trial, and the case was submitted to the jury, upon the charge of the judge, that if the contents of the barrels were Portland cement of any description, however inferior in quality, the plaintiffs could not recover. Upon that issue the verdict was with the plaintiffs. The court also charged the jury that the plaintiffs had the right to demand, in this case, that the article should be Portland cement, and, if it were not, then they were entitled to recover from the defendant the principal of the Von Angern note, with interest.

The defendant asked the court to charge that to entitle the plaintiffs to recover on the receipts the jury must find the defendant knew the article was not Portland cement, and wilfully issued the receipts knowing that fact; also, that a warehouseman incurs no liability to the holders of a receipt issued by him whenever the goods are described according to their outward appearance, marks and description, except for their safe custody and return, unless he has knowledge or reason to believe that such description is untrue, and that a warehouseman is simply a custodian of the goods deposited with him on storage, and his liability does not extend beyond the proper care of the goods, and return of the same, on demand, on payment of storage, unless he wilfully misrepresents the character or condition of the goods. The requests were denied. Proper exceptions were taken to the charge as made and to the refusals to charge as requested.

The jury found a verdict for the plaintiffs for the full amount claimed.

PECKHAM, J. The question in this case is as to the meaning of the receipt issued by the defendant. Does it mean that the warehouseman acknowledges and asserts the fact that the merchandise delivered to him and consisting of twenty-five hundred barrels does in truth contain the genuine article, Portland cement, or does it mean that the warehouseman has received that number of barrels bearing the usual appearance of barrels in which Portland cement is packed and with the usual marks and signs thereon, and represented to him to be Portland cement, and which he in good faith supposes to be that article?

The defendant, at the time he received this merchandise, was a warehouseman, and in connection with his business he had a bonded warehouse under license from the United States government, and in it he received on storage imported, dutiable merchandise which could not be delivered until the duty was paid. The goods in question came to the defendant from the vessels named in the two receipts, which vessels came from Marseilles, France, from which place Portland cement is imported. The barrels came on trucks licensed to transport bonded merchandise, and when they came in the duty had not been paid. They were stored in the bonded warehouse under the joint custody of the defendant and a government officer. The duty was subsequently paid. The defendant testified that the warehouseman had not authority to open goods stored in a bonded warehouse without permission of the government.

These barrels the defendant testified were in character, appearance and style, the same as those in which Portland cement was imported. The brand on the barrel heads was "Wil. Neight & Co., Portland Cement, Trade Mark." There was also a label on each barrel to the same effect, and also some other signs and letters, all of them consistent with the idea that the barrels contained genuine Portland cement, and in brief the whole external appearance of the barrel was that of one in which Portland cement was usually imported. Upon these facts, the court charged as above stated.

We think the language of the receipts is merely descriptive of the barrels which defendant received.

It is meant to describe their outside appearance and that they were in truth marked and represented to be Portland cement. It cannot be that the language properly construed could mean that the warehouseman warranted such contents. If that were the meaning to be attributed to such a statement, the warehouseman could be safe only after he had examined critically and cautiously the contents of each box or barrel which he received. To do so would consume a great deal of time, and frequently necessitate the employment of experts who dealt in or were judges of the particular article claimed to be delivered, and they would have to make such an examination of the article as its nature demanded before an opinion could be arrived at.

Anyone at all familiar with the business of a warehouseman knows that he could not transact business if he were first to examine the contents of each package, barrel or box of merchandise which was delivered to him and so packed as to cover and conceal the real nature of the goods delivered. The warehouseman cannot be supposed to know the contents of barrels or boxes so delivered to him. All he can be fairly charged with asserting by the mere acknowledgment of the receipt of merchandise thus described is that the box or barrel in which it is packed bears the same outward appearance as does the box or barrel in which merchandise of the character described is usually carried, and that there is nothing unusual or out of the ordinary way of business in the marks, appearance, signs, labels or character of the barrel or

box from that in which goods of the character described are usually transported, and that the articles have been represented to him and that he believes them to be as described.

It has been urged that a warehouseman may easily protect himself from any liability by signing a receipt which in so many words acknowledges the receipt of barrels or boxes said to contain certain described merchandise, but the contents of which are unknown by the warehouseman, and which, therefore, he does not warrant. This is true, but it does not answer the objection to a warranty which arises out of the transaction itself. In its very nature it seems to me plain that no warranty as to contents can reasonably be implied under these circumstances from the use of such language as these receipts contain. Representations in a bill of lading or warehouse receipt which should be held to be warranties should be confined usually to those which the carrier or warehouseman may ordinarily be assumed to have knowledge of, or which he or his agents ought to know. As was said by Mr. Justice Hoar in Sears v. Wingate (3 Allen, 103, at 107), when speaking of a bill of lading, the master is estopped to deny the truth of the statements to which he has given credit by his signature, so far as those statements relate to matters which are or ought to be within his knowledge.

It is known and understood that the business of a warehouseman is not that of an inspector of property delivered to him, nor is he an insurer of the contents of packages. It is no part of the duty of the defendant as a warehouseman to have property inspected or its quality warranted, and no proceedings are supposed to take place to enable a warehouseman to become acquainted with the contents of packages for the very reason that in his business it is unimportant what such contents are. The general object of giving a description of the property in the receipt, is for purposes of identification only, so that the identical property delivered to the warehouseman may be delivered back by him upon the return of the warehouse receipt, and for such purpose it is sufficient to describe the property as it by its external appearance seems to be. Such a description is not calculated to mislead any one in regard to the actual contents of the package. When the warehouseman described in this case the outward appearance and marks and the numbers on the barrels, he did warrant the correctness of his description so far as to say that the numbers stated were in reality delivered and that they were marked as stated, and also that there was nothing unusual in the appearance of the barrels or in the direction, marks or labels upon the merchandise which would reasonably lead to any suspicion that the contents were not what they were represented to be.

A warehouse receipt does not differ in this respect from a bill of lading. In the one case the warehouseman agrees to keep, and in the other case the carrier agrees to transport the goods which he receives, but the acknowledgement of delivery either to the warehouseman or to the carrier is essentially the same and the same rules govern in the interpretation of the receipt. In Hastings v. Pepper (11 Pick. 41), Shaw, Ch. J., said that the acknowledging to have received the goods in question in good order and well conditioned would be prima facie evidence that as to all circumstances which were open to inspection and visible, the goods were in good order, but the carrier could show that a loss did in fact proceed from a cause existing at the time of the execution of the bill of lading, if it were not then open and apparent, and if he showed that fact it would be a defense. This statement is approved in Nelson v. Woodruff (1 Black. [U. S.] 156 at 160).

In Warden v. Greer (6 Watts, 424), Huston, J., in delivering the opinion of the Pennsylvania Supreme Court, held that generally a bill of lading could not be contradicted, but that if a captain were innocently to receive a barrel of corn instead of a barrel of coffee, or a barrel of cider instead of Madeira wine, or a package of cotton linen instead of flaxen linen; it would seem that his bill of lading would not and ought not to exclude him from proving this, as the captain does not open or otherwise examine the casks.

We think the rule is clearly expressed in Hale v. Milwaukee Dock Co. (23 Wis. 276; S. C., on second appeal, 29 Wis. 482). It is there stated (29 Wis. at 489) that the warehouseman or carrier in regard to packages which are so covered as to conceal their contents, receipts them upon the representation of the bailor and upon the external appearance corresponding therewith as to contents. He is not supposed to have any actual knowledge of their contents and the language of the receipt is not to be so understood. It is a warranty that the barrels are so represented and so appear to him to the extent of his knowledge or means of information on the subject, and as they are represented and appear to him, so he represents or describes them in his receipt.

In the Wisconsin case here alluded to, the warehouseman receipted for fifty-four barrels of mess pork. The Supreme Court held the defendant at liberty to show its readiness to re-deliver the identical property delivered to it and that the barrels when the defendant took them and unknown to it really contained nothing but salt. A verdict for the plaintiff (who was a bona fide holder for value) was, therefore, set aside and a new trial granted.

It was stated upon the argument here that a different doctrine prevails in this state and counsel cited as authority for such claim Jones on Pledges, §252. The learned author does so remark and the cases of Meyer v. Peck (28 N. Y. 590); Armour v. Railroad Co. (65 id. 111), and

Miller v. Hannibal & St. Jo. R. R. (24 Hun, 607), are cited as authority for such alleged difference.

In Meyer v. Peck the question did not really arise. The facts showed the draft was paid by the defendant because drawn upon him by his own agent and without the least reference to the bill of lading. Chief Judge Denio referred to the principle as well understood, that a bona fide indorsee for value of a bill of lading could claim the benefit of an estoppel in his favor as against the carrier, and he said that such indorsee could rely upon the quantity of the merchandise acknowledged in the bill and might compel the carrier to account for the same, whether it was placed on board or not. But it is clear enough that a carrier thus situated ought to be estopped from showing that a less quantity was received, because it was his own carelessness in certifying to a fact which was or at any rate ought to have been within his own or his agent's knowledge. When one has advanced money upon the faith of a statement thus within the knowledge of the person making it, I think all would agree that the latter cannot be heard to dispute it. A carrier or a warehouseman is not, however, supposed to know the contents of merchandise so packed as to conceal such contents and, therefore, his ignorance cannot be said to be carelessness. In Armour v. R. R. (supra) the same principle was announced. The defendant acknowledged in its bill of lading the receipt of a quantity of lard which in fact it had not received. Drafts were attached to the bill and were paid on the faith of the defendant's acknowledgment in the bill of the receipt of the lard. It was held that the defendant was bound by the acts of its agent who signed the bill of lading and that it was estopped from denying the receipt of the lard.

It would seem as if this decision were right upon the plainest principles of justice. A written declaration was made that acknowledged the receipt of property which in fact had not been delivered and which defendant's agent knew had not been delivered, but trusted that it would be. It was a statement of that nature which either was or necessarily ought to have been within the personal knowledge of the defendant's agents and as to such a statement another person had the right to believe it and act as if it were true.

The case of Miller v. Hannibal & St. Jo. R. R. Co. (supra) was reversed in this court in the 90th N. Y. 430.

The point under discussion in that case and the only one to which the attention of this court on appeal was directed was whether the written and printed part of the bill of lading should be read together, so that the printed part, which acknowledged the receipt of the merchandise "in apparent good order, contents unknown," should be construed in connection with the written part, which acknowledged the receipt of "30 bbls. eggs." It was held the whole should be construed together, and that the bill simply admitted the receipt of 30 bbls. described as containing eggs, but the actual contents of which were unknown. The judge, in the course of his opinion, said that if the description of the article were a representation that the barrels contained eggs, plaintiffs would have the right to recover, citing the case of Meyers v. Peck (supra). It was held that it was not. Although there was in the bill of lading the added expression, "contents unknown," yet there was no decision that in the absence of such expression the description would have amounted to a representation. That question was not before the court, was not in fact discussed directly, and was not decided. For the reasons already suggested, it would seem improper to so regard the description of merchandise which, when received, is so covered and packed as to securely conceal the actual contents from the carrier or warehouseman.

In First National Bank of Chicago v. Dean (decided at the January term and not yet reported) there was a direct written representation on the receipts that the brandy was stored in a "free warehouse" of defendant's, which expression means that the revenue tax or import duties have been paid on all goods there deposited. This was a representation of a fact which was within the knowledge of the defendant, and we held that he could not be permitted to show that the representation was untrue as against a bona fide holder for value of the certificates, who had purchased in reliance upon the representation that the brandy was "free." The real point in dispute there was, whether the plaintiff occupied the position of such a holder.

From this review of the authorities upon which it was claimed that the courts of New York had taken an exceptional stand, I think it quite plain that in truth no exceptional doctrine obtains here. I think that we in common with the courts of other states hold the carrier or warehouseman estopped in regard to any error or misstatement in the bill or receipt only when it amounts to a representation as to a fact which was, or in the ordinary course of business ought to have been, within his knowledge and which, therefore, such a third person acting reasonably would have a right to rely and act upon.

The court below, however, has sustained the right of the plaintiffs to recover in this case chiefly upon the provisions of the Factor's Act of 1858, as amended by that of 1866 (Chap. 326 of the Laws of 1858; chap. 440, Laws 1866). The first section of the amended act prohibits a warehouseman (among others) from issuing a receipt for any goods unless such goods shall have been actually received into the store or upon the premises of such warehouseman at the time of issuing the receipt.

The court held that if the goods were not Portland cement then the receipts issued by the defendant were untruthful and a violation of the above cited first section of the act.

We think the act was not intended to and does not reach this case. It was not passed in order to transform a warehouseman from a mere depositary to that of an insurer of the kind and quality of goods deposited with him. It was not intended to alter the law in regard to the character of such a representation as is contained in these receipts or to make it anything other than a description of property as above stated. We are quite clear the act does not cover such a case as this if we assume the defendant was honestly mistaken when he described the goods actually received by him as Portland cement. The court withdrew from the jury the question of the knowledge of the defendant as to the character of the merchandise received by him as entirely immaterial, and hence we must assume his ignorance in discussing his liability. The English statute to amend the law relating to bills of lading, passed in 1855 (18 & 19 Vic. chap. 111), recited that "it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a bona fide holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid." It was then enacted that bills of lading in the hands of a consignee or indorsee for value, representing goods to have been shipped on board a vessel, should be conclusive evidence of such shipment as against the master, notwithstanding the goods or some part had not been so shipped, unless the indorsee had notice, etc.

This statute evidently referred to a case where there had been no delivery of any goods or only a part delivery of the amount receipted for, and we think the section of the acts of the legislature of this state above cited, refers to the same kind of omission. Signing a receipt for goods actually delivered, but known by the signer to be something other than that described in the receipt, would be a fraud and amount to a false representation for which the signer would be liable in any event.

But this issue was not submitted to the jury.

It is urged that such a receipt is made negotiable. We do not see that its negotiability is of the least importance in the decision of this question. That there is a certain kind of negotiability attached to this kind of a receipt and to a bill of lading is not disputed. (Dows v. Perrin, 16 N. Y. 325; Dows v. Greene, 24 id. 638; Lickbarrow v. Mason, 1 Smith's L. C. [8th Am. ed.] 1159 and notes; § 6, Factors' Acts, above cited.

It is not the same thing as the negotiability of a promissory note or bill of exchange. It could not be in the nature of things, but by the indorsement and delivery of such a receipt or bill of lading, the indorsee for value and without notice is entitled to hold the property represented thereby under the circumstances stated in the above mentioned acts.

In this case the plaintiffs are entitled to be treated as the owners of the property which was deposited with defendant, and they are entitled to its re-delivery to them upon payment of the charges, just the same as the original owner would have been but for the transfer. When, however, the plaintiffs demand, not the identical property which was deposited with the defendant, but such property as would have been deposited had the description in the receipt been correct, the right to demand such a delivery must be based not upon the mere transfer of the receipt, but upon the principle of estoppel; such a principle as precludes a party who has made a representation upon which another has acted from denying the truth of that representation. Obviously the first inquiry must be whether such a representation has been made, and when it turns out that it has not, the estoppel falls to the ground. We have seen that the character of the representations made by defendant was nothing more than that he had in fact received twenty-five hundred barrels of what purported to be and was described to him as and what he believed was Portland cement, packed as such cement was usually packed and bearing the outward indicia of such article. There is in such a case no room for the application of that principle which decrees that when one of two equally innocent persons must suffer from the fraud of a third, that one should suffer who has enabled the third person to commit the fraud.

Upon the proper construction given to the language of the receipt the representation contained therein was true. If, however, the plaintiffs chose to regard a mere description of the outward appearance of property packed in barrels as a representation and warranty by defendant that the contents were actually as described in the receipt and to advance money upon the faith of such alleged representation, the fault lies wholly with the plaintiffs, who placed a degree of faith in the correctness of the description which was totally unwarranted from the nature of the transaction and for which the defendant ought not to be held responsible.

Our conclusion is that the trial judge erred in his charge to the jury above quoted, and in his refusals to charge as above requested, and for such errors the judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

FIFTH NATIONAL BANK vs. THE PROVIDENCE WAREHOUSE COMPANY.

(17 R. I. 112; 20 Atl. 203.)

Assumpsit. Heard by the court, jury trial being waived.

July 12, 1890. STINESS, J. Alverson, a produce dealer in Providence, borrowed of the plaintiff the sum of $1,950, upon a warehouse receipt of the defendant which read as follows: —

Providence Warehouse Co.

Providence, September 28, 1888.

No. 5175

Marks,

Stored in Section B.

Received on storage of C. F. Alverson & Co., subject to the order of the Fifth National Bank, three hundred and ninety (390) cs. eggs. To be delivered according to the indorsement hereon, but only on the surrender and cancellation of this receipt, and on payment of the charges payble thereon.

S. J. Foster, Mgr.

Across the face of the receipt was the word "Negotiable."

There were no distinguishing marks on the cases of eggs, and none noted in the margin of the receipt; but the eggs were placed by themselves in the defendant's loft. Alverson had other eggs in the warehouse, some of which may have been stored with these; but this lot was specially known to the manager and servants of the warehouse, from the fact that a portion of it got wet when the defendant was putting it into the warehouse.

November 1, 1888, the defendant delivered these eggs to Alverson, describing them by the receipt number, 5175, receiving the storage fees and giving the receipt therefor afterwards. The plaintiff sues to recover the value of the eggs. The defendant contends that having kept other cases of Alverson's eggs, subject to the plaintiff's order, it had the right, in the absence of distinguishing marks, to deliver the eggs stored under this receipt, and hence is not liable for such delivery without the plaintiff's order. To support this proposition the defendant cites the following cases: Dole v. Olmstead, 36 Ill. 150, 85 Amer. Decis. 397, and 41 Ill. 344; 89 Amer. Decis. 386; Preston v. Witherspoon, 109 Ind. 457; Rice et. al. v. Nixon, 97 Ind. 99; and National Exchange Bank of Hartford v. Wilder, 34 Minn. 149.

These are cases where grain was deposited, according to usage, in common bulk, being necessarily indistinguishable, and the several depositors were held to be tenants in common of the common stock. Consequently, in the first case, loss by diminution or decay was to be borne pro ratâ; in the second, where there was a mingling with grain of the warehouseman, who was publicly selling and shipping from the common mass, an apparent ownership and authority to sell was conferred upon him, so that the depositor was estopped to assert title against an innocent purchaser in the usual course of business; in the third case, where the warehouseman sold in the same manner, leaving enough to supply the depositor, the bailment continued, and the warehouseman was not liable for loss from an accidental fire, without negligence. These cases are, therefore, quite different from the case at bar, and depend upon very different considerations. Aside from the different points involved, it is obvious that grain in an elevator is practically incapable of distinction, and can hardly be stored without commingling. But it is not so with merchandise packed in cases. Jones on Pledges, § 318. The warehouseman can place them in separate lots, or he can mark them with the number of the receipt. Gardiner v. Suydam, 7 N. Y. 357, cited by the defendant, was a suit in trover between two holders of receipts, which covered more flour than the depositor had in store, the defendant's receipt being prior in date. It was held, as there had been no delivery by separation, marks, or otherwise, the plaintiff showed no title to the specific property sued for; and, treating the receipts as agreements to deliver, the defendant had as good a right to the flour as the plaintiff. Judge Comstock, who was counsel for the respondent in that case, afterwards held in Kimberly v. Patchin, 19 N. Y. 330,—also a suit in trover between purchasers from a depositor, upon a sale of grain,—that separation from a mass, indistinguishable in quality or value, was not necessary to pass title, when the intention so to do is otherwise clearly manifested. Neither of these cases, though growing out of warehouse receipts, throws any light upon the liability of a warehouseman.

In the case before us, the eggs were delivered without an order from the plaintiff, with full knowledge that they were covered by the receipt which stipulated they were subject to the plaintiff's order. It is urged in justification that these eggs were out of cold storage, and other eggs were kept in cold storage to answer the receipt. To this the plaintiff replies that the eggs covered by this receipt were fall eggs, fresher than the others and of greater value. However this may have been, we think it is clear that the plaintiff, under this receipt, has the right of a bailor, and is not bound to receive other property of this description in place of his own, which the bailee has intentionally delivered to another. The transferee has the right to suppose that the described property is held subject to his order. How is he to know that the warehouseman has mingled it with other like property, so as to be indistinguishable from it, if such were the case? Surely the warehouseman is bound to some degree of care and responsibility to enable him to deliver what he receives. If it is enough that he deliver anything answering the same general description, a warehouse receipt is indeed a precarious security. The delivery to Alverson, who deposited the eggs, is no defence, since by

its contract the defendant assumed the obligation to deliver only upon the order of the plaintiff, knowing, from the course of business, that the plaintiff had advanced money upon the receipt. The case therefore differs, in this respect, from Parker v. Lombard, 100 Mass. 405, cited by the defendant. That was a suit in trover by the holder of a receipt against the purchaser of a warehouse, who, without notice or knowledge of the receipt, and upon information given by his predecessor, had notified the apparent owners of some cotton to take it away. It was held that he was not liable to the plaintiffs for a conversion of the property. He had no contract with the plaintiff, and had been guilty of no negligence in trying to ascertain the ownership of the property. The case, however, is instructive, because it recognizes the rule that delivery to a wrong person is in itself a conversion by a bailee. Upon this point the opinion quotes the language of Mr. Justice Buller in Syeds v. Hay, 4 Term Rep. 260: "If one man, who is intrusted with the goods of another, put them into the hands of a third person, contrary to orders, it is a conversion;" which is the claim of the plaintiff in the case at bar. Bank of Rome v. Haselton, 15 Lea, Tenn. 216, is nearer in point. There, receipts had been given for iron, not identified, from which the warehouseman had allowed the depositor to take parts, and afterwards to restore the quantity taken. In a suit between the creditors of the depositor and the holders of the receipts, the latter claimed title to the whole then there, and the court allowed it, upon the ground that in effect there had been an unauthorized loan of the iron, for which the receipt-holders could have recovered the value if it had not been replaced; having been replaced before the rights of others intervened, it inured to the benefit of the receipt-holders, who had the right to ratify and adopt the unathorized act. Ferguson v. Northern Bank of Kentucky, 14 Bush, Ky. 555, is an elaborately considered case, which, like most of the cases on warehouse receipts, involves the question of title in the holder of the receipt. There it was held that a receipt for a number of hams procured by the owner, who had a larger number in store, without separation or distinguishing marks, carried no title for want of delivery. In criticising Kimberly v. Patchin, supra, the court suggested that as the vendor in that case thought he was selling all, the near approach to the entire quantity may have influenced the court in holding the defendant liable for conversion. The case differs from the one before us. Here there is no question of delivery; the receipt was not for part of a larger bulk, but for a specific lot, deposited at the time of the receipt, by acceptance of the bill of lading and removal from the cars by the defendant to its warehouse.

Stewart, Gwynne & Co. v. Insurance Co., 9 Lea, Tenn. 104, is almost identical with the case at bar. There receipts were given for forty bales of cotton, "marks various," deliverable only upon the indorsement of the secretary of the Phoenix Insurance Company. Upon the failure of Vaughn, the depositor, the warehouseman notified the secretary that creditors of Vaughn were replevying the cotton then in store, and requested him to take forty bales to secure the company, or to defend the replevin suit. The secretary inquired if he had the same cotton that was on hand when the receipt was given; and upon being informed by the warehouseman that he had not, the secretary declined to have anything to do with the matter. At the maturity of the note, for which the receipt was security, the company demanded the cotton or its value and then brought suit. The court held that the receipt was a contract, vesting the right to the particular forty bales in the company. Parole testimony was offered to show that the receipt was not to cover any particular forty bales, but that the warehouseman was to keep on hand as much as forty bales, of the same value, belonging to Vaughn, subject to the receipt. This evidence was rejected, upon the ground that its effect would be to show an independent collateral agreement, contradictory of the written contract, since both contracts could not stand. The company therefore recovered the value of the cotton. So in Hale et al. v. Milwaukee Dock Co. 29 Wisc. 482, it was held that a warehouse receipt was a contract, binding the receiptor to safely store and deliver the same goods to the holder of the receipt, except in those cases where there is some express agreement or known usage of trade which shows that the parties otherwise intended. Dixon, C. J., says: "The meaning of the receipt clearly is, that the same fifty-four barrels received in the store, and described as mess pork, are deliverable or to be delivered to the bearer of the receipt, on return of the same and payment of storage; and the warehouseman, not less than the ship-owner or carrier, is bound to deliver the identical goods received, in fulfillment of the contract." Consequently the warehouseman, having delivered the same barrels which he received, was held not to be liable, although they did not in fact contain mess pork, but only salt: as he acted in good faith and was ignorant of the contents of the barrels. In Goodwin v. Scannell, 6 Cal. 541, the court held that the defendants, being warehousemen, and having given their storage receipt for a specific number of barrels of pork, could not set up the want of segregation to avert their liability; that by their receipt they charged themselves and were estopped; that if a warehouseman would protect himself from liability in such cases, he could do so by describing the goods as part of a larger lot and unseparated, or in bulk with the goods of others, which would give notice to any transferee of the warehouse receipt of the condition of the goods, and enable him to use necessary diligence in obtaining the title to specific

property. See, also, Lichtenhein v. Boston & Providence R. R. Co. 11 Cush. 70.

We think the plaintiff's claim in this case, to hold the defendant responsible for the same goods covered by the receipt, is sustained both by principle and authority. The contract is a plain one, which must be answered according to its terms.

A question is made upon the measure of damages. The action is assumpsit, setting out that the defendant agreed to keep, and deliver on the order of the plaintiff, three hundred and ninety cases of eggs; yet, unmindful of said promise, the defendant delivered the same to a person unauthorized by the plaintiff, whereby the plaintiff lost said eggs, and the defendant became liable to pay for the same on request. This suit is upon contract, and properly so, although the gist of the action is the wrongful delivery. Judge Cooley, Cooley on Torts, *91, lays down the rule that where a tort is a breach of duty arising out of a contract, the action may be in tort or for the breach of the contract. Taking the case of a common carrier as an illustration, he says: "Thus for breach of the general duty imposed by law, because of the relation one form of action may be brought, and for the breach of contract another form of action may be brought. Other bailees of property occupy a similar position; they assume certain duties in respect to the property by receiving it." As to the damages, the defendant contends that the plaintiff should made demand for the eggs, and, having made none before suit, the measure of damages is the value of the eggs at the date of the writ, viz., March 11, 1889, at which time the eggs, if kept, would have spoiled. In actions of tort the rule is, that the plaintiff is entitled to the value of the property at the time of the conversion. It amounts to conversion when one disposes of property of another without authority, or puts it out of his power to return it, or deals with it in a manner subversive to the dominion of the owner. Donahue v. Shippee, 15 R. I. 453. In such cases a demand is not necessary. When, therefore, the suit is in assumpsit, we see no reason for requiring a demand after proof of the fact of conversion, nor for making the rule of damages depend upon a demand. Both the breach of the contract and the conversion were complete upon the unauthorized delivery of the goods. See Jones on Pledges, §§ 429, 574; Lichtenhein v. Boston & Providence R. R. Co., 11 Cush. 70; Newcomb-Buchanan Co. v. Baskett, 14 Bush, Ky. 658; First National Bank of Louisville v. Boyce, 78 Ky. 42.

The rule of damages should be substantially the same in either form of action. But in this case the plaintiff had only a special property in the eggs as pledgee, and, delivery having been made to the pledgor, the measure of damages is the amount of the plaintiff's loan with interest, it appearing in evidence that the value of the property at the time of the conversion exceeds that amount.

SULPHO-SALINE BATH COMPANY v. WINFRED E. ALLEN.

(66 Neb. 295; 92 N. W. 354.)

Error from the district court for Lancaster county. Action in nature of special assumpsit by bailor against bailee for hire. Tried below before Holmes, J. Judgment for plaintiff. Defendant brings error. Affirmed.

DUFFIE, C. The plaintiff in error operates a bath-house in the city of Lincoln, having among its other attractions a plunge bath. In the office where tickets are sold is a system of drawers or boxes in charge of an attendant who presents one of them to any patron having valuables about his person, in which the valuables are deposited, the box returned to its proper place and locked, and the key given to the patron. After taking his bath the visitor returns the key to the attendant, who unlocks and presents the drawer to the visitor, who, in this way, regains possession of such valuables as he may have deposited. On the evening of July 21, 1900, Allen, the defendant in error, visited the bath-house, in company with one Chase, for the purpose of getting a bath. On purchasing tickets, the attendant presented a box to each of them, in which they deposited their valuables, received the keys to their respective boxes, passed into the bath-room, each taking a separate dressing room, where they disrobed, and afterward enjoyed their bath in the plunge. Allen testifies that he placed the key given to him in his coat pocket and that on returning to his dressing room he noticed that his clothing had been disarranged by some one during his absence in the bath, and his key was missing. He immediately notified the attendant from whom he had received the key, and was told that his property could not be returned until the managing official opened the boxes. The next morning he called at the bath-house and had a talk with the manager, who told him that his key had been turned in, and that his property was gone; that detectives had been employed; and requested him to call again a day or two later. The second day thereafter Allen again called upon the manager, and was told that nothing further had been learned, and, on Allen's demand to be paid the value of his property, payment was refused. This action was thereupon commenced to recover the value of the deposit, which, in his petition, Allen alleges was a gold watch of the value of $45, and currency to the amount of $116.

The answer is as follows:

"For answer to the petition of the plaintiff defendant admits that on or about the 21st day of July, 1900, plaintiff came to the defendant's bath-house to take a swim in its swimming pool; that before he went into said pool he without any request from defendant placed in a drawer at defendant's counter certain effects the kind, character and value of which if the same had

value defendant was not at any time informed or advised, which drawer was securely locked and the key was then and there delivered to plaintiff who took the same away with him. Plaintiff never returned said key nor is defendant aware what disposition he made of it.

"Defendant denies each and every allegation and averment in the petition contained not hereinbefore specifically admitted.

"Wherefore defendant prays to be hence dismissed with costs."

We think the evidence fairly establishes the fact that a custom prevailed at the bathhouse of inviting its patrons, when they purchased a ticket entitling them to a bath, to place their valuables in one of the boxes described. That this made the company a bailee of the property, can not be doubted. The evidence shows that the house had many patrons, that the dressing rooms were not provided with locks, thus rendering it necessary that some place should be provided for the safe-keeping of such valuables as visitors might have about their person while taking a bath.

In Woodruff v. Painter, 16 L. R. A. [Pa.], 451, a retail dealer in clothing was sued for the value of a watch which, at the direction of a clerk, he had placed in a drawer while trying on a suit of clothes. The court said (page 452): "When the defendants opened a retail clothing store they thereby invited the public to come into their place of business and purchase clothing in the usual manner; and when they extended this invitation they assumed some duty to the people who should respond to it. Even the householder who permits the use of a path leading to his house is deemed to hold out an invitation to all people who have any reasonable ground for coming thither to pass along his pathway, and is therefore held responsible for neglecting to fence off dangerous places. 1 Addison, Torts, 203. So, too, a shopkeeper is liable for neglect on leaving a trap-door open without any protection by which his customers receive injury. Parnaby v. Lancaster Canal Co., 11 Ad. & El. [Eng.], 223. In like manner it can not be doubted that, if these defendants had maintained or permitted a danger of any kind in their store, and by reason of it the plaintiff had sustained bodily injury, they would have been answerable to him for the consequences. In such case they would be said to have been guilty of negligence,—guilty of a neglect of duty which they owed to the customer; but I apprehend that the duty neglected would arise from an implied contract that, if customers would come to their store, no harm that could reasonably be averted should overtake them, and the consideration for such promise would be the chance of profit from their patronage. Upon principle the contract must be held to extend to the safety of such property as the customer necessarily or habitually in pursuance of a universal custom carries with him. Whatever thus necessarily, or in common with people generally, he habitually carries with him, and must necessarily lay aside in the store while making or examining his purchases, he is invited to lay aside by the invitation to come and purchase, and, having laid it aside upon such invitation and with the knowledge of the dealer, he has committed it to his custody. And, this being a necessary incident of the business upon which the customer was invited to come to the store, the care of the property would be within the authority of the salesman assigned to wait upon him; it would be part of the transaction in which he is authorized to represent his employer. This much was assumed without question in Bunnell v. Stern, 122 N. Y., 539, 10 L. R. A., 481, a case differing from the present in this only: that the article lost was a lady's cloak, and the saleswoman took no care whatever of it. Assuming that the jury would have found that a watch is such personal belonging as men usually carry with them, and that in the selection of a suit of clothes it is necessary or usual to remove it from the person, and lay it aside; and, further, that the plaintiff, by direction of the defendants' salesman, placed his watch in a designated drawer in the store, preparatory to the selection of a suit of clothes, to purchase which he visited the store,—the defendants thereby became chargeable as bailees. The principles which govern that relation are briefly and clearly stated by Judge Story, in his work on Bailments, thus: 'When the bailment is for the benefit of the bailor, the law requires only slight diligence on the part of the bailee, and of course makes him answerable only for gross neglect. When the bailment is for the sole benefit of the bailee, the law requires great diligence on the part of the bailee, and makes him responsible for slight neglect. When the bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee, and makes him responsible for ordinary neglect. Manifestly the bailment, in a case like the present, is of the latter class, for, while the customer pays nothing directly, or eo nomine, for the safe-keeping of his effects, the dealer receives his recompense in the profits of the trade of which the bailment is a necessary incident. It was upon this principle that Lord Holt said, in Lane v. Cotton, 12 Mod. [Eng.], 473, 483, an action was sustainable against an inn-keeper for the loss of a guest's goods, and that the court of appeals affirmed the judgment of the court of common pleas of the city of New York in Bunnell v. Stern, supra."

The answer of the company, a bailee for hire, is peculiar. While admitting the receipt of the property, or of some property, there is no plea that ordinary care was exercised in its preservation or that it was lost or taken from the possession of the company without negligence on its part; and the evidence on the part of the defendant below is more barren than its plea.

We have searched the record in vain for any testimony as to what became of the property. So far as the record discloses, it may still be in the company's possession. The only evidence in the record that the property was claimed and taken by some third party is a statement made by Allen, that during one of his calls the manager told him that the key had been turned in and that the property was gone. This statement, not under oath, can not be taken as evidence of the fact, especially when we consider that tne manager and his clerk both testified on the trial, and made no attempt to show that the property was taken by a third party. Having received the property as bailee, the burden was on the defendant below to show that it was lost, if such was the case, without negligence upon its part.

Complaint is made of several of the instructions given by the court, and particularly those defining the law relating to contributory negligence on the part of the plaintiff. To review these instructions in detail would occupy too much time and unduly extend this opinion. It is sufficient to say that the defendant did not plead contributory negligence as a defense, and, if such a plea had been entered, there is no evidence from which contributory negligence on the part of the plaintiff could be inferred. The whole theory of the defense, as we gather it both from the answer and from the testimony offered by the defendant, was that it was under no obligation to return the plaintiff's property until he had returned the key of the box in which it had been deposited. No time need be spent in demonstrating the unsoundness of such a defense. If the company is still in possession of the plaintiff's property, or if it has been lost because of its want of ordinary care in its preservation, it must answer in damages for its value, even though the plaintiff below is unable to return the key through its being lost or stolen from him. The verdict is the only one that could have been returned under the evidence, and technical error in the instructions, if any such there be, is error without prejudice.

Exception was taken to the action of the court in overruling the objections of the plaintiff in error to the use of the deposition of the defendant in error. The defendant in error is now a resident of the state of Washington, and his deposition was taken and used upon the trial. The certificate of the notary before whom the deposition was taken did not have an internal revenue stamp attached, and it is claimed that this rendered the deposition inadmissible in evidence under the provisions of the act of congress of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes." We have already held that the federal congress has no authority to make rules governing the admission of evidence in the courts of this state, or to determine what shall be competent or incompetent. Noble v. Citizens' Bank of Geneva, 63 Nebr., 847.

We discover no reversible error in the record, and recommend the affirmance of the judgment.

AMES AND ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

Affirmed.

EATON
v.
LANCASTER AND OTHERS.

(79 Me. 477; 10 Atl. 449.)

On exceptions by plaintiff from supreme judicial court, Lincoln county.

Action on the case to recover damages for the loss of a horse destroyed by fire in the stable of the defendant. The presiding judge ordered a nonsuit after the planitiff's evidence was introduced, and the plaintiff alleged exceptions.

LIBBEY, J. After the plaintiff's evidence was all out, the presiding justice ordered a nonsuit, to which the plaintiff excepted. If there was any evidence which, if believed by the jury, would authorize a verdict for the plaintiff, a nonsuit should not have been ordered. The following facts are not controverted. On the eleventh day of July, 1885, the defendants were livery-stable keepers in Belfast, and on that day the plaintiff's horse and harness were delivered to them at their stable to be kept for hire for an indefinite time. In the night of that day the stable took fire from some cause, and the plaintiff's horse, and all the horses in it, but one, were burned. About 1 o'clock in the night three men, McCabe, Twombly, and Casey, drove into the stable a team belonging to the defendants, which they had been using. They were to some extent intoxicated. After the team was put up they went into the loft of the stable which was full of dry hay, to stay during the night. About half an hour after the stable was on fire in the loft, and Twombly and Casey were burnt in it, McCabe escaping slightly burned. McCabe and Twombly were servants of the defendants, employed in their stable during the day, but were not on duty that night, and were not doing any act for the defendants. One McIntosh was a servant of the defendants, and that night was charged with the duties of night watch, and the general care of the stable. One of the regulations of the defendants for the care and management of the stable, was that no one should be permitted to sleep in the loft during the night. McIntosh knew that the three men were smokers, smoking pipes, and were in the habit of carrying their pipes and matches with them.

The plaintiff claims that he made out his right to recover on two grounds: First, that the fire was set to the stable carelessly by the three intoxicated men, two of whom were then in the employ of the defendants.

Second, that the three intoxicated men were permitted by McIntosh, the night watch, to go into the loft to sleep, and that that act was not the exercise of due care over the plaintiff's property, and that by reason of that careless act the stable was burned, and the plaintiff's horse and harness were destroyed.

By the contract of bailment the defendants were bound to exercise ordinary care over the plaintiff's property,—that degree of care which prudent and careful men would exercise over their own property under the circumstances. They were liable for the negligence of their servants in the performance of any duty in regard to the care and custody of the plaintiff's property, within the general scope of their own employment.

As to the first ground of the plaintiff's claim, we think it entirely fails, as neither of the three men were in the performance of any act for the defendants during that night, but were acting as they pleased for their own pleasure.

Upon the second ground of the plaintiff's claim there is more doubt. The plaintiff's claim is that McIntosh permitted the intoxicated men to go into the loft for the night; that this was within the scope of his general employment, and in the performance of his duty as night watch; that it was a careless, negligent act on his part for which the defendants are responsible, and was the proximate cause of the loss of plaintiff's property. These propositions are all controverted.

The first fact embraced in this ground of claim is that McIntosh permitted the three intoxicated men to go into the loft to sleep for the night. The burden is on the plaintiff to prove it. The only direct evidence in regard to it comes from McIntosh. He says the men went up in his presence: "They came into the office where I was before going up to lie down up-stairs; they then stepped out of the office and went across the barn floor to go up into the loft, and did go up into the loft—a hay loft—loose hay in it; should say the loft was sixty to seventy-five feet long and perhaps thirty-five feet wide It was full of dry hay." "Question. Did you make any objections to their going up into the loft? Answer. I did. I told them I should not go up there; says I, 'Boys, you better go up and lie down with me; there is plenty of room up-stairs.'" He further said he never knew them to go up there and lie down before; he knew it was against the rules. McCabe, one of the three men who went up, was a witness, but did not testify upon this point. This was all of the evidence as to what McIntosh did to prevent their going. Might the jury infer his consent from his testimony and the surrounding circumstances? We think they might. True, he says he objected; but when he states what he said to them, it appears more like advice, feebly expressed. He does not state their answer. He did not tell them they must not go, it was against the rules; nor did he interpose, nor attempt to interpose any force to stop them. They appear to have been friendly to him, two of them fellow-servants, working with him by day; and it is fair to presume that they would not have needed any vigorous objections on his part; but as soon as they went into the loft he went to his sleeping place and went to sleep. He was not a willing witness against the defendants, was still in their employ, and testifying to sustain his own conduct. The jury might well infer that, if he objected at all, his objection was of the character which is equivalent to consent. Was permitting them to go into the hay loft in their then condition, knowing that they were smokers, and carried their pipes and matches with them, to stay during the night, a want of due care? This was a question of fact for the jury, and we think that they might properly so find. It may be assumed that the defendants thought so, as, by one of their rules, they had forbidden it.

Are the defendants responsible for this negligent act of their servant McIntosh? We think so. It was an act directly in the line of his duty as a night watch, in charge of the stable. The fact that his negligence was in violation of the defendants' orders, if it was within the general scope of his duties, does not relieve the defendants from responsibility. The case is not like Williams v. Jones, 3 Hurl. & C. 256, 602, 33 Law J. (N. S.) Exch. 297, to which our attention is called, where a carpenter was employed by A. with B.'s permission to work for him in a shed belonging to B., and the carpenter set fire to the shed in lighting his pipe with a shaving. His act, though negligent, had nothing to do with his employment as A.'s servant, and was not within the general scope of his duties. Here the negligent act is directly within the line and purpose of McIntosh's employment. It is more like Whatman v. Pearson, L. R. 3 C. P. 422, where a carpenter having an allowance of an hour's time for his dinner in his day's work, but also having orders not to leave his horse and cart or place where he was employed, happened to live hard by, and, contrary to his instructions, he went home to dinner and left his horse and cart unattended at his door. The horse ran away and did damage to the plaintiff's railings, and the master was held liable.

The remaining inquiry is, was the negligence of McIntosh the proximate cause of the loss? The rule, as claimed by the counsel for the defendants, is that the injury must be such as according to common experience and the ordinary course of events might reasonably be anticipated. Admitted; and then it is a question for the jury. We think the jury would have been authorized to so find. To what extent the men were intoxicated was a fact for the jury. If to the extent to deprive them, substantially, of the use of their mental and physical powers, and they were in the

habit of smoking, carrying matches for a light, might not in fact what occurred have been "reasonably anticipated?" If it was negligent to let them go into the loft to stay under the circumstances, it must have been on account of danger from fire. There appears to have been no other danger to be apprehended. The negligence involved was permitting them to go into the loft to sleep. If, in their condition, they were a dangerous element there, the defendants must be held responsible for their acts. The case is the same in principle as where a railroad company, through its agents or servants, knowingly or negligently permits an intoxicated man to enter its cars among the general passengers, and, from intoxication, he commits an assault upon a peaceable passenger; in such case the company is liable. True, the degree of care required in the two cases is different; but, as far as the test of proximate cause is involved, the principle is the same. Exceptions sustained.

WALTON, VIRGIN, FOSTER, and HASKELL, JJ., concurred.

DE MOTT & INGERSOLL vs. LARAWAY.

(14 Wend. 225.)

Error from the Seneca common pleas. Laraway sued De Mott & Ingersoll in a justice's court to recover freight due to him as a common carrier. It was conceded that the amount was $39; but the defendants interposed as a defence the neglect of the plaintiff to deliver a hogshead of molasses, which he had received for transportation. Laraway was the owner and master of a canal boat, and received on board his boat at Troy, a hogshead of molasses and other goods belonging to the defendants to be transported to Kidder's Ferry, being a landing place nearest to Farmersville, where the defendants transacted business. All the goods were safely transported and delivered to the defendants, except the hogshead of molasses. The boat arrived at Kidder's Ferry, and in the attempt to hoist the hogshead of molasses into a warehouse, the usual place for the delivery of goods for Farmersville, the fall (part of the machinery for hoisting attached to the warehouse) broke, and the hogshead fell back into the boat, was stove, and most of the molasses was lost. At the time of the accident, the hogshead was clear of the boat, and almost up to the sill of the door of the warehouse. One of the defendants was present, and had wagons there in which some of the goods were loaded. The value of the molasses was proved. The justice gave judgment in favor of the defendants for $12.87. The plaintiff sued out a certiorari, and the common pleas of Seneca reversed the justice's judgment. Whereupon the defendants sued out a writ of error.

By the Court, SUTHERLAND, J. The court of common pleas erred in reversing the judgment of the justice. Laraway was a common carrier upon the canal, and as such undertook to transport the defendants goods from Troy to Kidder's Ferry. This necessarily included the duty of delivering the goods there in safety. They were all thus delivered except a hogshead of molasses, which was stove, in the act of being unladen; as they were hoisting it from the boat, with a tackle attached to a storehouse upon the bank of the canal, the rope broke, and the hogshead fell into the boat, and most of the molasses was lost. Although one of the defendants was present, there is no pretence that he had accepted the molasses as delivered, previously to the accident, or that he had anything to do with the delivery. The delivery was not complete when the accident occurred, and the goods were still at the risk of the carrier. It is a matter of no importance that the machinery employed in unlading the boat was attached to and belonged to a store on the bank of the canal, and not to the carrier's boat. It was pro hac vice his tackle, and he was responsible for its sufficiency. When the responsibility of a common carrier has begun, it continues until there has been a due delivery by him. 4 Kent's Comm. 604; 4 T. R. 581; 5 id. 389.

The objection of the defendant in error, that the claim of the defendants for the injury sustained by them, was not a proper subject of set-off, is disposed of by the stipulation of the parties that the whole matter should be submitted to the justice.

Judgment reversed.

IRA MERRITT vs. OLD COLONY AND NEWPORT RAILWAY COMPANY.

(11 Allen 80.)

Tort against a railroad corporation to recover for damages done to a caloric engine sent by the plaintiff to the depot of the defendants in South Boston for transportation to South Abington, while being loaded upon the cars.

At the trial in the superior court, before Morton, J., the plaintiff introduced evidence tending to show that the engine was carried by a truckman, and upon its reaching the depot the train for the day had gone, and the laborers at the depot had gone to dinner; that he notified the defendants' freight agent that he had come to deliver the engine, which was on a sled, and the agent replied that the men had gone to dinner and directed him to drive near a derrick, by a certain track, at which place heavy articles were loaded upon the cars, and there wait till the return of the men, who would run a car there and put the engine on board; that he did so, and when the men returned they ran a car there and commenced loading the engine, the agent of the defendants superintending and directing the work; that they put a chain round the engine and commenced hoisting, when the chain slipped; that they

put it round again and the truckman tied it on with a rope so as to prevent its slipping, and they hoisted it again, when the engine swung heavily against the car, breaking it badly; that the boom of the derrick was not over the sled, and the derrick could not be worked properly, because it was frozen at the bottom. The derrick and chain belonged to the defendants.

The defendants introduced evidence tending to show that the laborers received their orders from the truckman, as to the mode of unloading the sled; that the freight agent requested the truckman to back his horse and sled, so that the engine might be directly under the end of the boom, but the truckman, in attempting to do so, started his horse forward, and pulled the sled from under the engine, by reason of which it swung against the car; and that the derrick was not frozen, but worked properly and freely.

The judge instructed the jury that the defendants' liability as common carriers commenced when the engine was delivered to and accepted by them for the purpose of transportation; that until such delivery the truckman, who was also a common carrier, would be liable; but after such delivery and acceptance the defendants would be liable for the negligence of those employed by them to load or transport the engine; that it was for the jury to determine from the evidence whether there had been such delivery and acceptance, and that in order to constitute such delivery and acceptance it must appear that the defendants had through their agent taken and assumed the charge and custody of the engine, for the purpose of transportation.

After the charge, the defendants requested the court to instruct the jury what was in law an acceptance under the circumstances claimed by either side in this action; but the judge declined to give any further instructions upon this point. The defendants further requested him to instruct the jury that if the accident happened by the joint negligence of the defendants' servants and the truckman, while acting in concert under the directions of the truckman, the defendants would not be liable; but the judge declined so to rule, and upon this point instructed the jury that if the accident happened before a delivery by the truckman the defendants would not be liable; but if, after such delivery and acceptance as above stated, the accident happened through the joint negligence of the defendants' servants and the truckman in assisting them to load the engine, the defendants would be liable.

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

DEWEY, J. The instructions given were correct, and sufficiently full to guide the jury as to their verdict.

The plaintiff introduced evidence tending to show that the engine was carried by a truckman to the freight station of the defendants, to be transported to South Abington; that notice of its arrival was given to the freight agent, who directed the truckman to drive near a derrick by a certain track at which heavy articles were laden upon the cars, and there wait till the men came, when they would run in a car and put it on board; that the truckman followed this order, and the men came, run in a car, and commenced loading the engine, the agent of the defendants superintending and directing the work, and the truckman being present also, giving assistance to prevent the chain which had been placed around the engine from slipping. The mode of placing the engine upon the cars by means of a derrick was an arrangement of the defendants, and they provided the derrick for that purpose.

The evidence on the part of the defendants, as to the superintendence and control of the operation of removing the engine from the sled of the truckman to the cars, conflicted with that of the plaintiff; and this was submitted to the jury. It became necessary to ascertain at what point, as respects the rights of the bailor, the truckman's responsibility for the safe transportation of the engine ceased, and when the same was cast upon the defendants. The court properly ruled that it was when the engine was delivered to and accepted by them for the purpose of transportation, and that in order to constitute such delivery and acceptance it must appear that the defendants had through their agent taken and assumed the charge and custody of the engine for the purpose of transportation. Story on Bailm. § 453.

Of course in deciding the question when the custody does thus attach, much will depend upon the manner in which they receive goods for transportation, the provision they make for raising heavy articles into their cars, and the active participation of the agent of the company in reference to the same.

As to warehousemen, it has been held that as soon as the goods arrive and the crane of the warehouse is applied to them to raise them into the warehouse, the liability of the warehouseman commences, and it is no defence that they are afterwards injured by falling into the street from the breaking of the tackle. Story on Bailm. § 445.

In the opinion of the court, the instructions were sufficiently full, and the further instructions asked were properly refused.

Exceptions overruled.

SIMON A. LICHTENHEIN vs. THE BOSTON AND PROVIDENCE RAILROAD COMPANY.

(11 Cush. 70.)

Assumpsit to recover the value of a case of merchandise. The plaintiff claimed to charge the defendants only as warehousemen. The case was admitted to have been transported by the defendants over their

railroad from Providence to Boston, and to have been received at the depot in Boston on the 18th of March, 1850; that it was called for on the 18th of April following by the plaintiff's agent, and could not then be found. The defendants introduced evidence tending to show that the way bills of merchandise, received at the defendants' depot in Boston, were copied into a book, and that when merchandise was delivered from the depot, the name of the person to whom the merchandise was delivered, was inserted in pencil in the margin of said book, against the article delivered, and that this was the only evidence taken by the defendants of the delivery. The plaintiff contended that this was a careless mode of doing such business, and offered evidence that all the other railroad companies in Boston adopted a different mode, namely, that of taking receipts of the parties who received merchandise; but Hoar, J. in the court of common pleas, ruled that the evidence was inadmissible. The plaintiff further contended that the burden of proof was on the defendants to show not only the loss of the case of merchandise, but the manner of the loss. The judge ruled that to maintain the action, it was only necessary for the plaintiff, in the first instance, to show the receipt of the goods by the defendants and their failure to deliver them upon demand; that this imposed upon the defendants the duty of accounting for them; but that the defendants were not bound to show affirmatively in what precise manner the loss occurred; but only, if they were unable to prove, how it occurred, to show clearly that they had exercised ordinary care respecting the goods, and that the loss did not happen from any negligence or want of ordinary care on their part. The judge further ruled, that if the case was taken by mistake from the depot, and the defendants exercised ordinary care in the matter, the defendants would not be answerable for a loss under such circumstances; but that if the agent of the defendants delivered it by mistake to a wrong person, the defendants would be responsible.

The jury found a verdict for the defendants, and the plaintiff excepted to the above rulings.

DEWEY, J. 1. As to the ruling of the presiding judge, excluding the testimony offered by the plaintiff tending to show that other railroad companies require written receipts from those to whom goods are delivered from the warehouse of the company, and that such mode was a better one than that of the defendants, which was writing the name in pencil of the party who received an article, in the margin of the book against the article delivered, we are of opinion that it furnishes no ground for a new trial. If the case had been one of actual delivery to a third person by the agent of the defendants, and the question had been whether the mode of the defendants furnished equal security for ascertaining to whom the article had been delivered, the question whether a general usage of railroads in this matter might not have been admissible to show negligence, might have required further consideration. But as to the present case, the proposed evidence was wholly irrelevant. There is nothing in the case to show that any delivery of the property took place as between the defendants and any individual. If their mode had been like that of other companies, yet no receipt would have been taken by them, because, upon their hypothesis, there had been no delivery. The position of the defendants, on the contrary, is that the goods were fraudulently abstracted from their custody.

2. The further question is one of more importance. It arises upon a prayer for instructions to the jury that the burden of proof was on the defendants to show not only the loss of the goods from their warehouse, but the manner of their loss. The court so far adopted the prayer as to rule that the burden of showing the loss of the articles from their custody, and that such loss had not been occasioned by any want of ordinary care and diligence on their part, was on the defendants. The court, however, further ruled that they were not bound to show the precise manner in which the loss occurred, but that if unable to do this, they might exonerate themselves from that burden, by clearly showing that the loss did not happen from any negligence or want of care on their part. This, taken with the qualifications, is unobjectionable. But generally the carrier would have to show some mode in which the loss occurred, to sustain the burden on him, and establish the fact that the loss had not happened through his negligence. To hold as an abstract proposition that he must in all cases show the precise manner in which the goods were taken from him, or destroyed while in the warehouse, might in some cases charge him unreasonably.

3. We had more doubt at the argument upon another part of the instruction, namely, "if the article was taken by mistake from the depot, and the defendants exercised ordinary care in the matter, they would not be responsible." That doubt arose from the apprehension that this ruling might be taken to convey the idea that if the goods, while in the warehouse of the defendants, were taken away by a third person as his own, through mistake, although in the presence of the agents or servants of the warehousemen, and with their knowledge, but without a manual delivery by them, the defendants would not be liable therefor, if in their general care and supervision of their warehouse, they were guilty of no want of ordinary care and negligence.

As a matter of law, it must be held in a case like the present, that if there had been an actual delivery by the warehouseman of the goods to a third person by mistake, the warehouseman would be liable for the goods, and any attempt to show he was in

the exercise of ordinary care and prudence, would be unavailing. Such delivery to a third person, overrules all such grounds of excuse, and charges the warehouseman. And this seems to have been substantially stated by the presiding judge in the subsequent part of the instructions, where he says, "but if the agent of the defendants delivered it by mistake to a wrong person, the defendants would be responsible." We think, upon a proper construction of the whole charge, it must be understood that the defendants were to be charged in case there had been on the part of their agents a delivery to a third person, either actual or permissive. It would be a delivery for which the warehouseman would be chargeable to the owner, if by his silence, being present and knowing the same, he permitted the act of a third person, who should take the goods into his possession, and remove the same from the warehouse. Such permissive delivery, although entirely by a mistake as to the person, and under the supposition that he was the true owner, would not be the less a default of the defendants.

Taking the charge together, we understand the instruction to be, that if the article was taken by mistake by a third person from the depot, without the knowledge or implied assent of the warehouseman or his agents, the defendants, if they could show that they had in fact exercised ordinary care and diligence as to the custody of the goods, would not be responsible. If this be a correct view of the instructions, we perceive no sufficient ground for setting aside the verdict.

Exceptions overruled.

CROMWELL vs. STEPHENS.

(2 Daly 15.)

Motion for an injunction.

This action was brought by Charles T. Cromwell against Thomas Stephens and others, composing the Croton Aqueduct Board, for the purpose of obtaining an injunction to restrain the Board from stopping the supply of the Croton water to a building owned by the plaintiff. The question involved turned upon the character of the building, and the mode in which it was used; the facts respecting which are stated in the opinion of the court.

DALY, F., J. This is an application for an injunction to restrain the Croton Aqueduct Board from cutting off the Croton water from a large building at the corner of Frankfort and William streets, owned by the plaintiff, which is used as a cheap lodging-house.

The ordinance of the city corporation, establishing the rate of water rents, provides that hotels and boarding houses shall, in addition to the regular rate for private families, be charged for each lodging room, at the discretion of the Croton Aqueduct Board. The Board, upon the assumption that the plaintiff's building is a hotel, have imposed an additional tax of $180 annually. The plaintiff insists that it is not a hotel, and has refused to pay the additional tax, in consequence of which the Board have notified him that they will, if it is not paid, cut off the Croton water from the building; and the present application is to stay them from carrying that resolution into effect.

It appears that the building is a large structure of eight stories, each story consisting of lodging rooms, adapted to the use of one person only, and above the basement it is used exclusively as a lodging-house; that the rooms are very small, being from four to six feet wide and eight feet long; that they are intended for poor people, being let at the small rate of twenty-five cents per night, and the water used in each room does not exceed, upon an average, a pint a day, whereas the rooms in ordinary hotels are four times as large, can be occupied by four times as many persons, and the water used in such rooms is ten times greater; that there is not a sufficient supply of Croton water above the first floor; that four-fifths of the time it does not rise above that floor; that between seven o'clock in the morning and six in the evening there is no supply above the basement, and it could not be obtained between these hours for the use of the floors above, unless it was carried up from the floor below, at a great expenditure of time and labor; that the water for the supply of the rooms and for cleaning and ordinary use, above the second-floor, is supplied by a huge tank, which the plaintiff has caused to be erected at his own expense in the attic, into which the rain-water flows that falls upon the roof; that there is no cooking for guests, the house above the basement being adapted only for sleeping in, and not one-quarter as much water is used by each individual as would be used in a private house with the same number of people; that upon an average sixty-five out of the one-hundred and eighty rooms are untenanted, and yet the rate imposed by the Board is for one hundred and eighty rooms; that there is no bar or place for drinking or entertainment attached to the premises or connected with its occupation; there is a restaurant and a barber's shop in the basement, but each of them pays separately for the supply of Croton water which it receives.

This being the character of the building and of the uses to which it is applied, the question presented and the only one discussed upon the motion, is whether it is a "hotel"; a question the solution of which depends upon the meaning of that term.

Ordinarily, in a legal inquiry, it is sufficient to refer to some approved lexicographer to ascertain the precise meaning of a word. But this is a word of wide application, and as the meaning, which is to be attached to it in this country, has been the subject of much discussion upon the argument, it may be well to refer to its origin and past history, as one of the

means of determining its exact signification. The word is of French origin, being derived from hostel, and more recently from the Latin word hospes, a word having a double signification, as it was used by the Romans both to denote a stranger who lodges at the house of another, as well as the master of a house who entertains travelers or guests. Among the Romans it was a universal custom for the wealthier classes to extend the hospitality of their house, not only to their friends and connections when they came to a city, but to respectable travelers generally. They had inns, but they were kept by slaves, and were places of resort for the lower orders, or for the accommodation of such travelers as were not in a condition to claim the hospitality of the better classes. On either side of the spacious mansions of the wealthy patricians were smaller apartments, known as the hospitium, or place for the entertainment of strangers, and the word hospes was a term to designate the owner of such a mansion, as well as the guest whom he received. (Andrew's Lex.) This custom of the Romans prevailed in the earlier part of the middle ages. From the fifth to the ninth century traveling was difficult and dangerous. There was little security except within castles or walled towns. The principal public roads had been destroyed by centuries of continuous war, and such thoroughfares as existed were infested by roving bands, who lived exclusively by plunder.

In such a state of things there could be little traveling, and consequently the few inns to be found were rather dens to which robbers resorted to carouse and divide their spoils than places for the entertainment of travelers. (Historie des Hotelleries, Cabarets, &c., par Michel et Fournier, Paris, 1851, p. 181.) The effect of a condition of society like this was to make hospitality not only a social virtue but a religious duty, and in the monasteries, and in all the great religious establishments, provision was made for the gratuitous entertainment of wayfarers and travelers. Either a separate building, or an apartment within the monastery, was devoted exclusively to this purpose, which was in charge of an officer called the hostler, who received the traveler and conducted him to this apartment, which was fitted up with beds, where he was allowed to tarry for two days, and to have his meals in the refectory, while, if he journeyed upon horseback, provender was provided by the hostler for his beast in the stables. (Fosbroke's Monachism, 238, 3d ed.; Davies 2, 769.) In many countries this apartment or guest hall of a monastery retained the original Latin name of hospitium, but in France the word was blended with hospes and changed into hospice, and it afterward underwent another change. As civilization advanced and the nobility of France deserted their strong castles for spacious and costly residences in the towns, they erected their mansions upon a scale sufficiently extensive to enable them to discharge this great duty of hospitality, as is still the custom among the nobility and wealthier classes in Russia, and in some of the northern countries of Europe. Borrowing, by analogy, from an existing word and to distinguish it from the guest house of the monastery, every such great house or mansion was called a hostel, and by the mutation and attrition to which these words are subject in use the s was gradually dropped from the word, and it became hotel. As traveling and intercourse increased the duty upon the nobility of entertaining respectable strangers became too onerous a burden, and establishments in which this class of persons could be entertained by paying for their accommodation sprung up in the cities, towns, and upon the leading public roads, which, to distinguish them from the great mansions or hotels of the wealthy, and at the same time to denote that they were superior to the auberge or cabaret, were called hotelleries, a name which has been in use in France for several centuries, and is still in use to some extent as a common term for inns of the better class, while the word hotel in France has long ceased to be confined to its original signification, and has become a word of a most extensive meaning. It is the term for the mansion of a prince, nobleman, minister of state, or of a person of distinction, or of celebrity. It is applied to a hospital, or hotel dieu, or to a town hall or hotel de ville, to the residence of a judge, to certain public offices, and to any house in which furnished apartments are let by the day, week or month. (Roquefort, Etymologique Français, Paris, 1829; Dictionnaire de l'Academie Français, 1798, et Complement au Dictionnaire; Bescherelle, Dictionnaire Français).

The word, though so long in use in France, is of comparatively recent introduction into the English language. The Saxon word inn, was employed to denote a house where strangers or guests were entertained, down to the time of the Norman invasion, and under the Norman rule it was, in the popular tongue, the word for the town houses in which great men resided when they were in attendance on court; several of which became afterwards legal colleges, under the well known titles of inns of court. (Pearce, 50.) In all legal proceedings, however, and wherever the Norman French was spoken, the word hostel was the term for all such establishments. The places where entertainment could be procured for a compensation, to distinguish them from the inns, or great houses, where it was furnished gratuitously, were called in English common inns; while in Norman French, by a change analogous to that which had occurred in France, they were called first hotelleries, and afterward hostries. (Year Books, 42 E. iii., 11; 22 H. vi., 38; Statutes, 5 E. iii., c. xi.; Fitzherbert's Abm., p. 2, 28; Brooke's Abm., p. 4, 15; Dyer, R., 158, a note; Godb. R., 347; Kelham's Norman Dicty.; Law French Dicty., 1701.) To "host," was to put up at an inn;

and "hostler," before referred to as the title of the officer in the monastery who was charged with the entertainment of guests, was the Norman word for inn-keeper, and was in use until about the time of Elizabeth, when the keeping of horses at livery becoming a distinct occupation, it was the term for the keeper of a livery stable (Yelv. R., 67; Cooke's Entr., 347) and afterward of the groom who has charge of the stables of an inn. (Calye's case, 8 Co. 32; Bailey's Dictionary.)

It appears from a note of Malone, referred to in Todd's edition of Johnson's Dictionary, that the word hotel came into use in England by the general introduction in London, after 1760, of the kind of establishment that was then common in Paris called an notel garni, a large house, in which furnished apartments were let by the day, week or month. In Barclay's Dictionary, 1782; in the first edition of Walker, 1791, and in Sheridan's Dictionary, 1795, hotel is given as the proper pronunciation of hostel, an inn; and in the dictionaries of Jones, 1798, and of Perry, 1805, it is incorporated as an English word, and is defined in the latter to be "an inn, having elegant lodgings and accommodations for gentlemen and genteel families." Todd, 1814, defines it to be "a lodging-house for the accommodation of occasional lodgers, who are supplied with apartments hired by the night or week." The definition given by Knowles, 1835, is simply "a lodging-house." By Smart, 1836, "a lodging-house or inn." Beid, 1845, "an inn or a lodging-house." Boag, 1848, "an inn"; and by Dr. Latham, in his edition of Johnson's Dictionary, "an inn of a superior kind."

The word was introduced into this country about 1797. Before that time houses for the entertainment of travelers in this city were at first called inns, and afterwards taverns and coffee-houses. In 1794 an association organized upon the principle of a tontine, erected in Wall street what was then a very superior house for the accommodation of travelers, called the Tontine Coffee-house; the success of which led to the formation of another company for the erection of one upon a still more extensive scale in Broadway. This structure, which was called the Tontine Tavern, was built about 1796, upon the site of what had been a famous tavern or coffee-house in colonial times, and from the extensive accommodation it afforded and the superior character of its appointments, it was then, and for many years afterward, the most celebrated establishment of the kind in the country. There was at that period a rage for everything French. The city was filled with refugees from France and from the French West India possessions, whose residence among us produced a great change in our social habits, amusements and tastes (Watson's Annals, 209), while a fierce party strife prevailed between those who advocated the principles of the French Revolution and those who condemned them. The French national airs were sung in the streets, men mounted the tri-color cockade, and the proprietors of the new tavern, falling in with the popular current, gave a French name to their establishment, by changing it from the Tontine Tavern to the City Hotel. The new word was afterward adopted by the proprietors of other houses for the entertainment of travelers in this and neighborng cities, and becoming general, found its way into American dictionaries. Allison, one of the earliest of American lexicographers, 1813, defines it to be "an inn of high grade, a respectable tavern." Webster calls it "a house for entertaining strangers or travelers," and says that "it was formerly a house for genteel strangers or lodgers," but that "the name is now (1840) given to any inn." Worcester's definition (1846) is "a superior lodging-house with the accommodations of an inn; a public house: a genteel inn: an inn," and in the last edition of Webster, 1864, there is given an addition to the previous general definition: "An inn; a public house, especially one of some style or pretensions."

It is to be deduced from the origin and history of the word and the exposition that has been given of it by English and American lexicographers that a hotel, in this country, is what in France was known as a hotelerie, and in England as a common inn of that superior class usually found in cities and large towns. A common inn is defined by Bacon to be a house for the entertainment of travelers and passengers, in which lodging and necessaries are provided for them and for their horses and attendants. (Bac., Abm., Inns., B.) In Thompson v. Lacy (3 B. and A., 283), Justice Bayley declares it to be "a house where a traveler is furnished with everything which he has occasion for while upon his way," and, in the same case, Best, J., says it is "a house, the owner of which holds out that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received." But a more practical idea of what was understood at the common law as common inns, may be gathered from Hollingshed's description of them, as they existed in the days of Elizabeth. "Every man," says that quaint chronicler, "may in England use his inn as his own house, and have for his monie how great or how little varietie of vittals and whatsoever service himself shall think fit to call for. If the traveler have a horse, his bed doth cost him nothing, but if he go on foot, he is sure to pay a pennie for the same. Each comer is sure to be in clean sheets wherein no man hath been lodged since they came from the laundress or out of the water wherein they were washed. Whether he be horseman or footman, if his chamber be once appointed, he may carry the key with him as of his own house as long as he lodgeth there. In all our inns we have plenty of ale, biere, and sundrie

kinds of wine; and such is the capacity of some of them that they are able to lodge two hundred or three hundred persons and their horses at ease, and with very short warning (to) make such provision for their diet as to him that is unacquainted withall may seem to be incredible." (Hollingshed's Chronicle—Description of England.) And another observer (Fynes Moryson), writing before 1614, adds: "If the traveler eats with the host or at the common table his meals cost him sixpence, and in some places fourpence; but if he will eat in his chamber he commands what meat he will, and the kitchen is open to him to order the meat to be dressed as he likes best." (The Itenerary, pp. 111-151.)

In the above-mentioned case of Thompson v. Lacy, the defendant kept a house in London, called the Globe Tavern and Coffee-house, where he furnished beds and provisions to those who applied. No stage, coaches or wagons stopped there, nor were there any stables belonging to the house. The question was whether this was an inn, and it was held that it was. "The defendant does not charge," said Best, J., "as a mere lodging-house keeper by the week or month. * * * A lodging-house keeper, on the other hand, must make a contract with every man that comes, whereas an innkeeper is bound, without making any special contract, to provide lodging and entertainment for all at a reasonable price." In Doe v. Lansing (4 Camp., 76), decided before the above, Lord Ellenborough held that a coffee-house in London, where persons from the country lodged, was not an inn; and in an earlier case, (Parkhurst v. Foster, 1 Salk., 387), it was held that an establishment at a watering-place, where persons were taken to lodge, in which dressed meat was furnished to them at four pence per joint, and small beer at two pence per mug, and to whom stables were let to their horses, was not an inn. Neither of the cases are fully reported, and if maintainable, it must be upon the ground that these were not houses for the general reception of travelers, but places where either a lodging or certain articles of food, or the stabling of a horse, could be procured by paying for each in contradistinction to the general entertainment which an inn supplied to all travelers or guests at a reasonable charge. In Dausey v. Richardson (2 Ellis & Bl., 144), it was held that a boarding-house was not an inn, the distinction being put upon the ground that a boarder being received into a house is owing purely to a voluntary contract, whereas an inn-keeper, in the absence of any reasonable or lawful excuse, is bound to receive the guest when he presents himself. "The inn-keeper," said Coleridge, J., in The King v. Ivens (7 C. & P., 213), "is not to select his guests. He has no right to say to one you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received"; inn-keepers, he said, being a kind of public servants, having the privilege of entertaining travelers and of supplying them with what they want. In Seward v. Seymour (Anthon's Law Student, 51), it was held that a well-known establishment which formerly existed in this city, called the Atlantic Hotel, had a double character, being both a boarding-house and an inn; that in respect to those who occupied rooms and were entertained under precise contracts, it was a boarding-house, while with respect to transient persons, who, without any stipulated contract, remained from day to day, it was an inn; and this definition of an inn was substantially given by Chief Justice Oakley in Wintermute v. Clarke (5 Sandf., 247), as a house "where all who come are received as guests, without any previous agreement as to the duration of their stay, or as to the terms of their entertainment." In Willard v. Reinhard (2 E. D. Smith, 148), the distinction between a boarding-house and an inn was declared to be this: in a boarding-house the guest is under an express contract at a certain rate for a certain period of time, but in an inn there is no express engagement, the guest being on his way entertained from day to day, according to his business, upon an implied contract. And in Carpenter v. Taylor (1 Hilt., 195), it was held that a restaurant, to which a person resorts for the temporary purpose of obtaining a meal, is not an inn. "On the contrary," said Ingraham, J., "as the customs of society change and the modes of living are altered, the law as established, under different circumstances, must yield and be accommodated to such changes. Mere eating-houses cannot now be considered as inns. They are wanting in some of the requisites necessary to constitute them inns, as no lodging places are provided for travelers, and though the defendant may carry on in another part of his premises the business of an inn-keeper, it does not follow that the liability for that part of the premises is to be extended to the whole. To which it may be added, with equal force, that a mere lodging-house, in which no provision is made for supplying the lodgers with their meals, wants one of the essential requisites of an inn.

It follows from these authorities, that an inn is a house where all who conduct themselves properly, and who are able and ready to pay for their entertainment, are received, if there is accommodation for them, and who, without any stipulated engagement as to the duration of their stay, or as to the rate of compensation, are, while there, supplied at a reasonable charge with their meals, their lodging, and such services and attention as are necessarily incident to the use of the house as a temporary home. This, as accurately as I am able to state it, is the legal definition of an inn, and this is exactly what is understood in this country by a hotel. It is customary, especially in our cities, to let out furnished apartments in houses, by the week or by the month,

without meals, or with breakfast simply; but we do not, as the French do, call such houses hotels, but merely lodging-houses. (Worcester's and Webster's Dictionaries.) We have in the cities houses of entertainment in which the guest or traveler pays so much per day for his room, and takes his meals or not, as he thinks proper, in the restaurant, paying separately for each meal as he takes it. Where the restaurant forms a part of the establishment, and the house is kept under one general management for the reception of all travelers or guests that may come, it is an inn, there being no material difference between it and the Elizabethan inn, in which the traveler paid separately for his apartment and for each meal. It differs from a boarding-house, for the reason that all who come are received, and because the guest engaged for no specific period, but pays only for the time he is there.

In Smith v. Scott (9 Bing, 14; 2 Moo. & S., 35), it was held that a woman who kept a house without any public sign, in London, in which she let rooms to families or single men for long or short periods, and, if required, found cooked provisions for them, upon which she charged a small profit, receiving her orders usually every Monday and her payment at the end of the week—the house being open at all hours to any person who came—was a hotel-keeper, within the meaning of the Bankrupt Act of 6 Geo. IV., ch. 16, § 2, which enumerates "victualers, keepers of inns, taverns, hotels and coffee-houses," as among the classes of persons who may be declared bankrupt. C. J. Tindall put the decision upon the ground that some distinction must have been intended, as the word which immediately preceded hotel in the act is inn, and that it could scarcely have been intended to designate the same thing by both words. He was of opinion that hotel was not used in the sense of the old word hostel, "for that," he said, "means what is now termed an inn." "The modern word," he remarked, "was introduced from the French, and rather implies a house to which people resort for lodging than for the sort of entertainment which is to be procured only at an inn"; and Gaselee, J., said that there might have been doubt if the party had only received lodgers occasionally, but as the house was open to any comer, and all who frequented it were supplied with provisions to some extent, he regarded it as a hotel. It is sufficient to say in respect to this case that it may be that in London the word hotel is not applied to an inn; that there it has undergone no change, but still is limited to the signification which it originally had when introduced there. Such is not, however, the case in this country, where the word has been long in popular use to designate what in the law is denominated an inn.

I have discussed the meaning of this word closely, for the reason that it is an embarrassing question whether the building owned by the plaintiff is, or is not, a hotel. As contradistinguished from a boarding-house, it is public in its character, being open to all comers, and two of the principle wants supplied by an inn, lodging and meals, can be obtained there; but not under any general arrangement, as the restaurant is kept by one person and the lodging-house by another. The proprietor of the restaurant does not engage to provide lodgings for those who come to his restaurant for entertainment, and the keeper of the lodging-house lets out his rooms for twenty-five cents a night without any stipulation, express or implied, to furnish those who take them meals. Each is independent of and has no control over the other, and neither in his separate capacity could be regarded as the keeper of an inn, liable to that extraordinary responsibility for the safe keeping of the property of guests, which the law imposes upon that class of bailees. If the cases to which I have reference (Parkhurst v. Lansing, 1 Salk, 387, and Doe v. Lansing, 4 Camp, 76), were correctly determined, it is not an inn, and in the best view I can take of it, though the point is not free from doubt, it is not that kind of house for the general reception of travelers, which in this country is known as a hotel.

But though the uses to which the building is applied may not, in the legal or in the popular acceptation of the term, make it a hotel, it might still be deemed one in the sense of an ordinance regulating the rate to be paid for the supply of Croton water, if it were apparent that it was a kind of establishment for which the ordinance manifestly meant to provide. A huge lodging-house, supplied from roof to cellar, would consume as much water, and should be required, as well, to pay proportionally for the use of it, as a smaller building coming strictly within the definition of a hotel. The whole design of the ordinance was to regulate the tax according to the consumption, and for this purpose hotels and boarding-houses, in addition to the rate paid by private families, are to be charged for each lodging-room, and it is left to the discretion of the Croton Aqueduct Board to determine what the charge per room shall be. There are 180 lodging-rooms in the plaintiff's building, and the Board have imposed an annual tax of $180 or $1 for each room. It is but a just interpretation of the ordinance, however, to suppose that the design of it was that each lodging-room supplied with water in such an establishment, should be separately charged for, and not that a tax should be imposed where water cannot be supplied. During one-half of the twenty-four hours, the Croton water does not rise beyond the basement of the plaintiff's building, in consequence of the number of mechanical and other establishments in this particular locality, which, throughout the day, drain and greatly diminish the supply. Unable to procure by the ordinary flow of the aqueduct what is required

for the lodging-rooms above the first-floor, the plaintiff, as already stated, has been compelled to build a tank to receive the rain water from the roof, obtaining by that means what could not be obtained from the supply of the aqueduct. While, therefore, I am disposed to think that a large lodging-house, to which water is freely supplied, would come within the intention of the ordinance, I am of the opinion that the plaintiff's building does not. It is not strictly within the words of the ordinance, as it is not what is popularly known as a hotel, and it is not such an establishment as could have been contemplated by it, as it is not to be supposed that there was an intention to tax a man for all the lodging-rooms of a building if water could not be supplied to them, and he is compelled to obtain it elsewhere. It is a case, in my judgment, coming under the portion of the ordinance which provides that matters not mentioned are to be arranged by a special contract, and not under the one which imposes a charge upon each lodging-room. I shall, therefore, grant the injunction.

JAMES A. LUSK vs. E. C. BELOTE.

(22 Minn. 468.)

Appeal by defendant from an order of the district court for Ramsey county, Wilkin, J., presiding, refusing a new trial.

BERRY, J. In August, September and October, 1872, the defendant was keeping "The Park Place Hotel," a public inn and boarding house, in the city of St. Paul. On September 20, 1872, the plaintiff, his wife and four children being inmates of the hotel, a gold watch belonging to plaintiff, and certain articles of jewelry belonging to two of the children mentioned, were stolen from the rooms occupied by the plaintiff and his family. The jewelry consisted of "ordinary articles of wearing apparel and ornaments" of the plaintiff's two children, to whom the same belonged, and was brought to the hotel when they came there. The plaintiff's wife and six children became inmates of the hotel on August 7, 1872, and (with the exception of two children who left a few days before the theft) remained there until some time in October following. The plaintiff was not a resident of this state, but at the time when they came to the hotel his wife and children were living, and for three or four years previous had been living, in St. Paul, sometimes keeping house and sometimes staying at a hotel or boarding-house, the plaintiff being in the habit of making them an occasional visit as often as two or three times a year. The plaintiff arrived at St. Paul and became an inmate of the hotel about September 10, 1872, and remained about four weeks.

An inn-keeper is by the common law responsible for the loss, in his inn, of the goods of a traveller who is his guest, except when the loss arises from the negligence of the guest, or the act of God, or of the public enemy. 2 Kent, 592-597; Shaw v. Berry, 31 Me. 478; Sibley v. Aldrich, 33 N. H. 553; Hulett v. Swift, 33 N. Y. 571; Wilkins v. Earle, 44 N. Y. 172; 1 Chit. Cont. (11th Am. ed.) 674-677, and notes. But this strict liability exists only in favor of travellers. As the articles of jewelry stolen belonged to the plaintiff's children, being their "ordinary articles of wearing apparel and ornaments," and were brought to the defendant's inn when such children came there and became inmates thereof, the liability of defendant, as respects their loss, must depend upon the status of the persons to whom the same belonged.

Considering the length of time during which, and the manner in which, they had been living in St. Paul before they became inmates of the defendant's inn, they must be regarded as, in fact, dwellers in and inhabitants of St. Paul. There is no reason why they may not properly be so regarded, although their domicile was, in law, in another state. They were certainly not travellers in any just sense of the word, for persons who have dwelt in a city no larger than St. Paul do not become travellers by changing their dwelling place from one part of it to another. It is manifest, therefore, that, as respects the jewelry stolen, the verdict cannot be sustained; for, upon the evidence, it is obviously based upon the defendant's supposed liability for the loss of the same under the rule above mentioned—a rule, as we have seen, applicable only as between an inn-keeper and a traveller.

In reference to the plaintiff, it appears that he was not a resident of this state, and that he came to defendant's inn from some place without this state upon a visit to his family. There is no room, upon the evidence, to doubt that he came to defendant's inn, and was received there, as a traveller, and in no other character. His purpose evidently was to make a flying visit to his family, and a merely temporary stay in St. Paul, where he remained about a month only. Under such circumstances, unless something appears affirmatively to the contrary, his status as a traveller, like any other status, once shown to exist, is to be presumed to have continued. Neither the agreement by which he was to pay special rates for himself and family, lower than those ordinarily charged for transient guests, nor the fact that he remained in the inn for a month, nor, so far as we discover, any other fact which appeared in the case, furnish any evidence that his character was changed from that of a traveller to that of boarder. Jalie v. Cardinal, 35 Wis. 118, and cases cited. There was, therefore, no error in the instruction given to the jury to this effect. As respects, then, the plaintiff's watch, we see no reason why the evidence was not sufficient to charge defendant for its loss.

These are all the points which we deem it necessary to consider. For the insufficiency of the evidence in the case to sustain the verdict as respects the jewelry stolen, irrespective of other grounds, the defendant's motion to set aside the verdict and for a new trial should have been granted by the court below. As, however, upon the evidence, the plaintiff would appear to be entitled to re-

cover for the watch, and the testimony proving its value at $200.00 is not affected by any testimony to the contrary, the plaintiff may, within twenty days from notice of the filing of this opinion, remit all of the verdict except $200.00, and take judgment in the court below upon the verdict so reduced; otherwise, the order denying the motion to set aside the verdict and for a new trial is reversed.

THE QUEEN vs. RYMER.
(L. R. 2 Q. B. D. 136.)

Case stated by the vice-chairman of the West Sussex quarter sessions.

The defendant was tried at the Michaelmas sessions for the western division of the county of Sussex, for that he, being a licensed innkeeper, refused to supply the prosecutor with refreshments. There were several counts in the indictment varying the charge, some describing the prosecutor as a traveller, and others not, but otherwise nothing turned upon the form of the indictment.

The defendant was the proprietor of the Sea House Hotel at Worthing, attached to which, and under the same roof and licence, and open to the street by a separate door, was a refreshment bar called the Carlton, along which ran a counter with an open space in front of about ten feet wide. The hotel was used for the accommodation of visitors desirous of sojourning there, and the bar for the refreshment of those casually passing by, the one being divided from the other by the counter in question, the attendants having access from the hotel and serving from behind the counter.

The prosecutor, who was a householder living in the same town, within twelve hundred yards of the defendant, had been in the habit of coming to the premises of the defendant accompanied by two dogs. He had formerly three. One of the two was a savage dog, and generally wore a muzzle; the other of the two was a quiet animal. They were very large, of the St. Bernard mastiff breed.

On the 3rd of March, after a recent visit from the prosecutor, the defendant wrote to him as follows:—

"Royal Sea House Hotel,
"W. Cramer, Esq. "March 3rd, 1876.

"Dear Sir,—I regret to have to request you will be so good as not to bring your dog or dogs into the Carlton. The slop and mess this evening has been much complained of, and the dogs are as objectionable in the Carlton as in the hotel.

"I am, yours truly, James Rymer."

And on the 4th the prosecutor wrote in reply to the defendant, as follows:—

"Worthing, March 4th, 1876.

"Dear Sir,—In reply to your note of yesterday, I will so far comply with your request as not to bring my dogs into the refreshment bar, or, as you facetiously call it, the Carlton, when they are wet or dirty, but otherwise I must be allowed to follow my inclination as heretofore. The consequences of refusing a person refreshment without reasonable cause I need not point out to you, believing you superior to the general run of publicans; but I may add that hostelries, as well as public-houses, are placed under special laws, some of which tend to protect the public against the petty tyrannical, whimsical, mad freaks or acts of individual landlords. "Yours respectfully,

"Mr. James Rymer. "W. Cramer."

On the 6th of March the prosecutor went into the refreshment bar, leading the quiet dog in a chain, and demanded refreshment, asking for a glass of whiskey, but was refused by the person attending the bar by order of the defendant. The same occurred on the 7th and 8th, when he again went into the refreshment bar leading the same dog in leash, and taking it into the passage above described and demanded refreshment, tendering the money in payment, but was again refused by the order of the defendant.

On each occasion the bar was open, the hour was proper, and the order in itself reasonable. It was proved by other hotelkeepers that complaints had been made of the prosecutor's dogs by their customers, and some of them had gone elsewhere in consequence, and that the prosecutor had been remonstrated with; and himself admitted to one of the witnessess that, "No doubt his dogs were a nuisance to the hotel-keepers." It was also proved that other tradesmen in the town had complained of the dogs, and also that the dog in question had upon one occasion vomited on the door-mat of a tradesman's shop in the town. It was not proved that the prosecutor was a traveller in any sense, otherwise than that he was walking about the town with his dog for his own recreation and amusement.

Three questions arise: first, whether the place in which the prosecutor claimed to be received and served was an inn; secondly, whether the prosecutor was a traveller; and, thirdly, assuming both these questions answered in the affirmative, whether the defendant's refusal was without reasonable cause.

The vice-chairman declined to stop the case, which ultimately went to the jury. He told them that prima facie the defendant was bound by the law to supply the prosecutor, as one of the public, with refreshment upon his reasonable demand; that he could not select his customers, or reject any from caprice or dislike; but that if the prosecutor insisted (as he did) upon being accompanied by his dog, which, from its size, breed, nature, or habits, was obnoxious to his customers, and a nuisance in his business, he was justified (particularly after notice) in refusing to admit or serve the prosecutor.

The jury found the defendant guilty, and, in answer to the vice-chairman, said they considered the defendant was bound to serve the prosecutor, though accompanied by any dog, even a savage one; but they found, as a fact, that the dog in question was not a savage one.

The defendant was bound over on his own recognizance in 50l. to appear to receive judgment when called upon.

If the Court should be of opinion that the

conviction was right, it was to stand, otherwise to be quashed.

Jan. 25. No counsel appeared.

KELLY, C. B. In this case, if there were any reasonable ground for doubt, we should regret that the case has not been argued by counsel. But fortunately, though the case is of importance, it presents no difficulty whatever. The indictment charges the defendant that, being an inn-keeper, and under the obligation to receive the prosecutor in his inn, he refused to do so without having any reasonable cause or excuse for such refusal.

It was contended on the part of the prosecutor that, by refusing to provide him with refreshments, the defendant had committed an indictable offence. On the other hand it was urged on the part of the defendant, first, that the prosecutor was a local resident and not a traveller, and therefore there was no obligation on the part of the defendant to serve him; and, secondly, that, at all events, the defendant was justified under the foregoing circumstances in refusing to do so.

As to the first question, whether the place in question was an inn, we must look at the facts. The defendant was the proprietor of an hotel, and if the prosecutor had been refused accommodation in the hotel the case might have been different. But he was not. The place in question, known as the Carlton, was under the same roof as the hotel, but was entirely separate from it, with a separate entrance, and appears to have been a mere shop in which spirits are retailed across a counter. The letters, too, make it plain that this was the place to which admission was claimed by the prosecutor. Such a place is not an inn within the meaning of the common-law rule. An inn is a place "instituted for passengers and wayfaring men." Calye's Case. A tavern is not within the definition. In such a place as this no one has a right to insist on being received any more than in any other shop. Therefore, on this ground, even if it stood alone, this conviction must be quashed.

The second question is, whether the prosecutor was a traveller. I need hardly cite authorities to shew that it is essential to such a prosecution that the prosecutor should be a traveller. If any be wanted, the case of Rex v. Llewellyn, in which an indictment was held bad for want of an allegation to that effect, is an express authority upon the point. Here the prosecutor was not a traveller in any sense whatever.

Thirdly, even if both the foregoing questions had been answered otherwise, I think it clear that the defendant had reasonable cause for refusing to receive the prosecutor. I do not lay down positively that under no circumstances could a guest have a right to bring a dog into an inn. There may possibly be circumstances in which, if a person came to an inn with a dog, and the innkeeper refused to put up the dog in any stable or outhouse, and there were nothing that could make the dog a cause of alarm or annoyance to others, the guest might be justified in bringing the dog into the inn. But it is not necessary to decide any such question. In this case, looking at the previous facts, the number of dogs previously brought, and their kind and behaviour, the nature of the right claimed by the prosecutor in his letter, and the size and class of the dog, I think the defendant would have had ample ground for his refusal even if the place had been an inn and the prosecutor a traveller.

DENMAN, J. I am of the same opinion upon all points. The principles laid down in Burgess v. Clements shew that the object of the law upon the subject of an innkeeper's liability, is merely to secure that travellers shall not, while upon their journeys, be deprived of necessary food and lodging. With reference to the question of reasonable excuse, the finding of the jury does not affect the matter. I assume that, upon this part of the case, the proper question was left to them, namely, whether the defendant had reasonable cause for his refusal; and they have not found that he had not, nor is there any evidence to support such a finding. They have found what amounts to an erroneous statement of law.

FIELD, J., and HUDDLESTON, B., concurred.

MANISTY, J. I agree upon all points. I only wish to add that, in my opinion, a guest cannot, under any circumstances, insist on bringing a dog into any room or place in an inn where other guests are.

Conviction quashed.

EBEN H. SPRING vs. FREEMAN S. HAGER & ANOTHER.

(145 Mass. 186; 13 N. E. 479.)

Tort against the keepers of an inn, called the Elm House, in Greenfield, for the value of a watch, chain, and a sum of money, alleged to have been stolen while the plaintiff was a guest at the inn. Trial in the Superior Court, before Barker, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff, who was a grain-dealer, about fifty years of age, and lived in Erving, came to Greenfield to attend court, as one of the grand jurors. On the first day of court, at noon, he registered as a guest at the Elm House, having on his person a gold watch of the value of about $100, and a gold watch-chain of the value of about $40. The watch was carried in the watch pocket of his waistcoat, and the chain was attached to the waistcoat; and he had in the pocket of his trousers $15 or $20 in money. It was admitted by the defendants, at the trial, that the watch and chain were articles worn or carried on the person, and were reasonable in value and amount, and that the money was for travelling expenses and personal use.

On the evening of that day, about half-past nine, the plaintiff was shown to his room by one of the defendants, who left with the plaintiff a glass kerosene lamp, such as is commonly used in country hotels. There was no gas or other light in the room. On the walls of this room were a large number of pictures of noted singers and actresses and

performers, such pictures as are distributed for advertisements. The room was about ten feet wide and fifteen feet long, and had but one door. The plaintiff took the lamp from said defendant, and, as soon as the defendant left, closed the door and locked it, but did not bolt it. The lock was a common mortise lock connected with the door knob. After locking his door, the plaintiff looked at the pictures on three sides of the room, and prepared to retire. His waistcoat, with the watch in it and the chain attached, he laid upon a light stand on the farther side of the bed from the door, and near the head of the bed; his trousers containing the money he laid upon a chair, and retired. When he awoke in the morning, it was found that, during the night, the lock on the door had been picked, the room entered, and the trousers and waistcoat carried away by some person unknown. The waistcoat was soon found in the hallway, and the trousers were found in the street at some distance from the hotel, and the watch and chain and the money had been stolen. The door to the room was found to be slightly open.

It appeared that there was a bolt on the inside of said door, about six inches from the top. This bolt was about four inches long and one half-inch in diameter. The door was about six feet six inches high, and opened into the room. The plaintiff did not fasten the door with this bolt, and his attention was not called by the defendants or by any one else to the bolt; and he testified that he did not know it was there until after the robbery.

One of the defendants testified that the plaintiff told him, the day following the plaintiff's loss, that he, the plaintiff, did not bolt said door, that he did not think of it; and another witness, called by the defendants, testified that the plaintiff said, on the same occasion, that he did not see said bolt. The plaintiff denied that he made either of these statements.

The plaintiff testified, on cross-examination, that he had travelled considerably, and had stopped at hotels on numerous occasions; and that his habit had always been on such occasions, when there were both a bolt and a lock upon the door of his room, to use both the bolt and the lock.

The defendants contended that, upon the evidence, the plaintiff must have seen the bolt; that the plaintiff's loss was attributable to his failure to bolt the door in addition to locking it; and that such failure was such negligence on his part as to exonerate the defendants from liability to the plaintiff. There was no contention on the part of the defendants that there was any negligence on the part of the plaintiff except his failure to bolt the door.

The plaintiff requested the judge to instruct the jury as follows: "1. The plaintiff having locked the door of his room, his failure also then to bolt the door was not such negligence on his part as would preclude his recovery in this action. 2. The failure of the plaintiff to bolt the door of his room after having locked it, if said bolt was not known to the plaintiff, nor his attention in any way called to the same, was not negligence on his part, and will not preclude the plaintiff from recovery in this action."

The judge declined to give the instructions requested, but submitted to the jury, as a question of fact for them to determine, whether the failure of the plaintiff to bolt his door in addition to locking it was negligence on his part to which the loss was attributable, with appropriate instructions, not objected to, defining negligence on the part of the plaintiff, and its effect on the case.

The jury returned a verdict for the defendants; and the plaintiff alleged exceptions.

FIELD, J. The only negligence of the plaintiff which the defendants contended that the evidence proved, was the neglect of the plaintiff to bolt the door. The plaintiff locked the door by a lock connected with the door knob. The bolt was on the inside of the door, six inches from the top, and the door was "about six feet and six inches high." The plaintiff testified that "he did not know it was there until after the robbery." It does not appear that there were any regulations of the inn, which were posted in the room or anywhere else, or which were in any manner brought to the notice of the plaintiff, and it is conceded that the attention of the plaintiff "was not called by the defendants or by any one else to the bolt." The defendants contended, however, upon all the evidence, that the "plaintiff must have seen the bolt." The first request of the plaintiff for a ruling was, in effect, that his failure to bolt the door after having locked it was not such negligence as would defeat the action, even if he saw the bolt; and the second request was, in effect, that his failure to bolt the door after having locked it would not defeat the action, "if said bolt was not known to the plaintiff, nor his attention in any way called to the same." This second request raises the question whether it was the duty of the plaintiff to examine the door to see if there were other fastenings upon it besides the lock. It may be conceded that the bolt and lock together afforded greater security than either of them alone, and that, although the bolt was in an unusual place upon the door, it could easily have been seen if the plaintiff had searched for it.

The Pub. Sts. c. 102, § 16, provide that "An innholder against whom a claim is made for loss sustained by a guest may in all cases show that such loss is attributable to the negligence of the guest himself, or to his non-compliance with the regulations of the inn, if such regulations are reasonable and proper, and are shown to have been duly brought to the notice of the guest by the innholder." This provision was first enacted in the St. of 1853, c. 405, § 3, which was soon after the decision in Berkshire Woollen Co. v. Proctor, 7 Cush. 417; and, although this statute made some changes in the law, the clause that it is competent for an innkeeper to show that the loss is attributable to the negligence of the guest is only declaratory of the common

law. Mason v. Thompson, 9 Pick. 280. Berkshire Woollen Co. v. Proctor, ubi supra. Elcox v. Hill, 98 U. S. 218. Oppenheim v. White Lion Hotel Co. L. R. 6 C. P. 515. Cashill v. Wright, 6 El. & Bl. 890. Morgan v. Ravey, 6 H. & N. 265.

It has indeed been said that, "in the absence of notice of a rule of the inn to lock and bolt the door, the failure to do so is not legal negligence at common law." Murchison v. Sergent, 69 Ga. 206, 213. It has been often decided that not locking or fastening the door of a bedroom is not, as matter of law, negligence, but that this fact, in connection with others, may be evidence of negligence for the jury; and the weight of modern authority is, we think, that the failure to lock or bolt the door of a lodging-room at an inn, when there is a lock or bolt upon it, is evidence of negligence for the jury. Oppenheim v. White Lion Hotel Co., ubi supra. Spice v. Bacon, 36 L. T. (N. S.) 896. Herbert v. Markwell, 45 L. T. (N. S.) 649.

At common law, "inn-keepers, as well as common carriers, are regarded as insurers of the property committed to their care, and are bound to make restitution for any injury or loss not caused by the act of God, or the common enemy, or the neglect or fault of the owner of the property." Mason v. Thompson, 9 Pick. 284.

The statutes have not changed the general nature of the liability of an innholder; and, subject to the statutory provisions, he is liable to his guests in cases where no actual negligence on the part of himself or his servants is shown. It has been held that the burden of proof is upon the innholder to show that the loss was caused by the negligence of his guest. Norcross v. Norcross, 53 Maine 163. The language of the Pub. Sts. c. 102, § 16, implies that this burden is upon the innholder. The case at bar, is not, therefore, an action for negligence, and it may be doubted whether the rulings in such actions upon evidence of contributory negligence are in all respects applicable.

No case has been cited in which it has been held that the single fact that the plaintiff did not bolt his door, after having locked it on the inside, is sufficient evidence of negligence.

In Spice v. Bacon, and in Herbert v. Markwell, ubi supra, the jury must have found that the door was left unfastened either by bolt or lock.

In Morgan v. Rarey, 2 F. &. F. 283, it is said that the plaintiff locked the door, but did not bolt it. In the same case, in the Court of Exchequer, 6 H. & N. 265, 266, it is said that "witnesses were, however, called, on the part of the defendants, to prove that the plaintiff had told them that he had not locked the door." It was admitted that he did not use the bolt. There was a notice posted over the mantel-piece requesting "all visitors to use the night bolt," which the plaintiff admitted he saw, but said he did not read beyond the word "notice." Chief Baron Pollock, at nisi prius, left the question of negligence to the jury, but told "them at the same time that the guest was not bound to lock his bedroom door, &c." The verdict was for the plaintiff.

It must often depend much upon the circumstances of the case, the customs of the age and country, and the usages of the place, whether the plaintiff has been guilty of such negligence that the loss can be said to be attributable to it; and we cannot say, as matter of law, that, on the facts appearing in this case, if the plaintiff saw the bolt and did not use it, this was not some evidence of negligence to be submitted to the jury. The delivery of a key to a guest may be held to be an intimation to him that he is to use it in locking his door. The lock, however, is the only fastening which the guest can use when he is not in the room. A bolt, if seen, may itself suggest that it ought to be used. If, however, there are no regulations brought to the notice of a guest requesting him to bolt the door, and if it is not known to the guest that there is a bolt, and his attention is not in any way called to it, we are of opinion that the fact that, after locking his door with the key, he does not search for a bolt and find it, is not evidence of negligence on his part, and that the second ruling requested should have been given. See Murchison v. Sergent, ubi supra; Batterson v. Vogel, 10 Mo. App. 235.

Exception sustained.

R. E. O'BRIEN, APPELLANT,
vs.
E. E. VAILL, APPELLEE.
(22 Fla. 627; 1 South. 137.)

Appeal from the Circuit Court for St. Johns county.

The facts of the case are stated in the opinion.

Plaintiff urges:

1st. That defendant was liable as an inn-keeper, because plaintiff had been staying at the hotel, left his trunk at the hotel under distinct promise of defendant's agents that it should be taken care of, for he, plaintiff, was going to return to board with them, which the plaintiff afterwards did. His absence was but temporary, with agreement to return and board with them, which plaintiff did.

The consideration to them was his promise to board at this hotel; he was still the guest of this hotel in the sense that his baggage was in the inn-keeper's care, as if he were a guest eating and sleeping at the house.

As hotel or inn-keeper defendant was bound to exercise the greatest possible amount of care in keeping this property. Adams vs. Clem, 41 Ga., 65; Giles vs. Fauntleroy, 13 Md., 126; 21 Wendell, 282; 2 Croke, 189; 1 Comyn's Digest, 421; Mason vs. Thompson, 9—, 280; Shaw vs. Berry, 31 Me., 479; Grinnell vs. Cook, 3 Hill, 485; 5 Barb., 560.

Defendant was guilty of gross negligence in putting this baggage in an open hall after he had promised to take care of it. The very fact that any person could walk into the hotel and walk off undiscovered

with this large trunk shows gross negligence on part of defendant.

Again, we say that if defendant is not chargeable in this case as an inn-keeper, he certainly is as a bailee for consideration, and he should have exercised ordinary prudence and care in the keeping of this property. The consideration was the future boarding with defendant that plaintiff promised to do and did.

It is this fact of plaintiff's promise to return and board with defendant that constitutes the difference between the case at bar and cases cited by defendant's attorneys, where the courts say that although guest is intending to return yet there is not consideration and no binding contract. In those cases there is no promise or actual return to the hotel to board. Story on Bailments, secs. 23 and 33.

If plaintiff had not returned and boarded with defendant, the defendant might very properly have charged him storage on his trunk. Suppose the trunk was a great length of time at the hotel, who can doubt that defendant would have charged storage if plaintiff did not return to board at this hotel. There was no reasonable, ordinary care of this trunk, it was left in an exposed place and was carried off in consequence of this negligence. Story's Bailments, secs. 23 and 33.

And in the third place, if defendant was but a bailee without consideration, still, acting under an agreement to take care of the property, he was bound to do so. He took no care at all of this trunk, he might as well have put it on the front porch, and the loss coming from this total lack of care, if any responsibility attaches to a bailee without consideration, this is the case. It was a distinct betrayal of the confidence of the traveling public.

Defendant says, "I had no other place to store baggage." Witness O'Brien says, "he did, there was a cloak and satchel room where this trunk could have been stored." Any way it was the duty of defendant to have a baggage room with lock and key to protect baggage in his care.

THE CHIEF JUSTICE delivered the opinion of the court:

On the 26th of March, A. D. 1885, plaintiff, O'Brien, went to the hotel of the defendant, E. E. Vaill, in the city of St. Augustine, and stopped there as a guest. The next day plaintiff paid his bill to the clerk in the office of the hotel and told him he would be gone for a few days, but would leave his baggage, which consisted of two trunks and a valise, until his return, and which he requested the clerk to take care of for him. Plaintiff left his baggage in his room, locked the door and gave the key to the clerk. Plaintiff told the clerk that on his return he would board with him. On April 2d plaintiff returned and again became a guest of the hotel. The plaintiff's baggage had been removed by the proprietor to the main hall of the hotel. On inquiring for his baggage it was found that one of the trunks had been stolen.

It was in evidence that the front door opened into the office, and there was no entrance into the hall besides the entrance through the office; that when the house was not closed there was always some person in charge of the office, and when the hotel doors were closed there was always a watchman on duty. A former servant of the hotel was arrested for the theft, and confessing the crime, told the officers where they could find the trunk. Two hasps had been broken, and the most of the contents carried away. Vaill, the proprietor, refusing to pay O'Brien for his damage and loss, the latter brought suit.

The questions presented upon these facts are: 1st. Was Vaill, O'Brien having paid his bill and departed from the house but leaving his baggage saying he would return, liable to O'Brien under the law regulating the liability of an inn-keeper to his guest for the loss of such baggage. Attorney for appellant has called to our attention the case of Adams vs. Clem, 41 Geo., 65. In this case Mrs. Clem was the guest of the inn-keeper, Adams; her trunk was carried to her room, and was marked with her name; she paid her bill, saying that a gentleman, whom she pointed out, would call in ten minutes for it and bring it to her in the country, to which Adams assented. She left the inn on Monday and no one called for the trunk until Friday, when it was found to be lost. The court held the inn-keeper responsible.

The appellant also cites the case of McDonald vs. Edgerton, 5 Barbour, S. Ct., 560. This decision is partly based on the case of Grinnell vs. Cook, 3 Hill, 485. We think the court misconstrued Justice Bronson in the case of Grinnell vs. Cook. In that case Judge Bronson drew a well founded distinction in respect of the inn-keeper's liability for property left by the guest, as to whether the inn-keeper was to receive compensation for keeping the property during the absence of the guest. The guest had left a horse which required feed and attention, for which the inn-keeper had a right to charge a reasonable compensation. In the case of McDonald vs. Edgerton, the plaintiff left behind his coat and there was no compensation agreed on or expected for keeping it. Leaving property for which a compensation for keeping was to be paid continued the relation of innkeeper and guest so far as that property was concerned.

We think the current of authority and the weight of reason is opposed to the conclusion reached by the Supreme Court of Georgia and the Supreme Court of N. Y., in 5th Barbour, supra.

The law imposes on an inn-keeper an extraordinary liability for the protection of the baggage of his guest. He can avoid it only on the grounds of the loss being occasioned by the act of God, the public enemy, the misconduct of the guest, or the friends he brings with him. We can think

of no other reason for the imposition of this liability upon the inn-keeper than the profit he receives from entertaining his guest. When the traveler ceases to be his guest and the inn-keeper ceases to derive a profit for his entertainment, the relation of inn-keeper and guest have ceased as such and as a consequence their relative liabilities.

O'Brien, when he paid his bill and left the hotel, put an end to the relation of guest to the hotel keeper. See Miller vs. Peoples & Branum, 60 Miss., 819; Grinnell vs. Cook, 3 Hill, 485.

The expectation to become a guest again at some other time did not continue the relation of inn-keeper and guest.

The next question is, what was the relation of the parties after the cessation of the relation of inn-keeper and guest as shown by the evidence? We think it was that of bailor and bailee, and that the defendant was a gratuitous bailee. The statement of the appellant that he expected to return to and board at the hotel could not be considered as a consideration for taking care of the baggage. A gratuitous bailee is liable only for gross negligence. There is nothing proved in the case that will justify us in the conclusion that defendant was guilty of such negligence in opposition to the finding of the referee.

The judgment is affirmed.

JOHN PINKERTON v. ROBERT B. WOODWARD.

(33 Cal. 557.)

Appeal from the District Court, Twelfth Judicial District, City and County of San Francisco.

The defendant was sued as an innkeeper to recover for the loss of one hundred and sixty-eight ounces of gold dust, the property of the plaintiff; fifteen hundred dollars, gold coin, at the time of loss the property of the plaintiff's assignor, Robert Walker; and two hundred and twenty-seven and a half ounces of gold dust, at the time of loss the joint property of the plaintiff's assignors, Michael Lynn and Duncan McKinnon.

In his complaint the plaintiff

"Complains of Robert B. Woodward, defendant, and for cause of action alleges: That the said defendant, before and at the times hereinafter mentioned, was, and from thence hitherto had been, and still is, an innkeeper; and as such innkeeper, the said defendant hath, for and during all that time, kept and doth still keep, a certain public inn for the reception, lodging and entertainment of travellers—that is to say, a certain inn commonly called and known by the name and sign of the 'What Cheer House," in the City and County of San Francisco, and State of California.

"And plaintiff avers that said defendant, so being such innkeeper, the said plaintiff, on the first day of November, A. D. 1865, put up, and was then and there received into the said inn as a traveler, by the said defendant, and then and there brought into the said inn a certain purse or package containing one hundred and sixty-eight ounces of gold dust —the property of the plaintiff, of the value of twenty-six 92-100 dollars per ounce, amounting to the sum of four thousand five hundred and twenty-three 7-100 dollars lawful money of the United States. Plaintiff avers that defendant gave him notice, upon or shortly after his arrival in said house, that he would not be responsible as such innkeeper in said house, for any money or articles of value that would be left by his guests in their own rooms; but that all the money and valuables should be deposited in the safe at the office in said house for safe keeping. And said plaintiff was by the defendant particularly requested not to leave his money or valuables in his room in said inn. Plaintiff avers, that he did comply with said notice and request; and while he was a guest at said hotel, to wit: on or about the 11th day of November, A. D. 1865, he did deliver to one Seward W. Baker, the clerk and servant of defendant in said house, thereunto lawfully authorized by the defendant, the said one hundred and sixty-eight ounces of gold dust of the plaintiff, valued as aforesaid, to be put in the defendant's safe in said house, and there kept by him until he should demand the same. Plaintiff avers that said purse or package of gold dust aforesaid was then and there received by the defendant's said clerk and servant, and placed in said safe of said defendant, and in his custody and control, and has never since been returned to the plaintiff; and that the said plaintiff during all that time, abided as a traveller in said inn. Plaintiff avers that prior to the commencement of this suit, he did demand from said defendant, the return to him of said purse or package containing said one hundred and sixty-eight ounces of gold dust, valued as aforesaid, but that defendant neglects and refuses to return the same to him. Plaintiff avers that defendant, so being such innkeeper as aforesaid, not regarding his duty as such innkeeper, did not keep the said purse or package of gold dust aforesaid, so brought into and so being in the said inn, and so placed in said safe as aforesaid, safely and without diminution or loss; but, on the contrary thereof, the said defendant and his servants so negligently and carelessly behaved, and conducted themselves in that behalf, that afterwards, and while said plaintiff so abided in said inn as aforesaid, to wit: on or about the twelfth day of November, A. D. 1865, the said purse or package of gold dust aforesaid, was, by and through the mere careless negligence and default of the said defendant, and his servants in that behalf, wrongfully and unjustly taken and carried away by some person or persons to the said plaintiff as yet unknown, and were and still are thereby wholly lost to said plaintiff."

The complaint contains similar averments in respect to the plaintiff's grantors and their said property, and that their rights and title to said property, and their rights of action to recover for its loss, had been duly assigned to the plaintiff for valuable considera-

tions before the commencement of the action.

The defendant in his answer denies:

"That, at the time or times mentioned in the first count of plaintiff's complaint, or while plaintiff was stopping at the What Cheer House, this defendant was an innkeeper, or kept a public inn for the reception, lodging and entertainment of travellers; he (defendant) admits that he was, during all the time mentioned in plaintiff's complaint, the owner of the building known and designated as the 'What Cheer House.' * * * * * * On the contrary, this defendant avers that, at the time and times mentioned in the first count of plaintiff's complaint, and whilst plaintiff stopped at said What Cheer House as a lodger, he conducted and carried on said What Cheer House as a lodging house (but not as an inn) for the accommodation of lodgers, whether travellers or otherwise; that, within the same building where said lodging house was carried on by defendant was, at the time and times in the first count of plaintiff's complaint mentioned, and whilst plaintiff stopped at said lodging house, a restaurant or saloon, where people could, on application to the proprietors thereof, be furnished with food and drink, excepting intoxicating liquors, wines, ales, beer or cider. That said restaurant or saloon was conducted, managed and carried on jointly by this defendant and Charles Quast and Charles J. Woodward, and for their mutual and joint benefit; that persons lodging at said What Cheer House were under no obligations, expressed or implied, to procure their food or drink, or both, at said restaurant or saloon. That the said lodging house was not connected with said restaurant, nor managed or controlled by the same proprietors. That defendant did not keep, at the time and times mentioned in plaintiff's complaint, nor whilst plaintiff stopped at said lodging house, a table for furnishing persons who lodged at said What Cheer House, with food; nor did he make any contract, express or implied, nor hold out to plaintiff that he would supply him with meat or drink, or any other thing than a room and bed for his comfort and convenience as a lodger.

"That said 'What Cheer House' was at the time and times mentioned in the first count of plaintiff's complaint and whilst plaintiff stopped thereat as a lodger, conducted as follows, to wit: persons stopping there, and who applied for a room and lodging, were required to pay for such room and lodging in advance, and persons eating at such restaurant, whether lodging at said What Cheer House or lodging elsewhere, or whether travellers or residing in said city and county, were required to pay (by the proprietors of said restaurant) for each meal as it was eaten; that the manner in which such lodging house and said restaurant was conducted as aforesaid was well known to plaintiff at the time and times mentioned in the first count of plaintiff's complaint and during all the time plaintiff stopped at said What Cheer House.

"This defendant denies, that while he was an innkeeper, plaintiff, on the first day of November, 1865, or at any time, put up or was received into said alleged inn, to wit: said 'What Cheer House,' as a traveller. On the contrary, defendant avers the fact to be that about the first day of November, 1865, and at the time mentioned in the first count of plaintiff's complaint, said plaintiff was received at said What Cheer House as a lodger, and not otherwise.

"Defendant denies, upon and according to his information and belief, that at the time plaintiff was so received as a lodger he was a traveller; defendant denies that said plaintiff, at the time or times averred in the first count of plaintiff's complaint, brought into the said 'What Cheer House' one hundred and sixty eight ounces of gold dust; admits that said plaintiff at said time, to wit: November 11th, 1865, brought in said lodging house a purse or package which he said contained gold dust; that on a subsequent day, and after the same was lost as hereinafter averred, plaintiff asserted and claimed that said purse or package contained one hundred and sixty (160) ounces of gold dust; that the true and actual contents of said purse or package are unknown to defendant; and he denies, upon and according to his information and belief, that said purse or package contained one hundred and sixty-eight ounces of gold dust, or any number of ounces exceeding one hundred and twenty (120) or thereabouts; denies, and it is not true, that the gold dust mentioned in the first count of plaintiff's complaint, or the contents of said purse or package, was of the value of ($26 92-100) twenty-six 92-100 dollars per ounce, or that the same was worth any greater sum than fifteen (15) dollars per ounce; denies that the contents of said purse were of the value of four thousand five hundred and twenty-three 1-100 dollars ($4,523 1-100), or of any greater value than eighteen hundred dollars ($1,800); denies, and it is not true, that this defendant at any time gave to plaintiff or caused to be given to him the notice averred in the first count of plaintiff's complaint, or a notice that he would not be responsible as innkeeper in said house, or any notice as innkeeper. Defendant denies that he (defendant) requested plaintiff as averred in the first count of plaintiff's complaint. Denies that defendant or his servants at any time particularly or in any manner requested plaintiff not to leave his money or valuables in his room in said alleged inn or in said 'What Cheer House,' or in any manner notified plaintiff, or held himself out to plaintiff as an innkeeper.

"This defendant avers that, at the several times aforesaid, in conspicuous places in said house, were posted up printed notices or cards, copies of which are hereto annexed, marked 'A' and 'B' respectively.

"That by means of said printed cards, and in no other manner, did this defendant give notice to plaintiff, or make any request of the purport, or to any similar effect, of the notice or request averred in the first count of plaintiff's complaint. That said notices or cards were posted up in conspicuous places

in said What Cheer House, at and during all the times mentioned in plaintiff's complaint.

"This defendant admits, that said plaintiff did on or about the eleventh day of November, 1865, deliver to the clerk and servant of this defendant, in said lodging house, a purse or package, which, he asserted, contained gold dust, but what amount of gold dust was contained therein, and what was the value thereof, defendant is ignorant and unable to state; and he denies, upon and according to his information and belief, that the same contained more than one hundred and twenty (120) ounces of gold dust; and denies, upon and according to his information and belief, that the contents of said purse or package exceeded in value eighteen hundred dollars ($1,800) lawful money of the United States. And this defendant admits and avers that said purse or package, and the contents, was, without being weighed or the contents thereof ascertained, deposited by the servant of this defendant in the safe mentioned in plaintiff's complaint, to wit: an iron and burglar proof safe, known as 'Tilton & McFarland's' safe.

"Denies, and it is not true, that defendant undertook or agreed to keep said package safely, or to return the same to plaintiff when thereafter demanded. On the contrary, he avers that the only undertaking or agreement he made with plaintiff concerning said package, was to the effect that defendant would deposit the same in said safe, and would take such reasonable care of the same as men of ordinary prudence would take of the same.

"This defendant admits, that the said purse and its contents have not been restored to plaintiff; avers the fact to be that on the morning of the thirteenth day of November, 1865, at or about three o'clock in the morning, the said package or purse mentioned in the first count of plaintiff's complaint, then being in said safe, and not having been removed therefrom, and being subject to plaintiff's order, and said safe then being securely locked, and the key thereof in the pocket of the clerk of defendant, and said house being guarded by two honest, reliable and competent men, to wit: said clerk and a watchman; said safe then being in a well lighted room, to wit: the office of said 'What Cheer House,' lit with gas; the said clerk of this defendant, in charge of and guarding said safe and its contents (including the purse or package mentioned in the first count of plaintiff's complaint), was feloniously knocked down, rendered insensible by said evil disposed persons to defendant unknown, the key of said safe taken from his pocket by violence, and said safe feloniously opened and robbed by said evil disposed persons who then and there feloniously stole and carried away from said What Cheer House, and to some place to the defendant unknown, of the contents of said safe, about thirty thousand dollars ($30,000) in value including the said purse or package so averred to have been deposited therein by plaintiff, and including money belonging to defendant in part; that said robbery and theft was without the fault, connivance, carelessness or negligence of this defendant, or of any of his servants employed in or connected with the 'What Cheer House.' That, immediately upon said robbery being discovered, the fact was notified to the police department of said city; large rewards for the recovery of said money so stolen has been and was offered and advertised by defendant, and defendant and the police of said city and county have used the utmost diligence to recover the said purse or package, and the other contents of said safe, so stolen as aforesaid, but have been utterly unable so to do. That, by means of and in consequence of said robbery and theft, defendant has been unable to, and he avers and insists he is thereby discharged from all obligation to, return said purse or package and its contents, or any part thereof, to plaintiff.

"And defendant denies, upon and according to his information and belief, that during all or any of the time mentioned in the first count of plaintiff's complaint, or at any time, plaintiff remained or abided as a guest at said 'What Cheer House,' or in any manner therein except as a lodger.

"Defendant denies that he neglected or refused to return said package or purse or its contents, or any part of such contents, to plaintiff; avers that at the making of the demand averred in the first count of plaintiff's complaint, he (defendant) had not the said purse and contents, or any part of the said alleged contents, in his possession, or under his control; but, on the contrary, the same had been feloniously stolen, as hereinbefore averred.

"Defendant denies, and it is not true, that this defendant in any manner disregarded his duty as innkeeper, or as a lodging house keeper, or in any manner, with reference to keeping said package or purse, or the contents thereof, safely. Denies, and it is not true, that he or his servants, or any of them, negligently or carelessly, dishonestly or otherwise improperly conducted or behaved themselves in connection with the said purse or package, or its contents, or the keeping thereof: denies, and it is not true, that said package or its contents was lost or carried or taken away through or by means of the carelessness or negligence, or default, of this defendant, or any of his servants or employés."

The answer contains similar averments and denials in respect to each of plaintiff's assignors. Exhibits A and B are as follows:

"EXHIBIT A.

("Mentioned in foregoing Answer.)

"Special Notice.

"The proprietor will not hold himself responsible for anything lost from the rooms.

"Deposit your money and valuables in the safe at the office.

WHAT CHEER HOUSE.

Deposits Delivered
from
8 to 11 a. m.
from
2 to 4 p. m.

"Have your baggage checked in the Baggage Room.

"Be particular to lock and bolt your door, and extinguish your light before retiring to bed.

"Beds not reserved, unless paid for before 10 a. m.

"What Cheer House, San Francisco.
R. B. Woodward,
Proprietor."

"EXHIBIT B.
("Mentioned in foregoing Answer.)
"Rules and Regulations
"of the
"What Cheer House,
"San Francisco, Cal.

"1. Gentlemen will please register their names on arrival, and make known how they wish to room, whether by the day or week, and pay in advance.

"2. Gentlemen wishing to retain any particular bed or room, are requested to apply before 10 o'clock a. m., otherwise they cannot consider them as engaged.

"3. Guests are particularly requested not to leave money or articles of value in their rooms, as the proprietor will not hold himself responsible for any loss that may occur.

"4. Money and valuables should be deposited in the safe at the office for safe keeping.

"5. Have your baggage, etc., checked in the Baggage Room.

"6. Cast-off clothing will not be allowed to remain in any of the rooms.

"7. Guests are requested to avoid the filthy practice of spitting on the carpets, smoking, lying upon the beds with their boots on, or defacing the walls by lighting matches, driving nails, or moving furniture.

"8. Gentlemen will please extinguish their lights before going to bed.

"9. Reading in bed positively prohibited.

"10. All persons finding money, or articles of property, lost in the house, will deliver the same to the proprietor or bookkeeper, to be reserved till called for by the proper owner.

"11. Any remissness or impertinence on the part of the servants should be reported to the proprietor without delay.

"12. This house will be kept open all night.

"The Boarding Department is conducted on the European plan, at reduced rates.

Terms in this Room:

"Lodging per day, — cts. Lodging per week, —.

"Shower Baths Free!!
"R. B. Woodward.
"Proprietor."

On the trial there was evidence tending to prove that the plaintiff and his three companions, Robert Walker, Michael Lynn, and Duncan McKinnon, were residents of Canada, but had been mining at the Cariboo Mines in British Columbia. They left the mines with their gold dust and money, the result of their labors, and started on their journey home in Canada West. They came to San Francisco by steamer, and arrived on the first day of November, 1865, having no business here at all. It was a convenient route, and afforded them the opportunity of travelling by steam from Victoria to San Francisco, and from the latter place to New York. They immediately went to the hotel called the "What Cheer House," of which the defendant was proprietor, and very shortly afterwards engaged passage by the Nicaragua route to New York, on the steamship America, which sailed on the 13th of November, 1865, and expected and intended to embark on her.

Walker had fifteen hundred dollars in gold coin, and the others had their respective bags of gold dust, the amounts being the same that are particularly stated in the complaint. The coin and gold dust were placed in charge of the hotel, and put by the clerk in a safe kept for that purpose, pursuant to the various notices, rules and regulations posted up in the public places around the hotel and in the rooms of the guests. A register of deposits was kept in the house by the bookkeeper, and the names of the depositors were entered in it, with a description of the articles, and date set opposite. This had been the custom of the house for years.

In the case of the plaintiff and his companions these formalities were observed, and all the proper entries made in the register, and the clerks of the house were perfectly informed that these were gold dust and coin, and memorandums to that effect were made in the register. The defendant did not live at the hotel, but exercised a general supervision over it, and chiefly depended on his agents and employés at the house.

That the rule and custom generally observed at the What Cheer House at the times the plaintiff and his assignors stopped there, was that persons stopping there, and who applied for rooms and lodging, were required to pay for such room and lodging in advance, and persons eating at the restaurant, (which was kept in the basement of the building, and managed and conducted by and for the benefit of defendant, Charles Quast, and Charles J. Woodward, but in the name of the defendant,) whether lodging at the What Cheer House or not, were required to pay for each meal as it was eaten. This rule at the restaurant was not inflexible, however, and was not enforced as to the plaintiff, who settled for a portion of the meals eaten by him and his assignors with the clerk of the What Cheer House by general bill.

On the 13th of November, 1865, at 3 o'clock, a. m., the safe of the What Cheer House, in which the treasures of the plaintiff and his assignors were deposited, was broken into, and their property stolen and carried away. The money and treasure was deposited in a safe known as a "Tilton and McFarland Safe." At the time of the robbery the combination lock was not turned

on. Other than this, all usual and necessary precautions seemed to have been adopted for the safety of the treasure contained in the safe. A portion of the plaintiff's money was not brought by him to the What Cheer House on his first arrival, but was received by him and deposited, several days after, in the safe, as the residue had already been deposited.

The three others assigned their claims to Pinkerton, who brought this action against the defendant, as an innkeeper, for the amount of the loss.

Other portions of the evidence given on the trial are stated in the opinion of this Court.

The Court gave the following instruction, requested on plaintiff's part, to the giving of which the defendant at the time duly excepted, to wit.

"I. If the defendant, Woodward, at the time referred to in the evidence, kept open for the reception and entertainment of the travelling public, the house called the 'What Cheer House,' and there furnished travellers with those things ordinarily required whilst upon their way, he was an innkeeper, and subject to all their liabilities.

"II. An inn is a public house of entertainment, kept open for the reception and accommodation of travellers, and its character is not changed by the innkeeper's requiring lodgings to be paid for in advance, or meals to be paid for as ordered.

"III. A person who makes it his business to entertain travellers and passengers, and provides lodgings and necessaries for them, is a common innkeeper, whether he requires payment in advance, or at the time of furnishing articles, or afterwards.

"IV. If the defendant held himself out to the public as a person who, at the What Cheer House, entertained passengers and travellers, and provided them with lodgings and meals, he is responsible as an innkeeper, no matter what private contracts he may have had with others to assist him in conducting some part or parts of the entertainment prepared for his guests.

"V. If the plaintiff, and those whose claims he holds by assignment, were travellers and transient persons, and were received by the defendant at the 'What Cheer House,' as an innkeeper, the plaintiff and his assignors became the guests of the defendant, and the latter became responsible for the safety of all their property committed to defendant's care, whilst his guests, and defendant can only exempt himself from liability by showing that the loss was by the act of God or the public enemy, or the neglect and fraud of the owner or owners of the property lost.

"VII. If the defendant was an innkeeper, and the plaintiff and his assignors were guests of defendant, and travellers and transient persons, and as such committed their property and funds to the custody of the defendant and his agents, to be placed in a safe, according to the defendant's rules and regulations posted up in the What Cheer House, the defendant cannot excuse himself from restoring to the plaintiff such property and funds, by showing that the safe was robbed by unknown persons, either within or without the house.

"VIII. The liability of innkeepers is not limited merely to the personal baggage of guests, or merely funds sufficient for travelling expenses to their destination, but it extends to all articles of the guest which the innkeeper receives in his custody at his inn.

"IX. An innkeeper's liability is not affected by the fact that he is not paid a separate sum to take charge of the goods or money of his guests. The compensation to him for entertaining his guests covers the property. The care and custody of the goods is secured by the principal duty of the innkeeper to entertain his guests."

The Court was requested by the defendant to give the following instructions, which were severally refused and indorsed with the reason for such refusal. To such refusal the defendant at the time duly excepted, to wit:

"4th. The defendant insists that the contract of bailment which the law implies was entered into between Pinkerton, Walker, Lynn and McKinnon, respectively, and defendant, at the times they respectively delivered the two packages or purses containing gold dust, and the fifteen hundred dollars in coin, to the defendant, was a bare, naked bailment to keep the same for the use of the bailor, which in law is called depositum; and insists that, as such a bailee, he (defendant) is not chargeable for a common neglect to take care of the same; but if the same was lost or stolen without gross neglect on his part (or that of his servants), the plaintiff cannot recover therefor.

("Not given. It does not purport to be a charge or statement of what the law is, but merely what defendant insists it is.)

"5th. Deposit is a bailment of property to be kept for the bailor, without recompense to be paid by the bailor or received by the bailee.

("Not given. It is thought to be a mere abstract proposition of law, not applicable to the case.)

"7th. The defendant might carry on in one part of the building, known as 'The What Cheer House,' a lodging house, and in another part an eating house, saloon or restaurant, if the two were conducted separately; that is, if the lodging house was conducted and carried on by defendant solely for his exclusive benefit, and under his exclusive control, and the eating house, saloon or restaurant was conducted, carried on and controlled by the defendant, and others who were interested with him, and who had as much or more control of the management thereof as defendant, and who received a share of the profits, the fact that such business was carried on in the same building did not make defendant an innkeeper.

("Not given. Thought to be of a tendency to mislead.)

"8th. If you find, from the evidence, that plaintiff and his assignors, Walker and Lyon and McKinnon, at the time they respectively stopped at the What Cheer House, made a special agreement with defendant for the use of a room or rooms, or part of a room and bed, by the week, and paid therefor in advance, and were stopping at said What Cheer House, at the time of the deposit by them (or delivery by them to the clerk of defendant) of the gold dust and coin alleged to have been delivered, and were occupying rooms, or parts of rooms, and beds, under such special agreement, having paid therefor in advance for a week, said person and persons were lodgers, and not guests at an inn.

("Not given for the same reason as the last.)

"9th. If a person, upon a special agreement, boards or sojourns at an inn, and is robbed, or his property is stolen by some person or persons other than the innkeeper or his servants, the innkeeper shall not answer for it (the theft or loss).

"10th. If a person, upon a special agreement, lodges or occupies a room at an inn, or in the house of another, and is robbed or his property stolen by some person or persons other than the proprietor, or his servants or guests, the innkeeper or proprietor shall not answer for it.

("Not given for the same reason assigned to the seventh.)

"12th. An innkeeper is a person who makes it his business to entertain travellers and passengers, and provide lodging and necessaries for them, their horses and attendants.

("Not given. He need not, in cities or towns where there are public stables or others provided for such uses, make it his business to provide necessaries for travellers' horses.)

"13th. That if the jury find from the evidence that the restaurant or eating saloon, kept in the basement of the building known as the 'What Cheer House,' was conducted and carried on from October 31st to Nov. 14th, 1865, inclusive, by Charles Quast, Charles Woodward and defendant, jointly and for their joint benefit, profit and advantage, and remainder of the establishment known as the What Cheer House was conducted by defendant alone for his exclusive profit and advantage, then no person stopping at said What Cheer House, whether a traveller or a person residing in the city, had a right to demand that he be furnished with meat or drink at such restaurant, and the right so to demand determines whether or not such house is an inn.

("Not given. Thought not correct as a proposition of law, and if correct, calculated to mislead.)

"14th. If the jury believe from the evidence that plaintiff and his assignors, at the time they respectively delivered to the clerk of the defendant the gold dust and gold coin for which a recovery is sought, knew that defendant did not keep a table for furnishing persons stopping at the What Cheer House with meat and drink, and did not make any charge to plaintiff and his assignors except for lodging by the week, but left the plaintiff and his assignors to furnish themselves with food, meat and drink at any place, eating house, restaurant, or saloon they saw proper, and plaintiff and his assignors, at the time they respectively made the delivery of the gold dust and coin for which a recovery is sought, to the clerk of defendant, were acting with the knowledge that if they ate at any other place than the What Cheer Restaurant no charge would be made against them by defendant, other than for the use of the lodging room and bed occupied by them respectively, and if they should eat at the What Cheer House Restaurant they would be and were required to pay to the keepers of such restaurant for such meal, when eaten, and before leaving the restaurant; then it cannot be said that plaintiff or his assignors, so acting with such knowledge, delivered such gold dust and coin to defendant in the character of an innkeeper, nor did defendant receive the same in the character of an innkeeper.

("Not given, for the same reason as the last.)

"15th. An inn is a house where the traveller is furnished with everything which he has occasion for whilst on his way. If you believe defendant did not keep such a house at the time the gold dust and coin mentioned in the complaint was delivered to defendant, then plaintiff cannot recover in this action.

"16th. If the jury believes that defendant was not in fact an innkeeper, i. e., a person who makes it his business to entertain travellers and passengers and provide lodgings and necessaries for them, his having held himself out as such (if the jury believe he did so hold himself out) constitutes no basis on which the plaintiff can recover in this action.

"17th. If the jury believe from the evidence that the moneys and gold dust in the complaint mentioned were feloniously taken by force, and robbery, and such robbery was committed by a person who was not a servant or employé nor a guest in the What Cheer House, and was without the connivance of defendant, his servants or guests, and without any negligence of defendant, his servants or guests, then the defendant is not liable, and your verdict should be for defendant.

"18th. If you find that defendant nor his servants were not guilty of any negligence in taking care of the moneys or gold dust mentioned in the complaint, and the same was taken feloniously by a robber, and by force, against the consent and will of defendant and his servants, you should find for defendant.

"In determining the question of negligence you should consider the following facts and circumstances, if proven by the evidence:

"1. Were the servants employed by defendant, and particularly the watchman and clerk in charge of the What Cheer House, the office, and safe, at the time the same was robbed, (if you believe the same was robbed,) honest, faithful, and competent?

"2. Was the clerk knocked down by force? Was the key of the safe in his pocket, and was it taken by force from his pocket?

"3. Was the room in which the safe was kept in full view of a frequented, public street in this city, by glass doors opening in the street? Was such room well lighted by gas? Was such public street lighted by gas? Was money of defendant, or in which defendant was jointly interested, kept in the same safe in which the money and gold dust described in the complaint was kept? Were the moneys described in the complaint kept in a safe?

"4. Did defendant keep a clerk and watchman to guard the house and the safe which contained the moneys and gold dust described in the complaint? Was such clerk on duty at the time the safe was robbed? Could such clerk have prevented the robbery?

"19th. If the jury believe from the evidence that at the time plaintiff and his assignors stopped at the What Cheer House, and at the time the money and gold dust in question was stolen, if the same was stolen, that house was kept as a lodging house by defendant, and that defendant did not keep a bar, nor undertake to furnish food, meat and drink, for persons stopping at the house, and the restaurant and eating saloon then conducted in the basement of the building 'What Cheer House' was conducted and carried on by Quast, Charles Woodward, and defendant jointly, and the custom of defendant was, to charge persons who had a room and bed, or a bed, at said lodging house, and receive pay from such persons nightly or weekly for lodging, without reference to the time the person stayed in the house, and that custom was followed with reference to plaintiff and his assignors, and the custom of the proprietors of the said restaurant or saloon was to charge and collect pay of the persons eating there by the meal, then the defendant was not an innkeeper, and his liability for the custody and care of the moneys and gold dust mentioned in plaintiff's complaint is not governed by the rules applicable to innkeepers, but he was only required to take such care of the moneys and gold dust mentioned in plaintiff's complaint as men in the exercise of ordinary prudence would take of similar money and property belonging to themselves; and if the jury believe defendant and his servants took such care, and the safe was robbed, and the moneys and gold dust in question stolen and robbed without the fault or negligence of defendant or his servants, plaintiff cannot recover.

"23d. One taking lodgers to lodge and diet in his house, and letting stables for their horses, is not an innkeeper.

("Not given. Not relevant to the case.)

"24th. If defendant required payment for lodging nightly, or weekly, he was a lodging house keeper; if plaintiff and his assignors assented to such requirement, and make a special agreement in pursuance thereof.

"25th. In a boarding or lodging house, the guest is under an express contract, at a certain rate, for a certain period of time; but in an inn there is no express engagement; the guest, being on his way, is entertained from day to day, according to his business, upon an implied contract.

"26th. If the jury find plaintiff and his assignors could only stay as long as they respectively paid in advance for lodging, and could only eat one meal at the restaurant without paying, and could not eat a second meal without paying for the first, then the What Cheer House was not an inn.

"28th. That if the jury believe plaintiff Pinkerton deposited 168 ounces, or any other quantity of gold dust with the defendant, or, what is the same thing, the clerk of defendant at the What Cheer House, the same was not baggage nor money for travelling expenses; and the rules applicable to innkeepers are not applicable to and do not regulate defendant's liability or duty in respect to the keeping and care of such gold dust.

"29th. That if the jury believed Michael Lynn and Duncan McKinnon, or either of them deposited 227½ ounces, or any other quantity of gold dust, with defendant or his clerk at the What Cheer House, the same was not baggage nor money for travelling expenses, and the rules applicable to innkeepers are not applicable, and do not regulate defendant's liability or duty in respect to the keeping and care of such gold dust.

"30th. That the rule of law applicable to such gold dust, whether defendant was or was not an innkeeper, is that defendant was bound to take such reasonable care of the same as men in the exercise of ordinary prudence would take of the same species of property; and if the jury believe that defendant kept the said gold dust in a safe, and took such care thereof as men of common ordinary prudence would have taken thereof, and the same was stolen without the fault or negligence of defendant, or his servants, or guests abiding in his house, but by robbery and force committed by some person or persons coming from without the house, plaintiff cannot recover the value of such dust or any part thereof.

"31st. That if the jury believe that the plaintiff Pinkerton contributed to the loss of the gold dust, by him alleged to have been deposited with defendant, by his own carelessness or negligence, he cannot recover the value of such gold dust, or any

part thereof. That in determining that question, it is proper for the jury to inquire, could the plaintiff have himself deposited said gold dust in a bank, or in the United States Mint, at San Francisco; if he could, was he guilty of negligence in not having done so?

("Not given. First part good—last part bad.)

"32d. That if the jury believes that Lynn and McKinnon, or either of them, contributed to the loss of the gold dust, by them alleged to have been deposited with defendant, by their negligence or carelessness, or the negligence or carelessness of either of them, plaintiff cannot recover the value of such gold dust, or any part thereof; that in determining that question, it is proper for the jury to inquire, could the said Lynn and McKinnon have deposited said gold dust in a bank, or in the United States Mint at San Francisco; if they could, were they guilty of negligence in not having done so?

("Not given, for the same reason as the last.)

"33d. That, if the jury believe that plaintiff and Lynn and McKinnon were induced to deposit the gold dust which they did deposit with defendant, and Robert Walker was induced to deposit the $1,500 which he deposited with defendant, in consequence of and in pursuance of the printed notices posted in the 'What Cheer House,' copies of which notice are annexed to defendant's answer, and made such deposit under the provisions of said notices, such deposit or deposits created a special contract between plaintiff and defendant, and Lynn and McKinnon and defendant, and Walker and defendant, and the liability of defendant created thereby was to take such care thereof as men in the exercise of common, ordinary prudence would have taken of the same; and if defendant and his servants did take such care thereof, and the same was stolen by robbery and force, which defendant, by the exercise of common, ordinary care could not have prevented, then plaintiff cannot recover the value of such gold dust and coin.

"34th. That if the jury believe the money alleged to have been deposited by Robert Walker, in the complaint named and claimed to have been ($1,500) fifteen hundred dollars, gold coin, or any part thereof, was not provided by Walker for travelling expenses, plaintiff cannot recover for the part thereof not provided for travelling expenses.

"36th. That if the jury believe that any portion of the money alleged to have been deposited by Walker was not provided for use as travelling expenses by him as a traveller, plaintiff cannot recover for such portion, if the jury believe that defendant took such care thereof as men in the exercise of common, ordinary prudence would have taken of the same, and the same was feloniously stolen by robbery and force, which ordinary prudence could not have guarded against, plaintiff is not entitled to recover for such portion.

"37th. Even if the jury should find from the evidence that the What Cheer House mentioned in the complaint was an inn, and was kept by the defendant as such inn at the several times mentioned in the complaint, and that the plaintiff and his assignor, Robert Walker, were each of them a guest at said inn on the first day of November, 1865, and continued to be such guests at the said inn to and including the 13th day of November, 1865, still, if the jury also believe from the evidence that the $1,500 gold coin deposited by the said Robert Walker at said What Cheer House, and the 168 ounces of gold dust deposited by the plaintiff at said house, were so deposited by the said plaintiff and the said Walker, respectively, only on the 11th day of November, 1865, and not before that time, and only deposited after several days had elapsed from the time that the said plaintiff and said Walker first became guests at said house, it does not necessarily follow that the defendant is responsible as an innkeeper for the loss of the said $1,500 in gold coin and the said 168 ounces of gold dust. If the jury believe from the evidence that said $1,500 gold coin and said 168 ounces of gold dust were deposited as an ordinary bailment, and that the said defendant and his servants and employés used reasonable and ordinary diligence in taking care of said gold dust and gold coin, and that the same was lost by robbery effected from without the house, and without the connivance or fault of the defendant, or any guest, agent, servant or employé of his, and the jury may find for defendant as to said $1,500 gold coin and said 168 ounces of gold dust aforesaid.

("Not given. Thought to be likely to mislead.)

"38th. Even though the jury may believe from the evidence that the What Cheer House mentioned in the complaint was an inn, and was kept by the defendant as such inn at the several times mentioned in the complaint, and that the plaintiff and his assignors, in the complaint mentioned, were guests, and that each of them was a guest at said inn on the first day of November, 1865, and continued to be such guests until and including the 13th day of November, 1865, and that at the time or times when the said plaintiff and his said assignors, respectively, became guests at said inn, the said plaintiff and his assignors, as such guests, respectively, delivered to and deposited with said defendant the said gold coin and gold dust mentioned in the complaint, and that the said defendant received the same in his capacity as keeper of the inn mentioned in the complaint, nevertheless, if the jury believe, from the evidence, that the said defendant did thereupon, at said inn, keep and guard and preserve the said coin and gold dust with the utmost care and diligence during the whole time that the same were on deposit at said inn,

and that notwithstanding such care and diligence on the part of the said defendant and his servants and employés, and without fault upon his or their part, or upon the part of any guest of his at said inn, the said gold coin and gold dust was, on the night of the thirteenth day of November, 1865, feloniously stolen and by force robbed from said inn, and from the custody of the defendant and his guests and servants at said inn, by some person or persons to him and them unknown, who entered said inn from without for that purpose in the night time, and effected said robbery by superior force and violence, overcoming the said agents and servants of the defendant, then the jury should find their verdict for the defendant.

"39th. Even if the jury believe from the evidence that defendant kept the What Cheer House as an inn, at the several times when plaintiff and his assignors delivered the packages of gold dust and coin, respectively, to defendant's servants, and if the jury believe that at such time and times the plaintiff and his assignors were guests at such inn, and any portion of the gold dust and coin so delivered was not provided for travelling expenses by such guests, the defendant is not liable as an innkeeper for such portion, but only as a bailee without hire; if the jury believe he did not charge and did not intend to charge any compensation for keeping such gold dust and coin, if he and his servants took ordinary care of the same, the defendant is not responsible for the loss of the same."

The following instructions were prepared by the Court and delivered to the jury of its own motion, to the giving of which the defendant at the time duly excepted, to wit:

"Gentlemen of the Jury: The plaintiff claims to recover from the defendant the value of 395½ ounces of gold dust and $1,500 in gold coin, alleged to have been placed in defendant's hands as an innkeeper by plaintiff and others, while guests at his inn, a few days previous to the 13th day of November last, and while they were travelling and on their way from the British Possessions on the Pacific Coast to their home in Canada. Plaintiff sues as well for money, etc., claimed by himself, as for that of certain others who have assigned their several demands to him. No question is made about the bona fides of the respective assignments. Defendant, among other things, claims that he was not an innkeeper; that the valuables in question were received by him through his employés, not for hire or reward, but as a matter of accommodation to plaintiff and others whose claims he represents; that the same were put into a safe by him for that purpose provided, and carefully guarded; and, while so in his custody and guarded, the said safe, on the night of the 12th of November, was opened by thieves and the contents stolen, including plaintiff's treasure, without the fault or negligence of himself or his servants.

"An early inquiry by you will be to determine from the proofs whether or not defendant, at the time alleged, was an innkeeper. The Court understands, and so charges you, that an inn, as known to the law, and defined in this class of actions, is a public place of entertainment for all travellers who choose to visit it. It is distinguished from a private lodging or boarding house mainly in this: that the keeper of the latter is at liberty to choose his guests, while the innkeeper is obliged to entertain and furnish all travellers of good conduct and means of payment, everything which they have occasion for as such travellers, whilst on their way. A house becomes an inn by the mere custom of receiving persons transiently as guests, without a definite agreement as to time. But a mere restaurant or place of eating is not one. It is immaterial, in determining whether one was an innkeeper at any given time, to inquire in what way, as to the particular agencies employed by him to acomplish it, the desired entertainment to the traveller, whether in part or in whole, was furnished. Such agencies or means are unimportant. A material fact to determine, in any given case, is whether the alleged innkeeper professed to supply the travelling public at his public house with what travellers have necessary occasion for; and, if it be found that he did, and, further, that he entertained travellers for hire, it is entirely without importance to know whether the lodging department was conducted by one set of the innkeeper's servants, and the provisions made by him for the traveller's eating are through a restaurant in the same building, wherein the innkeeper's actual interest was only that of a partner. Business arrangements of the innkeeper, as to the mode of supply, are neither of the concern of the traveller nor do they in any way affect the legal relations between the innkeeper and his travelling guests, either as to their reciprocal obligations or liabilities while that relation lasts.

"Should you find that the defendant was, at the time alleged, an innkeeper within the meaning of that term as defined to you by the Court, and you further find that the plaintiff and his assignors were travellers and guests of defendant as such innkeeper, and that plaintiff and his assignors, while at defendant's inn as such travellers and guests, placed in charge of defendant, through his servants and employés by him thereto authorized, money or other valuables for safe keeping during their temporary sojourn, as alleged in complaint, and the same, while so left in his charge, were lost by theft or robbery, and through no fault or negligence of plaintiff, his assignors, or the act of God, or that of the public enemy, then, and in such case, the defendant, as an innkeeper, is held to extraordinary liability therefor, on grounds of public utility growing out of his vocation. In such case he is holden to warrant the safe keeping of the property of his travelling

guests; his liability is that of an insurer, and as such insurer of the property delivered to him, he is liable for loss or damage happening to it while in his possession, except when such loss or damage is occasioned by the act of God, or the public enemy, or through the fault of the owner.

"The principle of public utility which underlies this most salutary rule of the law, touching an innkeeper's liability to his travelling guests, is supported by manifest reason. It has been early and often expressed by distinguished jurists, and, it is thought, has commended itself at all times to the just and enlightened, on all occasions where expressed.

"'If he be not held to this strict rule of accountability, it would be in his power to combine with robbers, or to pretend a robbery, or some other accident, without the possibility of remedy to the party injured, inasmuch as the combination could be effected in such a clandestine manner as would render discovery practically impossible'; and it is added, 'the law will not expose him to so great a temptation.' Again, it has been forcibly said, 'that in case goods should be lost or injured by the grossest negligence of the innkeeper or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss.'

"These considerations are the basis of the law which obtains in the best adjudged cases as to the liability of innkeepers; they are confessedly those on which the liability of common carriers rests; and if salutary as to common carriers, they are equally so as to innkeepers. 'Carriers and innkeepers are under legal obligations—the former to accept property offered for transportation, the latter such travelling guests as present themselves, with their goods; and they are entitled to demand a reasonable compensation, and they have a lien on the property therefor. The carrier may demand recompense commensurate with his extraordinary liability; so, too, may the innkeeper. Indeed, they stand alike in all substantial points of duty, obligations and rights, as well public as private.' Unless we are at liberty to make a distinction in favor of innkeepers which clearly impugns a principle conceded by all to properly apply to common carriers, innkeepers cannot be relieved from the rule which holds them liable as insurers, with the exceptions previously stated, against loss and damage to the goods of their travelling guests, occurring when in their possession.

"We further charge you, that if you believe, from the evidence, that the defendant, at the time alleged in the complaint, was the keeper of an inn, and as such, and as a part of his business as an innkeeper, had been and was in the habit of receiving moneys, gold dust, or other valuable packages from his guests for safe keeping, and for such guests' accommodation, and kept a book for the registry thereof, and that plaintiff and his assignors, as travelling guests of defendant, delivered at the inn, to the clerk of defendant having charge of such valuables and registry, money and gold dust, or either of them, for safe keeping, and the same has been lost while so in the custody of defendant, which loss was not caused by the act of God nor by that of the public enemy, nor by that of plaintiff or his as- is liable for the actual value of what was signors, then defendant, as such innkeeper, so lost.

"Should you find that the defendant was not an innkeeper at the time charged, and that he received plaintiff's and his assignors' coin and dust for safe keeping, without reward received or to be received therefor, then and in such case defendant was only bound to use such care in the safe keeping thereof as a prudent man, under similar circumstances, is reasonably expected to employ in the preservation of his own property.

"Should you find that defendant was not an innkeeper, and that the alleged valuables were left with him, not for reward, and that the same were lost through no fault or negligence of himself or servants, then defendant is not liable.

"Should you find for plaintiff, then, in estimating the value of the gold dust alleged to have been lost, you are not at liberty in your calculations to recognize any mercantile difference in value between gold and silver, as distinguished from United States legal tender notes, since, in law, the dollar of the one is the equivalent of the dollar of the other."

A verdict and judgment were rendered and entered for the plaintiff for ten thousand seven hundred and eighty-eight dollars. By the terms of the judgment the sum of fifteen hundred dollars, being a portion of said judgment, was made payable in gold coin only.

The defendant moved for a new trial upon the grounds, among many others, that the verdict was against the evidence, and that the verdict and evidence were against law; that the Court erred in giving to the jury the instructions that were given, and erred in refusing to give to the jury the instructions asked for by the defendant.

The motion was denied, and from the order denying the same, and from the judgment, the defendant appealed.

By the Court, RHODES, J.:

The definition of an inn, given by Mr. Justice Bayley, in Thompson v. Lacy, 3 B. and Ald. 286, as "a house where a traveller is furnished with everything which he has occasion for while on his way," is comprehensive enough to include every description of an inn; but a house that does not fill the full measure of this definition may be an inn. It probably would not now be regarded as essential to an inn that wine or spirituous or malt liquors should be provided for the guests. At an inn of the greatest completeness entertainment is furnished for the traveller's horse as well as

for the traveller, but it has long since been held that this was not essential to give character to the house as an inn. (See Thompson v. Lacy, supra; 2 Kent, 595; 1 Smith Lead. Cases, notes to Coggs v. Bernard; Sto. on Bail. Sec. 475; Kisten v. Hildebrand, 9 B. Mon. 74.) In Wintermute v. Clarke, 5 Sandf. 247, an inn is defined as a public house of entertainment for all who choose to visit it. The defendant insists that the "What Cheer House" was a lodging house and not an inn; because, as he says, the eating department was distinct from the lodging department. It appears that in the basement of the "What Cheer House," and connected with it by a stairway, there was a restaurant, which was conducted by the defendant and two other persons jointly, and that the three shared the profits. Where a person, by the means usually employed in that business, holds himself out to the world as an innkeeper, and in that capacity, is accustomed to receive travellers as his guests, and solicits a continuance of their patronage, and a traveller relying on such representations goes to the house to receive such entertainment as he has occasion for, the relation of innkeeper and guest is created, and the innkeeper cannot be heard to say that his professions were false, and that he was not in fact an innkeeper. The rules regulating the respective rights, duties and responsibilities of innkeeper and guest have their origin in considerations of public policy, and were designed mainly for the protection and security of travellers and their property. They would afford the traveller but poor security if, before venturing to intrust his property to one who by his agents, cards, bills, advertisements, sign, and all the means by which publicity and notoriety can be given to his business, represents himself as an innkeeper, he is required to inquire of the employes as to their interest in the establishment, or take notice of the agencies or means by which the several departments are conducted. The same considerations of public policy that dictated those rules demand that the innkeeper should be held to the responsibilities which, by his representations, he induced his guest to believe he would assume. We think the jury were fully warranted by the evidence in finding that the "What Cheer House" was an inn, and that the defendant was an innkeeper; and the Court correctly instructed the jury in respect to those facts.

II. Very little need be said upon the question whether the plaintiff and his assignors were guests at the defendant's inn. A traveller who enters an inn as a guest does not cease to be a guest by proposing to remain a given number of days, or by ascertaining the price that will be charged for his entertainment, or by paying in advance for a part or the whole of the entertainment, or paying for what he has occasion for, as his wants are supplied. We see no reason why the innkeeper may not require payment in advance or why the guest may not pay in advance for lodgings for a part or all the time he intends to remain as a guest at the inn. There can be no doubt from the evidence that the plaintiff and his assignors went to the "What Cheer House" as travellers and intended to have left for New York on the day the robbery was committed.

III. Did the defendant receive the coin and gold dust as a bailee without hire, or in the character of innkeeper? In Mateer v. Brown, 1 Cal. 221, it is held that that was a question of fact, and the question was directed to be submitted to the jury. It was shown, beyond all controversy, that the gold dust was taken to the inn several days after the plaintiff arrived there as a guest. If that circumstance would have relieved the defendant of responsibility as an innkeeper, the question would not have been directed to be submitted to the jury, for it would be useless to find that he received it as innkeeper unless he could be held responsible in that capacity. That case is authority that the innkeeper may be held responsible for the property of the guest, placed under his care, after the owner of the property has become a guest at the inn. Two of the guests, in this case, deposited their gold dust with the defendant on their arrival at the hotel, and the others —the plaintiff and Walker—made their deposits after they had been at the hotel ten days. No reason is perceived why the responsibility of the innkeeper, for the safe keeping of his guests' property should be limited to such property as the guest may have in his immediate possession at the moment of his arrival at the inn. The relation of innkeeper and guest, out of which springs the responsibility, is the same, whether the guest's baggage is conveyed to the inn with him, or at a subsequent time; or whether he then has in his possession or afterwards procures the money, clothing, etc., that he may need on his journey.

The guests of the house were requested not to leave money or articles of value in their rooms, but to deposit the same for safe keeping in a safe at the office, and there is nothing in the case to show that the deposits were made by the guests or received by the innkeeper for any other reason or purpose than in pursuance of such request and the better to enable the inn-keeper to give that care and security to the property which are required of him by law. In Needles v. Howard, 1 E. D. Smith, 55, and Stanton v. Leland, 4 E. D. Smith, 94, the material questions arising upon this point were very fully considered and the conclusion reached was adverse to the position of the defendant. The instruction requested by the defendant on this point was liable to the objection stated by the Court as the ground of its refusal, that it was likely to mislead the jury. The kind of bailment denominated in the instruction "ordinary bailment," is not defined or in any way distinguished from that bailment which

arises when a guest places his property in the custody of an innkeeper in the customary mode.

IV. The fourth point as stated by the defendant is, "Was the money, etc., lost by a forcible robbery, without fault, carelessness, negligence, or connivance of defendant, his servants or guests?" We think the jury were justified in answering the question in the negative, because of the neglect of the defendant's clerk to turn on the safe the combination lock. But under this point counsel have discussed the question whether an innkeeper is an insurer of the property of his guest, committed to his care. The authorities do not agree upon this question. Some of the cases hold that the innkeeper is not responsible when the loss was occasioned by inevitable casualty, by irresistible force, by superior force, or by robbery or burglary, committed by persons from without the inn; and some go even further and hold that the presumption of negligence may be rebutted, by showing that there was no negligence in point of fact on his part, or that of his servants. But the preponderating weight of authority, from the time of the decision in Calye's Case, 8 Coke, 32, to the present time is in favor of the rule that he is liable as an insurer. The rule is thus stated in 1 Pars. on Cont. 623: "Public policy imposes upon an innkeeper a severe liability. The later, and on the whole, prevailing, authorities make him an insurer of the property committed to his care, against everything but the act of God, or the public enemy, or the neglect or fraud of the owner of the property. He would then be liable for a loss occasioned by his own servants, by other guests, by robbery or burglary from without the house, or by rioters or mobs." The rule is carried to the same extent in Mateer v. Brown, 1 Cal. 221. We deem it unnecessary at this time to enter upon a review of the cases, or to recapitulate the argument or reasons in support of the rule, as this has very fully been done in Shaw v. Berry, 31 Maine, 478; Sibley v. Aldrich, 33 N. H. 553; Hulet v. Swift, 42 Barb. 249, S. C.; and 33 N. Y. 571. (See, also, Grinnell v. Cook, 3 Hill, 485; Thickstone v. Howard, 8 Blackf. 535; Piper v. Manny, 21 Wend. 282; Mason v. Thompson, 9 Pick. 280.)

V. The fifth point is that the defendant is not liable for an amount beyond what is sufficient for the reasonable travelling expenses of the plaintiff and his assignors. The gold dust was not money, any more than are bank bills, or Government stocks or securities; but it was so readily convertible into money at San Francisco that for the purposes of this question it may be treated as money. The doctrine of Mateer v. Brown is opposed to the limited liability contended for. It would be altogether impracticable for the Court to lay down any rules for determining what would be reasonable travelling expenses. One person might choose to make the trip in the cheapest manner, and another might indulge in the most lavish expenditures. The contingencies to which the party might be subject on his journey could not be anticipated, nor the expenses calculated with any certainty. But if the innkeeper is authorized in any case to supervise the expenditures of his guest there was nothing of that character manifested here. The notice to the guests was that the innkeeper would not hold himself responsible for their money or articles of value unless they were deposited in the safe at the office. There was no limit indicated as to the amount or value that might be deposited; and it appears that at the time the safe was robbed it contained money and gold dust, deposited by guests, of about the amount of thirty thousand dollars. These deposits were being made every day, and entries thereof were made in a book kept for that purpose. The evidence shows that the receipt and entry of such deposits was a part of the regular and usual business of the hotel. The plan was devised and carried on, not only for the innkeeper's protection, but to induce travellers to patronize the hotel, by offering them greater security for their property. After having thus offered, as an innkeeper, to take charge of the money of his guests, and having received it on deposit and placed it where such property was usually kept, he cannot avoid responsibility for its loss, by saying that the guest deposited too much money. It is too late to raise the objection that the amount of money was larger than the guest might need for his reasonable expenses after the money deposited according to the rules of the inn has been stolen, even admitting that the objection would be good before the deposit was made.

Several of the cases cited by the defendant support the position that the innkeeper is not responsible for everything that the guest may choose to bring to the inn; but we apprehend that he would not have been relieved of responsibility in any of those cases had the property at his request been committed to his special care and custody. In Calye's Case it was resolved that "if one brings a bag or chest, etc., of evidences into the inn, or obligations, deeds, or other specialties, and by default of the innkeeper they are taken away, the innkeeper shall answer for them." The language of Mr. Chancellor Kent is equally strong: "The responsibility of the innkeeper extends to all his servants and domestics, and to all the movable goods and chattels and moneys of his guest which are placed within the inn." (2 Kent, 593.) There are many cases in which it is held that his responsibility extends to money and chattels other than such as are provided by the guest for his necessary or convenient use while travelling. In Clute v. Wiggins, 14 Johns. 175, the guest recovered for certain bags of wheat and barley. In Piper v. Manny, 21 Wend. 282, the recovery was for a tub of butter. In Snider v. Geiss, 1 Yeates, 34,

the innkeeper was held liable for two hundred and thirty Spanish milled dollars. In Hulett v. Swift, 33 N. Y. 571, the plaintiff recovered the value of his horses, wagon and a load of buckskin goods. In Townson v. Havre de Grace Bank, 6 Har. & John. 47, the property in controversy was one thousand dollars, in bank bills. In Mateer v. Brown, the amount deposited was five thousand five hundred dollars, in gold dust. The doctrine laid down in Purvis v. Coleman, 21 N. Y. 112, applies with very decided force to the question here. A sum of money, four hundred sovereigns, was stolen from the plaintiff's trunk, which was in a room in the hotel, assigned to the plaintiff. Notice, in fact, had been given to the plaintiff, on his arrival, that the defendants had provided a safe for the deposit of the valuables of their guests, and that they would not be liable for their loss, unless they were deposited in the safe. The Court declared that "at common law the defendants were liable for all losses of the property of their guests infra hospitium," excepting, of course, those occasioned by the act of God or the public enemy, or the neglect or fraud of the guest; but that the Legislature had modified this strict liability at common law, by enacting that if the proprietor of a hotel should furnish a safe at the office of the hotel for the safe keeping of the money and other valuables of his guests, and should notify them thereof by posting notices in the rooms occupied by his guests, he should not be liable for any loss of money or valuables, etc., if the guests should neglect to deposit the same in such safe. The Court affirmed the judgment for the defendants on two grounds. 1st, that the actual notice was sufficient under the statute without proof of the constructive notices, by posting the notice in the room of the guest; and 2d, that the guest having received the notice in fact, and failing to comply with it, was guilty of negligence, and must bear the loss. A majority of the Court concurred on the first ground, and the whole Court concurred on the second ground. One purpose of the Act, it was held, was to enable the host to relieve himself of his common law liability—that is, of liability for the loss of the money or the valuables of the guest who neglected compliance with the notice. That was the main object of the Act, although it was at the same time intended to provide for the security of the guest. That was precisely the purpose of the notice in this case, which was given to the guests by posting the rules of the house in the rooms occupied by them. The statute of New York was, in truth, only declaratory of the law in such cases, except only in respect to constructive notice, which is made equivalent to actual notice. In passing upon the second ground, it was held that, when the notice in fact was given, independently of the statute, the innkeeper would not be responsible for the loss when the guest neglected to comply with the requirements of the notice. It necessarily follows that he would have been responsible for the loss had the guest made the deposit in compliance with the notice. The statute, then, conferred upon him no right or privilege but that of imparting notice by posting the same in the manner therein prescribed, and neither added to nor diminished the responsibility that he would have incurred had he received the money on deposit, in pursuance of a notice in fact, and in the course of the usual and customary business of the hotel. Nothing is said in that case as to there being an excess of money beyond what was needed for travelling expenses and personal use, but if there is anything in the point it was obvious, from the amount of money involved.

The authorities cited by the defendant throw some light on the question. Thus in Orange County Bank v. Brown, 9 Wend. 85, the plaintiff sought to recover from a common carrier for the loss of eleven thousand dollars, which the plaintiff's agent was conveying in his trunk. He stated to the officers of the boat that the trunk was valuable, but not that it contained money. He placed the trunk in the office, as he was directed by the clerk, and it was stolen from that place. Mr. Justice Nelson, in delivering the opinion of the Court, said: "Now upon the ground that the defendants in this case have received no compensation or reward from the plaintiffs or any other person for the transportation or risk of the money, and that they were deprived of such reward by the unfair dealing of the agent of the plaintiffs with the defendants, I am of opinion that the plaintiffs cannot recover, and that they were properly nonsuited on the trial." Miles v. Cattle, 19 Com. L. R., 333, cited in that case, was decided on the same ground—that the defendant was entitled to compensation for the transportation and risk of the money, but it was carried among the baggage of the passengers without informing the defendants. The same principle was applied in Pardee v. Drew, 25 Wend. 459, when the attempt was made to have merchandise transported as baggage, without disclosing its presence. See also Hawkins v. Hoffman, 6 Hill, 588, where the same doctrine is announced. It was held—Mr. Justice Bronson delivering the opinion—that the contract to convey the baggage of the passenger was implied from the usual course of business, and that the price paid for fare is considered as a compensation for carrying the baggage; but that baggage did not include money or merchandise. In respect to innkeepers, none of the cases in which the grounds of liability is considered, hold that he is entitled to any separate compensation for the care of the guest's property, and as he is not entitled to separate compensation on account of the property, we cannot see how he can complain that the guest has in his trunk or has deposited in the safe more money than was reasonable for his travelling expenses. His implied contract covers it all, whatever it

may be. Berkshire Woolen Co. v. Proctor, 7 Cushing, 423, is decisive, as authority, of this question. The sum of five hundred dollars was stolen from the trunk of the plaintiff's agent, which was in a room occupied by him in the defendant's hotel. This question was fully considered by the Court, and it was held that "the responsibility of innkeepers for the safety of the goods and chattels and money of their guests is founded on the great principle of public utility, and is not restricted to any particular or limited amount of goods or money."

Here there is no ground for saying that the guest manifested a lack of care, for he placed his money where the innkeeper assured him it would be safe. He, as innkeeper, notified his guest to deposit his money in the safe and he received it as an innkeeper in the usual course of his business, and he must respond as an innkeeper for its loss.

Wilkins v. Earle, 4 Am. Law Reg., New Series, 742, is cited by the defendant, as very cogent authority in support of his position. The decision may be sustained, perhaps, upon the ground upon which it was placed, but some of the views advanced we think are unsound and are not supported by the authorities cited. The plaintiff, in compliance with a general notice from the innkeeper, delivered to the clerk, to be deposited in the safe, a sealed package marked only with his name, and in reply to an inquiry as to what it contained, replied merely "Money." The notice required the property deposited to be "properly labelled," and the clerk informed the plaintiff that they made their guests describe their property before redelivery. The Court considered that the case resolved itself into the question, "Whether the plaintiff by depositing in the safe of the defendants the package, which he delivered to the clerk, under the circumstances under which he so deposited it, and with no more notice of its value than was given in his conversation with such clerk at the time of such delivery, was not guilty of such negligence or did not so violate the implied condition of the liability of defendants as to exempt them entirely therefrom?" and both branches of the inquiry were answered in the affirmative. The neglect on the part of the plaintiff was in failing to disclose the amount of money in the package, but we shall not consider whether that omission was in violation of the notice, or the spirit of the Act in relation to innkeepers. The Court, after citing many cases, still feeling a doubt as to the extent of the liability of innkeepers, endeavors to determine the point by the cases relating to carriers of passengers, they being considered by the Court as analogous in principle. But, as we have already remarked, the analogy fails because the carrier of passengers is under the implied obligation to carry with the passengers, without extra compensation, only his baggage; and that, as it is held, does not include money, except what is necessary for travelling expenses, and some cases hold that even that cannot be properly included as baggage. The carrier has a right to demand compensation for conveying property that is not baggage, and by custom the charge depends on the value as well as the weight or bulk, and it would be a fraud upon him to attempt to saddle him with the risk, without giving him the compensation for transporting it. If the passenger chooses to carry a large amount of money he assumes the risk of its own loss.

The Court, evidently appreciating the hardship of the case, as other Courts have done—and there is equal hardship, whether the loss falls on the host or the guest—were of the opinion that the innkeeper is held liable for clothing, ornaments of the person, including a reasonable amount of jewelry, and sufficient money to pay the travelling and other reasonable daily expenses of the guest, and that beyond those things he is not liable, unless he has voluntarily and knowingly undertaken the care and custody of them. If any argument can legitimately be drawn from the cases of passenger carriers, in support of the limitation of the liability of an innkeeper, the latter must surely be held liable for what, as against the forum, is regarded as the baggage of the passenger. The cases cited by the Court include as baggage a watch, articles of jewelry, a gun and the tools of a trade, if carried in a trunk, and generally everything destined for the personal use, convenience, and even instruction and amusement of a passenger. Suppose two travellers on their way to the same destination, the one having in his possession a watch, jewelry and some other of the articles above mentioned, and the other having the money with which he intends to purchase articles similar to those possessed by his comrade, and both are robbed at an inn. We are unable to see why the innkeeper should not be responsible to the latter as well as the former. How can it make any difference in his liability because the one chooses to wear his gold "specimen" in the form of a pin, and the other carries his in his purse? Both are entitled to the same care and protection, and any attempt to discriminate between the liability of the innkeeper for these respective cases leads to inconsistencies if not to absurdities. This case was decided at about the same time as Hulett v. Swift, 33 New York, 571, though neither case is referred to in the other; but we prefer to follow the higher, and, in our opinion, the better authority.

VI. It is claimed that the Court erred in ordering that fifteen hundred dollars of judgment be paid in gold coin. The verdict is general. The amount deposited by Walker, there can be no doubt, constituted a part of the gross sum of the verdict. That amount is alleged in the complaint to have been deposited in gold coin. The answer admits that he deposited a purse

containing gold coin, but cannot state the amount, and denies that it exceeded one thousand dollars in value. This is an admission that the money deposited was gold coin. The specific Contract Act provides that "in an action against any person for the recovery of money received by such person in a fiduciary capacity, or to the use of another, judgment for the plaintiff, whether the same be by default or after verdict, may be made payable in the same kind of money or currency so received by such person." The kind of money received by defendant not being in issue, and he having received the same in a fiduciary capacity, it was proper for the Court, upon a verdict for the amount of money, to order judgment in the kind of money received by him.

VII. The value of the gold dust at its highest market value, and the coin, do not equal the verdict by the sum of one hundred and thirty-one dollars and twenty cents. It is claimed by the plaintiff that this is accounted for by interest allowed by the jury by way of damages. But the sum does not tally with the interest on the value of the gold dust and the coin nor on the coin or gold dust alone. The jury were not instructed that they could allow interest, and there is nothing that indicates that they have done so. The verdict is excessive in the amount mentioned.

Judgment reversed and cause remanded for a new trial, unless plaintiff within twenty days after receiving written notice that the remittitur is filed in the Court below, release one hundred and thirty-one dollars and twenty cents of the judgment, and if such release is filed then the judgment shall stand affirmed.

HANS OLSON vs. A. M. CROSSMAN.

(31 Minn. 222; 17 N. W. 375.)

Appeal by defendant from an order of the municipal court of Minneapolis, refusing a new trial after a verdict of $143.69. The principal questions of fact litigated at the trial were (1) was the plaintiff's money stolen from him, while asleep at defendant's inn, where he had taken lodging for one night? and (2) if stolen, was the theft committed by one of the two companions who came to the inn with him, and occupied the same bedroom, or by a stranger, who was also assigned to and occupied the same bedroom? It was in evidence that the statutory notice for exemption from liability was not posted, but it appeared at the top of the page of the register where plaintiff signed his name, (and at the top of each page in the book,) there was a printed notice that "all moneys, jewels, and other valuables must be left at the office; otherwise the proprietor would not be responsible." The court instructed the jury that this notice would not exonerate the defendant, unless brought to plaintiff's notice, so that he understood it and agreed to it.

GILFILLAN, C. J. Action by a guest against an innkeeper, to recover for money stolen from plaintiff in the inn while such guest. The common-law liability of an innkeeper is well stated in Lusk v. Belote, 22 Minn. 468, thus: "An innkeeper is by the common law responsible for the loss, in his inn, of the goods of a traveller who is his guest, except when the loss arises from the negligence of the guest, or the act of God, or of the public enemy." Unless it appear to have arisen from an excepted cause, when the loss is proved, the innkeeper is liable. There was no pretence in this case that the loss was from the act of God or of the public enemy. The only claim that it was from plaintiff's negligence was based on the fact that the money might have been taken by one or other of two companions with whom plaintiff came to the inn, and with whom he occupied a room. The court correctly charged the jury that, if taken by one of these, the defendant would not be liable, but that, to absolve him on that ground, the fact that it was so taken must affirmatively appear.

While a theft from the guest by a companion whom he brings to the inn is imputable to the guest as his own negligence, he is not to be charged with negligence merely because the theft was committed by another guest of the inn whom he does not bring there, even though, with his consent, he is placed to sleep in the same room with such other guest.

The statute (Gen. St. 1878, c. 124, §§ 21, 22,) enables an innkeeper to limit his liability as to certain property of a guest, by keeping an iron safe and posting certain notices. The evidence does not indicate that defendant had complied with this. A notice at the head of the register of guests, or a verbal notice to the guest, not being such notice as the statute prescribes, is of no avail unless the guest consent to it, so as to constitute a contract limiting the innkeeper's liability. Of course, it would not amount to such a contract unless the guest's attention was called to it, so that he might be presumed to have understood and assented to it.

The evidence was sufficient to sustain the verdict.

Order affirmed.

SINGER MANUFACTURING CO. vs. CHRISTOPHER C. MILLER.

(52 Minn. 516; 55 N. W. 56.)

Appeal by defendant, Christopher C. Miller, from a judgment of the District Court of Hennepin County, Canty, J., entered September 26, 1892, against him for $46.

Defendant kept a public inn in Minneapolis called the Hotel Grace. On December 1, 1890, Carl Van Raden, his wife and two children were received by defendant as boarders, at $15 per week. They remained until June 8, 1891. Among the effects which they brought to the inn was a Singer Sewing Machine. When they left,

Van Raden owed $240.50 balance for their board. The defendant detained his goods, claiming a lien on them for this sum. The plaintiff, the Singer Manufacturing Company, then appeared and demanded the machine, claiming tnat it owned it and had leased it to Van Raden, and given him an option to buy it for $25. Defendant had not before heard of this claim, but supposed Van Raden owned the machine. He refused to give it up, and the company brought this action in a Justice's Court, and at the trial proved its ownership, but was there defeated. Plaintiff then appealed to the District Court, where the facts were admitted to be as above stated. The judgment of the justice was reversed, and judgment entered for plaintiff, on the ground that Van Raden was a boarder and not a guest. The defendant appeals to this court.

VANDERBURGH, J. The court below found the facts as stipulated by the parties in the agreed statement of facts, as submitted, and, as a legal conclusion, that the plaintiff was entitled to judgment. The defendant claimed an innkeeper's lien upon the chattel in controversy, a sewing machine, on the ground that it was brought to his hotel by a guest, who, it now appears, had contracted to purchase the same of plaintiff, but the title had not passed, though the possession had been delivered. The defendant, however, had no notice of the plaintiff's claim, and insists upon his lien thereon, with other goods of the guest, for the amount of his bill.

The plaintiff's counsel does not seriously contest the proposition that an innkeeper may have such lien on goods in the possession of his guest infra hospitium, though they belong to a third person, provided the innkeeper has no notice of that fact.

If the innkeeper's liability would attach in case the sewing machine were lost or stolen, it would seem but just to hold that his lien attaches whenever there is a corresponding liability. Schouler, Bailm. § 292; Manning v. Hollenbeck, 27 Wis. 202; Threfall v. Borwick, L. R. 7 Q. B. 711.

The respondent, however, claims that the judgment may be supported on the ground that the findings of fact show that the party who brought the machine to defendant's hotel was received as a boarder, and remained there as such, and not as a traveler or guest. The evidence is not here, and so the question is not whether it would support a finding either way, but whether it appears from the stipulated facts, which are adopted as the findings in the case, that he was a guest. To entitle the defendant to assert his innkeeper's lien, he must have received the property as the goods of a guest, but this does not appear, and there is no such finding. It appears from the agreed statement that he received the party, his wife, and two children as boarders and lodgers, and that they continued to board and lodge with him for about six months at the rate of $15 per week, and that is all. This does not affirmatively establish the relation of guest and innkeeper, so as to subject him to the liability, or give him the rights incident thereto. Error must appear.

Judgment affirmed.

LOUIS COOK v. A. J. KANE and D. W. PRENTICE.

(13 Ore. 482; 11 Pac. 226.)

Baker County. Defendant Prentice appeals. Affirmed.

LORD, J. This suit was instituted by the plaintiff, as an innkeeper, to enforce a lien against a piano, put in his possession by the defendant as his guest, for a debt due for lodging and entertainment. By the facts stipulated, it is admitted that the relation of innkeeper and guest existed between the plaintiff and defendant when the plaintiff, at the request of the defendant, paid the freight charges on the piano, and took it into his custody; that the piano was in fact the property of a third person, who had consigned it to the defendant to sell on commission, but that the plaintiff did not know it was the property of such third person, but received it in his character as an innkeeper and as the property of his guest. Upon this state of facts, we are to inquire whether the piano is chargeable with an innkeeper's lien for board and lodging furnished his guest.

At common law, the liability of an innkeeper for the loss of the goods of his guest is special and peculiar, and like that of the common carrier, is founded on grounds of public policy. It must not, however, be confounded with that of a common carrier; the liabilities, though similar, are distinct. (Clark v. Burns, 118 Mass. 275; Schouler on Bailments, 259.) Whatever controversy may exist in the judicial mind as to the true measure of the innkeeper's responsibility, it cannot be denied that his liability for the loss of the goods of his guest is extraordinary and exceptional. (Schouler on Bailments, 261, and Notes; Coggs v. Bernard, 1 Smith's Lead. Cas. Amer. Notes 401.) Compelled to afford entertainment to whomsoever may apply and behave with decency, the law, as an indemnity for the extraordinary liabilities which it imposes, has clothed the innkeeper with extraordinary privileges. It gives him, as a security for unpaid charges, a lien upon the property of his guest, and upon the goods put by the guest into his possession. (Overton on Liens, 129.) Nor is the lien confined to property owned by the guest, but it will attach to the property of third persons for whom the guest is bailee, provided only he received the property on the faith of the innkeeping relation. (Schouler on Bailments, 292; Calye's Case, 1 Smith's Lead. Cas. 247; Manning v. Hollenbeck, 27 Wis. 202.) But the lien will not attach if the innkeeper knew the property taken in his custody was not owned by his guest, nor had any right to deposit it as bailee or otherwise, except perhaps some proper charge incurred against the specific chattel.

In Broadwood v. Granerd, 10 Exch. 147, the innkeeper knew that the piano sent to the guest did not belong to him, and did not receive it as part of the guest's goods; and it was on that ground alone that he was held not entitled to his lien. But in Threfall v. Borwick, L. R. 7 Q. B. 210, where the innkeeper had received the piano as part of the goods of his guest, it was held that he had a lien upon it. Miller, J., said: "When, having accommodation he has received the guest with his goods, and thereby has become liable for their safe custody, it would be hard if he was not to have a lien upon them. And under such circumstances, the lien must be held to extend to goods which he might possibly have refused to receive." Lusk, J., said: I am of the same opinion. The innkeeper's lien is not restricted to such things as a traveling guest brings with him in journeying; the contrary has been laid down long ago. It extends to all goods the guest brings with him and the innkeeper receives as his. If he has a lien as against the guest, the cases have established beyond all doubt that he has the same right as against the real owner of the article, if it has been brought to the inn by the guest as owner." To the same effect Quain, J., said: "There is no authority for the proposition that the lien of the innkeeper only extends to goods which a traveler may be ordinarily expected to bring with him. . . . The liability, as shown by the old cases, extends to all things brought to the inn as the property of the guest and so received, even a chest of charters or obligations; and why not a pianoforte? If, therefore, the innkeeper be liable for the loss, it seems to follow he must also have a lien upon them. And if he has a lien upon them as against the guest, the two cases cited (and there are more) show that if the thing be brought by the guest as owner, and the landlord takes it in thinking it is the guest's own, he has the same rights against the stranger, the real owner, as against the guest." Upon appeal from the decision of this case, in Threfall v. Borwick, L. R. 10 Q. B. 210, it was held, affirming the decision, that whether the defendant, as innkeeper, was bound to take in the piano or not, having done so, he had a lien upon it. Although there are certain dicta not necessary to the decision in Broadwood v. Granard, 10 Exch. 417, to the effect that the innkeeper was not bound to receive the piano, yet the real ground of the decision was based on the fact that the innkeeper knew that the piano sent to his guest was the property of a third person, and did not, therefore, receive it as part of his guest's goods, that the right to subject the piano to his lien was denied; but e converso, if he had not known the piano was the property of a third person, and had received it as the property of his guest, would not his lien have attached? It is not material whether the innkeeper is bound to receive such property, or not, although it is said the liability may be well extended, according to the advanced usages of society; yet if he does receive as the property of his guest, and thereby becomes liable for it, he must be entitled to his lien. (Threfall v. Borwick, supra.)

Whenever, by virtue of the relation of innkeeper and guest, the law imposes this extraordinary responsibility for the goods of the guest, it gives the innkeeper a corresponding security upon the goods put by the guest into his possession. It is true that the piano was shipped to the defendant in his name, but he brought it to the inn as his property, or at least it was brought there at his request and upon his order, and put in the custody and possession of the plaintiff as the property of his guest. It is admitted that the plaintiff received it as a innkeeper, and safely kept it as the property of his guest; nor is it doubted but what he would have been liable for its loss; and in such case, it is difficult to perceive upon what principle of law or justice he can be denied his lien. The judgment must be affirmed.

WALDO, C. J., concurring.

THAYER, J. (dissenting). It appears from the transcript herein that the respondent, on or about the twelfth day of September, 1885, commenced a suit in said Circuit Court against one A. J. Kane, to subject a certain piano to the payment of a claim against him in favor of the said respondent. The respondent alleged in his complaint in the suit that he was a hotel-keeper in Baker City in said county; that in May, 1885, Kane became a guest at his hotel, was furnished with meals, food, and lodging of the reasonable value of $160, which had not been paid; that on the third day of July, 1885, while Kane was such guest, the respondent, at his request, took the piano into charge, then in the freight office of the Oregon Railway and Navigation Company at said city, consigned to Kane as his property; and at Kane's request placed it in the hotel, where he had ever since had it in charge; that Kane was wholly impecunious and insolvent; that during all of said times Kane claimed the lawful possession of the piano; that he was no longer a guest of respondent, and that the respondent claimed a lien on the piano for said sum of $160; that on the third day of July, 1885, at the request of Kane, the respondent advanced to the said Oregon Railway and Navigation Company, as freight transportation and charges, $14.50, which Kane had not paid, and that during the same time he loaned to Kane $12.50. The respondent demanded, as relief, a judgment against Kane for the sum of $160, and for the further sum of $26.75, and that he decreed to have a lien upon the piano for said sums, and that it be sold, and the proceeds be applied in payment thereof. It further appears that on or about the twenty-eighth day of September, 1885, the appellant D. W. Prentice appeared before the said court and applied to intervene in the suit; and that the

court, upon such application, granted an order permitting the appellant to file an answer to the complaint, which was filed accordingly; that the appellant denied in his answer that the indebtedness of Kane was any greater sum than $140; and alleged ownership of himself in the piano, and that he was entitled to the possession of it; that he had demanded it, and the respondent wrongfully detained it; that Kane had never been the owner of the piano; that it was shipped and consigned to Kane to sell on commission; and that the only right or interest Kane had in it, or ever had, was in the commission to be derived in the sale of it, of which the respondent had full knowledge; that respondent claimed to keep it upon an alleged lien for the payment of a debt due him as hotel and inn keeper for board and lodging furnished Kane, and money loaned to him; admitted the payment by respondent of $14.50 for the charges for freight and transportation of the piano, and alleged that before filing his answer he had tendered it to him; and alleged other matters not necessary to be mentioned for the purposes of this decision.

After the filing of said answer, the parties entered into a stipulation, in which they agreed that for the purpose of the determination of the suit, the issue should be taken and considered as fully made as though reply had been filed, and that no objection should be made to the manner or form of the pleadings; that the court should hear and determine, and enter its decree in the case upon the following agreed facts:

"1. That defendant A. J. Kane became indebted between the —— day of May, 1885, and September 11, 1885, to plaintiff, in the sum of $140, for board and lodging furnished said Kane by plaintiff, as a hotel and inn keeper, at Baker City, Oregon, and in the further sum of $12.50, money loaned said Kane by plaintiff, between May 28 and August 3, 1885, no part of which has been paid.

"2. That said defendant Kane continued to be the guest of said defendant at his said hotel at Baker City, Oregon, until September 11, 1885, when he left said plaintiff's hotel and inn, and that said Kane is impecunious and wholly insolvent.

"3. That on the third day of July, 1885, plaintiff took into his charge and custody and control one upright D. W. Prentice piano, No. ———, mentioned in complaint, with the consent of A. J. Kane, and at his request; that the same was placed in the parlor of said plaintiff's hotel and inn, where it ever since has been and now is; that the said instrument is of the value of $380.

"4. That said piano was shipped to Baker City, Oregon, consigned to defendant A. J. Kane, and in his name, by D. W. Prentice, to be sold by said Kane on commission.

"5. That said A. J. Kane is not now, and never was, the owner of said piano, and the only right he had therein was to sell the same, and retain his commission out of the gross amount.

"6. That D. W. Prentice has always been, and now is, the owner of said piano mentioned in the complaint.

"7. That plaintiff paid freight charges on said piano to the Oregon Railway and Navigation Company, at the request of said Kane, the sum of $14.50.

"8. That said D. W. Prentice, before the filing of the answer herein, demanded the possession of said piano from plaintiff, which was refused by plaintiff, and that said Prentice offered to plaintiff the said sum of $14.50, so paid by said plaintiff as freight charges on said piano, which sum plaintiff refused to accept.

"9. That said D. W. Prentice has paid into the hands of the clerk of this court the said sum of $14.50, as a payment in full of all claims and demands due from him to plaintiff, and the said sum is now subject to the order of plaintiff."

The court found the facts in accordance with the above stipulation, and as conclusions of law based on said findings, the court concluded:

"1. That the plaintiff, Louis Cook, is entitled to have and recover judgment against the said defendant A. J. Kane, for the sum of $140 as declared on in the first cause of suit in said complaint.

"2. And for the further sum of $12.50 as set forth and declared on in the second cause of suit in said complaint, and for the costs and disbursements of this suit, and that he is entitled to have execution and decree issue therefor.

"3. That plaintiff has a good and valid lien, as a hotel and inn keeper, upon the said upright piano mentioned in the complaint, and now in the possession, in the sum of ——— dollars, being the amount of the board and lodging furnished by said plaintiff to the defendant A. J. Kane, between the third day of July, 1885, and the eleventh day of September, 1885; that the same should be foreclosed on and against the said upright piano mentioned in the complaint, to satisfy said sum of ——— dollars; that he is entitled to judgment and decree of this court directing that sale of said piano for the payment and satisfaction of said sum of —— dollars, and the costs and disbursements herein, and the receiver herein, in accordance with the law and practice of this court, and as property is sold on execution, sell said piano, and out of the proceeds of said sale, after paying the costs and expenses of the same, pay to plaintiff the amount of said lien, and if any overplus remain, the same to be paid into the registry of this court, subject to the order of the intervenor, D. W. Prentice.

"4. That a judgment be docketed herein for the sum of —— dollars against the said defendant, A. J. Kane."

From which decree the appeal is taken.

The question to be determined is whether the decree is sustained by the facts alleged

and stipulated. The respondent's counsel claimed in the outset that the appellant had no standing in court, that there was no party to a suit in this state known as an intervenor. There is no such party known to our Code. We have only two parties to actions, suits, and proceedings, except in garnishee proceedings, and they are known as plaintiff and defendant. Where property has been attached in the hands of a third person, and the latter refuses to furnish a certificate concerning it, or his certificate furnished it is unsatisfactory, and he is required to appear and be examined on oath concerning the same, such person, in the proceedings thereon, is known as the garnishee. (Civil Code, sec. 161.) Nor do I know of any case where a person not made a party to an action, suit, or proceeding has the right to become a party plaintiff or defendant, upon his or her own motion, except that in actions for the recovery of the possession of personal property, and an immediate delivery is claimed, another person than the defendant may claim the property. (Civil Code, sec. 140.) But there is a power in the court in all cases to cause other parties than those before it to be brought in when a complete determination cannot be had without their presence. (Civil Code, sec. 40.) Under the latter provision, I think it was proper in this case for the court to require the appellant to be made a party defendant, and that, in substance, was all that was done.

The appellant claimed ownership of the piano which the respondent was attempting to subject to the payment of his debt, and "a complete determination of the controversy" could not be had without the presence of the appellant. Upon the main question in the case, there is some doubt in view of the authorities upon the subject. Though upon a common-sense view there would not seem to be any. That the man Kane could pledge the appellant's piano for his own hotel bill, or in any way subject it to the payment thereof, would shock all sense of property right. The respondent's counsel, however, have cited numerous cases where such a lien has attached to the property of a third person, and I have no doubt but that such lien will in many cases attach to the property taken by the guest to the inn, at which he obtains accommodations, though he be not the owner of it. But in all such cases, it seems to me the property must derive some special benefit, or else the owner must have intrusted it to a party under circumstances from which he could reasonably have concluded that the party would become the guest of an inn, and take the property with him there as his own; and I do not think the rule should extend further than this. In the case under consideration, it does not appear that the appellant ever knew that Kane was stopping at a hotel. He sent the piano to him at Baker City, to sell upon commission. It does not appear that the respondent furnished the entertainment upon the credit of the piano, or upon the supposition that it belonged to Kane. The latter might, and so far as I can see would, have continued a guest at the hotel the same whether the piano had been sent or not. It is not a case, as I view it, where the owner of the property has clothed another with the indicia of ownership, and a third person been deceived thereby into purchasing it, or giving credit upon the faith of such indication. It was purely a business transaction. The appellant was attempting to make sale of his property, and sent it to Kane for that purpose. The latter had no authority in the premises, except to exercise the special power conferred, and it does not appear but that the respondent had full knowledge of the facts, as the appellant alleged he did in his answer. I am inclined to believe that the burden of proof was upon the respondent to establish that he supposed the piano to belong to Kane, and that he entertained him upon the faith that such was the fact before he could claim a lien upon it for the hotel bill. The property of one man should not be taken for the debt of another against the former's consent, unless he has done some act or neglected some duty creating the liability. A party cannot be deprived of his ownership to property to satisfy the claim of another, unless he has in some form obligated himself to submit to it. He must have agreed to it in terms, or have done some act directly or remotely authorizing it. I do not think that the pleadings and agreed facts in this case establish that the respondent had any lien upon the piano for the hotel bill against Kane, or for anything beyond the sum advanced by the respondent for the freight and transportation of it, unless it be for its storage; but the instrument has doubtless been used sufficiently to offset any sum for storage, and the appellant duly tendered the amount advanced as freight and transportation.

I think the decree should be reversed as to the appellant.

ALLEN AND ANOTHER v. SACKRIDER AND ANOTHER.

(37 N. Y. 341.)

Appeal from the general term of the Supreme Court, where a judgment entered in favor of the defendants, upon the report of a referee, had been affirmed.

This was an action by Elijah B. Allen and Walter B. Allen against Norman Sackrider and Frank Farnham, to charge the defendants as common carriers, with damage to a quantity of grain, shipped by the plaintiffs in a sloop of the defendants, to be transported from Trenton, in the province of Canada to Ogdensburgh, in this state, which accrued from the wetting of the grain in a storm.

The case was tried before a referee, who found as follows: "The plaintiffs, in the fall of 1859, were partners, doing business at Ogdensburgh; the defendants were the owners of the sloop Creole, of which Farnham was master. In the fall of 1851, the plaintiffs ap-

plied to the defendants to bring a load of grain from the bay of Quinto to Ogdensburgh; the master stated, that he was a stranger to the bay, and did not know whether his sloop, had capacity to go there; being assured by the plaintiffs that she had, he engaged her for the trip, at three cents per bushel, and performed it with safety. In November 1859, plaintiffs again applied to defendants, to make another similar trip for grain, and it was agreed at $100 for the trip. The vessel proceeded to the bay, took in a load of grain, and, on her return, was driven on shore, and the cargo injured to the amount of $1346.34; that the injury did not result from the want of ordinary care, skill or foresight, nor was it the result of inevitable accident, or what, in law, is termed the act of God. From these facts, my conclusions of law are that the defendants were special carriers, and only liable as such, and not as common carriers, and that the proof does not establish such facts as would make the defendants liable as special carriers; and, therefore, the plaintiffs have no cause of action against them."

Judgment was, accordingly, entered upon the report, in favor of the defendants; and the same having been affirmed at general term, the plaintiffs appealed to this court.

PARKER, J. (after stating the case.) The only question in the case is, were the defendants common carriers? The facts found by the referee do not, I think, make the defendants common carriers. They own a sloop; but it does not appear that it was offered to the public, or to individuals, for use, or ever put to any use, except in the two trips which it made for the plaintiffs, at their special request. Nor does it appear that the defendants were engaged in the business of carrying goods, or that they held themselves out to the world as carriers or had ever offered their services as such. This casual use of their sloop in transporting plaintiffs' property, falls short of proof sufficient to show them common carriers.

A common carrier was defined, in Gisburn v. Hurst (1 Salk. 249), to be, "any man undertaking, for hire, to carry the goods of all persons indifferently;" and in Dwight v. Brewster (1 Pick. 50), to be, "one who undertakes, for hire, to transport the goods of such as choose to employ him, from place to place." In Orange Bank v. Brown (3 Wend. 161), Chief Justice Savage said: "Every person who undertakes to carry, for a compensation, the goods of all persons, indifferently, is, as to the liability imposed, to be considered a common carrier. The distinction between a common carrier and a private or special carrier is, that the former holds himself out in common, that is to all persons who choose to employ him, as ready to carry for hire; while the latter agrees, in some special case, with some private individual, to carry for hire." (Story on Contracts, § 752 a.) The employment of a common carrier is a public one, and he assumes a public duty, and is bound to receive and carry the goods of any one who offers. "On the whole," says Prof. Parsons, "it seems to be clear, that no one can be considered as a common carrier, unless he has in some way held himself out to the public as a carrier, in such manner as to render him liable to an action, if he should refuse to carry for any one who wished to employ him." (2 Pars. on Cont., 5th ed., 166, note.)

The learned counsel for the appellant, in effect, recognizes the necessity of the carrier holding himself out to the world as such, in order to invest him with the character and responsibilites of a common carrier; and, to meet that necessity, says, "the Creole was a freight vessel, rigged and manned suitably for carrying freight from port to port; her appearance in the harbor of Ogdensburgh, waiting for business, was an emphatic advertisement that she sought employment." These facts do not appear in the findings of the referee, and, therefore, cannot, if they existed, help the appellants upon this appeal.

It is not claimed that the defendants are liable, unless as common carriers. Very clearly, they were not common carriers; and the judgment should, therefore, be affirmed.

Judgment affirmed.

AYRES et al.,
v.
CHICAGO & N. W. RY. CO.

(71 Wis. 372; 37 N. W. 432.)

Appeal from circuit court, Sauk county, Alva Stewart, Judge.

For former appeal, see 17 N. W. Rep. 400.

This case was here on a question of pleading upon a former appeal. 58 Wis. 537, 17 N. W. Rep. 490. The amended complaint is to the effect that the defendant, the Chicago & Northwestern Railway Company, being a common carrier engaged in the transportation of live-stock, and accustomed to furnish cars for all live-stock offered, was notified by the plaintiffs, Volney Ayres and George Hagenah, on or about October 13, 1882, to have four such cars for the transportation of cattle, hogs, and sheep at its station at La Valle, and three at its station at Reedsburg, ready for loading, on Tuesday morning, October 17, 1882, for transportation to Chicago; that the defendant neglected and refused to provide such cars at either of said stations for four days, notwithstanding it was able and might reasonably have done so; and also neglected and refused to carry said stock to Chicago with reasonable diligence, so that they arrived there four days later than they otherwise would have done; whereby the plaintiffs suffered loss and damage, by decrease in price and otherwise, $1,700. The answer, in effect, admitted the defendant's incorporation with the privileges alleged; "that it was at all times engaged in the transportation over its roads of live-stock, when and if it was able to do so, and was accustomed to furnish suitable cars therefor upon reasonable notice, when within its power to do so; and to receive, transport, and deliver such live-stock with reasonable dis-

patch, but only upon special contracts at the time entered into between the shipper and this defendant, and upon such terms and conditions as should be agreed upon in writing; that one of the lines of this defendant railway is located as in said amended complaint stated." The answer also, in effect, alleged that "within a reasonable time, and as soon as it reasonably could, and as soon as it was within its power to do so," after the application of the plaintiffs for such cars, the defendant "forwarded four suitable and empty cars to La Valle," and "three suitable and empty cars to Reedsburg," which cars were severally forwarded with reasonable dispatch, and arrived in due course, and as soon as they could with reasonable dispatch be forwarded over its line; that at the times of such respective shipments the plaintiffs entered into an agreement in writing with the defendant for the transportation of said stock at special rates, and in consideration thereof it was agreed that the defendant should not be liable for loss from the delay of trains not caused by the defendant's negligence. At the close of the trial the jury returned a special verdict to the effect (1) that at the times named plaintiffs were copartners at Reedsburg, engaged in buying and shipping live-stock to the Chicago market for sale; (2) that at the times stated the defendant was a common carrier, and as such, engaged in the transportation of live-stock, and accustomed to furnish cars for, and transport all live-stock offered for, that purpose; (3) that one of its lines run from La Valle and Reedsburg to Chicago; (4) that October 13, 1882, the plaintiffs, being fully apprised of the state of the Chicago market for live-stock and prices, proceeded to buy therefor seven car-loads of cattle, hogs, and sheep, four to be loaded at La Valle and three at Reedsburg; (5, 6, 7, 8, 9, 10, and 14) that the plaintiffs notified the defendant's agents, at the respective stations, October 13, 1882, to have such cars in readiness at such stations, respectively, October 17, 1882, and that such notices were reasonable, and such agents promised to order the cars and have them in readiness at the time; (11) that two cars were furnished at Reedsburg, October 17, 1882, and one October 19, 1882; (12) that the four were furnished at La Valle, October 19, 1882; (13) that the defendant furnished two as soon as it reasonably could, but five it did not; (15) that the plaintiffs received no notice before October 17, 1882, that the cars would not be furnished as ordered; (16, 17, and 18) that prior to that time, and with the expectation that the cars would be on hand as ordered, the plaintiffs had bought sufficient stock to load several cars, and had the same at said respective stations on the morning of October 17, 1882; (19) that the defendant, being able to furnish such cars, disregarded its duty as a common carrier of live-stock in not having the same on hand when ordered; (20) that, had the cars been so furnished, they would have arrived at Chicago on the morning of October 18, 1882; (21) as it was, two arrived there on Thursday, October 19, 1882, a. m., and five on Friday, October 20, 1882, at 5:45 p. m.; (22, 23, and 24) that the market value of hogs in Chicago, on Friday, October 20, was $7.36 per hundred, on Saturday, October 21, was $7.11, and on Monday, October 23, $6.81; (25, 26, and 27) that the loss on the hogs, by reason of depreciation of the market, was $140.08; that the total damages of the plaintiffs on all the stock was assessed at $825.97, made up of the following items, to-wit: Taking care of and feeding stock, $50; shrinkage on hogs, cattle, and sheep, $408.35; depreciation in value on hogs and sheep, $172.58; and interest on the above sums until the rendition of the verdict, $195.04. The defendant thereupon moved for judgment in its favor upon the verdict and record, which was denied. Thereupon the defendant moved to set aside the verdict, and for a new trial, upon the grounds that the verdict is against the weight of the evidence, and for errors of the court in its charge to the jury, and in its rulings on the trial, and because the damages were excessive, and contrary to the proofs, which motion was denied. Thereupon, and upon the motion of the plaintiffs, judgment was ordered in their favor on the special verdict for $825.97 damages and costs. From the judgment entered thereon, accordingly, the defendant brings this appeal.

CASSODAY, J., (after stating the facts.) There is no finding of any agreement on the part of the defendant to have the cars in readiness at the station, on Tuesday morning, October 17, 1882. There is no testimony to support such a finding. One of the plaintiffs testified, in effect, that he told the agent that he would want the cars on the morning of the day named; that the agent took down the order, put it on his book, and said, "All right," he would try and get them; but that they were short because they were then using more cars for other purposes; that nothing more was said. It appears in the case that the cars were in fact furnished. It also appears that, as the shipments were made, special written contracts therefor were entered into between the parties, whereby it was, in effect, agreed and understood that the plaintiffs should load, feed, water, and take care of such stock, at their own expense and risk, and that they would assume all risk of injury or damage that the animals might do to themselves, or each other, or which might arise by delay of trains; that the defendants should not be liable for loss by jumping from the cars, or delay of trains not caused by the defendant's negligence. The court, in effect, charged the jury that there was no evidence of any negligence on the part of the defendant, causing delay in any train after shipment, and hence that the delay of the two cars admitted to have been furnished in time was not before them for consideration. This relieves the case from all liability on contract. It also narrows the case to the defendant's liability for the delay of two days in furnishing the five cars at the station named, as ordered by the plaintiffs, and in the absence of any con-

tract to do so. In Richardson v. Railway Co., 61 Wis. 601, 21 N. W. Rep., 49, 18 Amer. & Eng. R. Cas. 530, it was, in effect, held competent for a railroad company engaged in the business of transporting live-stock, to exempt itself by express contract "from damage caused wholly or perhaps in part, by the instincts, habits, propensities, wants, necessities, vices, or locomotion of such animals." And it was then said: "Since the action is not based upon contract, the plaintiff must recover, if at all, by reason of the defendant's liability as a common carrier, upon mere notice to furnish cars and a readiness to ship at the time notified. Did such notice and readiness to ship create such liability? We have seen that a carrier of live-stock may, to at least a certain extent, limit its liability. Whether the defendant was accustomed to so limit its liability, or to carry all live-stock tendered upon notice, without restriction, does not appear from the record. If it was accustomed to so limit, and the limitation was legal, it should at least have been so alleged, together with an offer to comply with the customary restriction. If it was accustomed to carry all livestock offered upon notice and tender, and without restriction, then it would be difficult to see upon what ground it could discriminate against the plaintiff by refusing to do for him what it was constantly in the habit of doing for others." In that case there was a failure to allege any such custom or holding out on the part of the defendant, or that reasonable notice had been given to the defendant to furnish suitable cars to the person applying therefor, or that the same was witnin its power to do so; and hence the demurrer was sustained. The allegations thus wanting in that case are present in this complaint. It is, moreover, in effect, admitted that the defendant was at times, when able to do so, engaged in the transportation of live-stock over its roads, one line of which runs through the stations in question; that it was accustomed to furnish suitable cars therefor, upon reasonable notice, when within its power to do so; and to receive, transport, and deliver such live-stock with reasonable dispatch, but only upon special contracts at the time entered into between the shipper and the defendant, and upon such terms and conditions as should be agreed upon in writing. It is, moreover, manifest that the defendant actually undertook to furnish the cars at the time designated by the plaintiffs; that it succeeded in furnishing two of them on time; that there was a delay of two days in furnishing the other five; and that the plaintiffs were willing to, and did, submit to the terms and conditions of carriage imposed by the defendant by signing the special written contracts mentioned. It must be assumed, also, that such special written contracts were substantially the same as all contracts made by the defendant at that season of the year, for the shipment of similar live-stock under similar circumstances. Otherwise the defendant would be justly chargeable with unlawful discrimination; the right to do which the learned counsel for the defendant frankly disclaimed upon the argument. We are therefore forced to the conclusion that at the time the plaintiffs applied for the cars the defendant was engaged in the business of transporting live-stock over its roads, including the line in question, and that it was accustomed to furnish suitable cars therefor, upon reasonable notice, whenever it was within its power to do so; and that it held itself out to the public generally as such carrier for hire upon such terms and conditions as were prescribed in the written contracts mentioned. These things, in our judgment, made the defendant a common carrier of live-stock, with such restrictions and limitations of its common-law duties and liabilities as arose from the instincts, habits, propensities, wants, necessities, vices, or locomotion of such animals, under the contracts of carriage. This proposition is fairly deducible from what was said in Richardson v. Railway Co., supra, and is supported by the logic of numerous cases. Railroad Co. v. Bank, 123 U. S. 727, 8 Sup. Ct. Rep. 266; Moulton v. Railway Co., 31 Minn. 85, 16 N. W. Rep. 497, 12 Amer. & Eng. R. Cas. 13; Lindsley v. Railroad Co., (Minn.) 33 N. W. Rep. 7; Evans v. Railroad Co., 111 Mass. 142; Kimball v. Railroad Co., 26 Vt. 247, 62 Amer. Dec. 567; Rixford v. Smith, 52 N. H. 355; Clarke v. Railroad Co., 14 N. Y. 570, 67 Amer. Dec. 205; Railroad Co. v. Henlein, 52 Ala. 606; Baker v. Railroad Co. v. 10 Lea, 304, 16 Amer. & Eng. R. Cas. 149; Railroad Co. v. Lehman, 56 Md. 209; McFadden v. Railway Co., (Mo.) 4 S. W. Rep. 689, 3 Amer. & Eng. Cyclop. Law, pp. 1-10, and cases there cited. This is in harmony with the statement of Parke, B., in the case cited by counsel for the defendant, that "at common law a carrier is not bound to carry for every person tendering goods of any description, but his obligation is to carry according to his public profession." Johnson v. Railroad Co., 4 Exch. 372. Being a common carrier of live-stock for hire, with the restrictions and limitations named, and holding itself out to the public as such, the defendant is bound to furnish suitable cars for such stock, upon reasonable notice, whenever it can do so with reasonable diligence, without jeopardizing its other business as such common carrier. Railway Co., v. Nicholson, 61 Tex. 491; Railroad Co. v. Erickson, 91 Ill. 613; Ballentine v. Railroad Co., 40 Mo. 491; Guinn v. Railway Co., 20 Mo. App. 453. Whether the defendant could with such diligence so furnish upon the notice given was necessarily a question of fact to be determined. The plaintiffs, as such shippers, had the right to command the defendant to furnish such cars. But they had no right to insist upon nor expect compliance, except upon giving reasonable notice of the time when they would be required. To be reasonable, such notice must have been sufficient to enable

the defendant, with reasonable diligence, under the circumstances then existing, to furnish the cars without interfering with previous orders from other shippers at the same station, or jeopardizing its business on other portions of its road. It must be remembered that the defendant has many lines of railroad scattered through several different states. Along each and all of these lines it has stations of more or less importance. The company owes the same duty to shippers at any one station as it does to the shippers at any other station of the same business importance. The rights of all shippers applying for such cars under the same circumstances are necessarily equal. No one station, much less any one shipper, has the right to command the entire resources of the company, to the exclusion or prejudice of other stations and other shippers Most of such suitable cars must necessarily be scattered along and upon such different lines of railroad, loaded or unloaded. Many will necessarily be at the larger centers of trade. The conditions of the market are not always the same, but are liable to fluctuations, and may be such as to create a great demand for such cars upon one or more of such lines, and very little upon others. Such cars should be distributed along the different lines of road, and the several stations on each, as near as may be, in proportion to the ordinary business requirements at the time, in order that shipments may be made with reasonable celerity. The requirement of such fair and general distribution and uniform vigilance is not only mutually beneficial to producers, shippers, carriers, and purchasers, but of business and trade generally. It is the extent of such business ordinarily done on a particular line, or at a particular station, which properly measures the carrier's obligation to furnish such transportation. But it is not the duty of such carrier to discriminate in favor of the business of one station to the prejudice and injury of the business of another station of the same importance. These views are in harmony with the adjudications last cited. The important question is whether the burden was upon the plaintiffs to prove that the defendant might, with such reasonable diligence, and without thus jeopardizing its other business, have furnished such cars at the time ordered and upon the notice given; or whether such burden was upon the defendant to prove its inability to do so. We find no direct adjudication upon the question. Ordinarily, a plaintiff alleging a fact has the burden of proving it. This rule has been applied by this court, even where the complaint alleges a negative, if it is susceptible of proof by the plaintiff. Hepler v. State, 58 Wis. 46, 16 N. W. Rep. 42. But it has been held otherwise where the only proof is peculiarly within the control of the defendant. Mecklem v. Blake, 16 Wis. 102; Beckmann v. Henn, 17 Wis. 412; Noonan v. Ilsley, 21 Wis. 141; Railroad Co. v. Bacon, 30 Ill. 352; Brown v. Brown, 30 La. Ann. 511. Here it may have been possible for the plaintiffs to have proved that there were at the times and stations named, or in the vicinity, empty cars, or cars which had reached their destination, and might have been emptied with reasonable diligence, but they could not know or prove, except by agents of the defendant, that any of such cars were not subject to prior orders, or superior obligations. The ability of the defendant to so furnish with ordinary diligence, upon the notice given, upon the principles stated, was, as we think, peculiarly within the knowledge of the defendant and its agents, and hence the burden was upon it to prove its inability to do so. Where a shipper applies to the proper agency of a railroad company engaged in the business of such common carrier of live-stock for such cars to be furnished at a time and station named, it becomes the duty of the company to inform the shipper, within a reasonable time, if practicable, whether it is unable to so furnish, and if it fails to give such notice, and has induced the shipper to believe that the cars will be in readiness at the time and place named, and the shipper, relying upon such conduct of the carrier, is present with his live-stock at the time and place named, and finds no cars, there would seem to be no good reason why the company should not respond in damages. Of course, these observations do not involve the question whether a railroad company may not refrain from engaging in such business as a common carrier; nor whether, having so engaged, it may not discontinue the same. The court very properly charged the jury, in effect, that if all cars had been furnished on time, as the two were, it was reasonable to presume, in the absence of any proof of actionable negligence on the part of the defendant, that they would have reached Chicago at the same time the two did—to-wit, Thursday, October 19, 1882, A. M., whereas they did not arrive until Friday evening. This was in time, however, for the market in Chicago on Saturday, October 21, 1882. This necessarily limited the recovery to the expense of keeping, the shrinkage, and depreciation in value from Thursday until Saturday. Railroad Co. v. Erickson, supra. The trial court, however, refused to so limit the recovery, but left the jury at liberty to include such damages down to Monday, October 23, 1882. For this manifest error, and because there seems to have been a mistrial in some other respects, the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

RAILROAD COMPANY v. REEVES.

(10 Wall. 176.)

In error to the Circuit Court for the Western District of Tennessee, the case being this:

Reeves sued the Memphis and Charleston Railroad Company as a common carrier for damage to a quantity of tobacco received by it for carriage, the allegation being negligence and want of due care. The tobacco came by

rail from Salisbury, North Carolina, to Chattanooga, Tennessee reaching the latter place on the 5th of March, 1867. At Chattanooga it was received by the Memphis and Charleston Railroad Company on the 5th of March, and reloaded into two of its cars, about five o'clock in the afternoon.

The Memphis and Charleston Railroad track extends from Memphis to Stevenson, Alabama, a point west of Chattanooga, on the Nashville and Chattanooga Railroad. Between Chattanooga and Stevenson, by contract between the two companies, the trains of the Memphis and Charleston road were drawn by engines belonging to the last-named road, an agent of the road being at Chattanooga and receiving freight and passengers there for Memphis.

One Price, who as agent of Reeves was attending and looking after the tobacco along the route, testified (though his testimony on this point was contradicted) that the agent of the company at Chattanooga promised that, if the bills were brought over in time, the tobacco should go forward at six o'clock that evening; and shortly before that time informed him that the bills had come over, and assured him that the tobacco would go off at that hour. It did not do so, though he, Price, the agent, supposing that it would, went on by a passenger train and so could no longer look after the tobacco. By the time-tables which governed at the time the forwarding of freight, goods received during one day were forwarded the next morning at 5.45 a. m., and at that time the train on which the tobacco in question was placed went off. The train, however, found the road obstructed by rocks that had fallen during the night and had to return, and in consequence of information of the washing away of a bridge on the road, had to remain at Chattanooga. Chattnooga is built on low ground, on the Tennessee River, which a short distance west of it, runs along the base of Lookout Mountain. On the 5th of March there had been heavy rains for some weeks, and the river had been rising and was very high. Freshets of the years 1826 and 1847, the highest ever remembered previous to one now to be spoken of, or of which there was any tradition, had not risen by within three feet as high as the level of the railroad track in the station where the cars containing the tobacco were placed, on their coming back to Chattanooga, after their unsuccessful attempt to go forward.

The river rose gradually until the evening of the 7th (Thursday), at which time it reached the high water mark of 1847. That night it rose an average of four inches an hour from 7 p. m. to 6½ a. m. of the 8th of March, and it continued to rise until about 2 p. m. of Sunday, the 10th of March. On Friday, at 1 p. m., the engines standing on the tracks were submerged so that their lower fire-boxes were covered. On Saturday, at 8 p. m., the engines and cars were submerged ten feet or more, and the freight in question was thus damaged. Had it gone off on the evening of the 5th it would not have been damaged. A freight train did leave Chattanooga going towards Memphis on that evening, but it carried freight of the Nashville and Chattanooga road only, and none for the road of the defendant. Four or five days elapsed from the time when the water began to come up into the town, before it was so high as to submerge the cars and injure the freight. No one expected the water would rise as it did, because it rose full fifteen feet higher than had ever before been known. The rise was at first gradual, and from the direction of Lookout Mountain, by backing; but afterwards it came suddenly from the direction of the Western and Atlantic road, opposite to its former direction, and then rose very rapidly. Although on the 6th the river was getting out of its banks, there was no apprehension, up to the night of the 7th, that the water would submerge the town. During the night of the 7th merchants removed their goods, and one Phillips, who that night removed his to the second story of a building standing on ground no higher than the depot, saved them. The water rose into his building on the morning of the 8th. The people finally fled to the hills, and there was a universal destruction of property as well of individuals as of railroads passing through the city. The waters indeed were so high and the flood finally so unexpected that the mayor broke open railroad cars and took provisions which were in process of transportation, to feed the famishing population. The cars in which the tobacco was were standing on the highest ground in the region of the station. There were roads in other directions, beside the road over which the rock had fallen, physically traversable by the cars which had the tobacco; but there were difficulties of various kinds in going on them, which the agents considered amounted to a bar to trying to use them.

On this case the defendant, having by a first and second request, asked the court to instruct the jury that there was no obligatory contract even if the jury believed the conversations deposed to by Price, asked further instructions.

"Third. That if the jury shall believe that the train was stopped on the morning of the 6th by the falling of rock on the track and the washing away of a bridge, and was obliged to put back to Chattanooga in order to send force and implements to put the road in repair, then such delay was inevitable, and would not subject the road for any consequential damages, the immediate cause of the damage being the flood.

"Fourth. That when the damage is shown to have resulted from an immediate act of God, such as a sudden and extraordinary flood, the carrier would be exempt from liability, unless the plaintiff shall prove that the defendant was guilty of some negligence in not providing for the safety of the goods. That he could do so must be proven by the plaintiff, or must appear in the facts of the case.

"Fifth. If the freight train carrying the tobacco left Chattanooga on the morning of the 6th of March, 1867, on its proper time under the contract, and was prevented from going forward by obstructions on the track

or the washing away of a bridge, caused by an extraordinary fall of rain and freshet, and was detained at Chattanooga by these obstructions, or either of them, until the tobacco was injured by the subsequent freshet, which could not be avoided, then the delay at Chattanooga would not be negligence, and the defendant would not be liable for the injury caused by such subsequent freshet, if such freshet was such as is described in the former request for instructions as an act of God, provided the defendant used all proper diligence to rescue the property from injury at Chattanooga, or provided the freshet was so sudden and overwhelming as to prevent rescuing it."

But the court refused to give any of these instructions, and gave the jury, among others, the following ones:

"2d. If you shall be satisfied from the proof that the tobacco was injured while the cars upon which it was being shipped were standing at the depot in Chattanooga by a freshet which submerged the cars containing the tobacco, and that no human care, skill, and prudence could have avoided the injury, then such injury would be occasioned by the 'act of God,' and the defendant would not be liable. But, if you believe that the cars containing the tobacco were brought within the influence of the freshet by the act of the defendant, or its agents, and that if the defendant or agents had not so acted the tobacco would not have been damaged, then the injury would not be occasioned by the 'act of God,' and the defendant would be liable for the damage sustained.

"3d. If you shall believe that the tobacco was received at Chattanooga by the defendant on the evening of the 5th of March, 1867, and that the agent of the defendant having the charge of the freights at, and superintending their shipment from, that point to Memphis, made a contract with Price, the agent of the plaintiff, by which the tobacco was to be sent forward for Memphis on the same evening, and that the agent of the defendant did not comply with the said contract or engagement so made with the agent of the plaintiff, but held the tobacco over until the next morning's train, and, as a consequence of such delay, the tobacco was injured by a freshet in the rivers and creeks contiguous to Chattanooga, and which freshet would not otherwise than by said delay have caused the said injury, then the defendant can claim no exemption from its liability as carriers on account of any injury or damage occasioned by the said freshet, and you will find a verdict in favor of the plaintiff.

"4th. If you shall believe that the tobacco in controversy was not sent forward from Chattanooga, en route for Memphis, until the morning of the 6th of March (and this in the absence of any such contract as stated in the preceding instruction), and that the train upon which said tobacco was being transported was delayed and hindered in its progress by an obstruction upon the track of the road some two and a half or three miles from Chattanooga, which obstruction was occasioned by a slide or tumbling of a rock from the mountain side along which the track of the road is located, and in consequence of said obstruction the said train returned to the depot at Chattanooga, when, by a diligent effort on the part of the defendant's agents the obstruction might have been removed and the train gone through to some other point on the road where no injury would have resulted; and if you believe that while the train was so at the depot at Chattanooga the tobacco aforesaid was damaged as alleged, then the returning of the train to Chattanooga was the immediate cause of the injury, and not the freshet; and the injury would not be caused by 'the act of God,' man's agency having intervened and the defendant would not be relieved from liability, and the plaintiff will be entitled to a verdict in his favor.

"5th. That the loss or damage to the goods in question, if produced by a rise, or freshet, in the river or creeks in the vicinity of the depot where the train was standing, such rise, or freshet, to constitute it 'the act of God,' in a legal sense, must have been so sudden, immediate, and unforseen as to leave the carrier no sufficient time or means of escape from its consequences. But if it be not shown by the evidence that such was the fact, then it was the duty of the defendant or its agents to save the property of the plaintiff from the impending danger, if it were possible to do so, by extraordinary exertion. If the damage could have been prevented by any means within the power of the defendant or its agents, and such means were not resorted to, then the liability of the defendant would not be relieved, and the jury must find for the plaintiff."

The trial and verdict, which went for the plaintiff, was had March 26th, 1868. On the 15th of April following a motion was made by the defendant for a new trial, and overruled. The record went on, under date of the 18th of April, 1868, to say, after giving the title of the case, that,

On this day came the defendant by attorney and tendered its bill of exception herein, and asked that the same might be signed and sealed by the court and made part of the record in this cause, which was accordingly done.

The "bill of exceptions, filed April 18, 1868," then followed. It commenced, after the title of the case, by saying that, "on the trial of this cause, the following proceedings were had." Then came the testimony introduced, the prayer of the plaintiff in error for five distinct instructions, the refusal of the court to grant them, and the instructions which the court did give (all as already mentioned), and the statement that the defendant excepted to the action of the court in refusing the instructions aforesaid, and also in giving the charge aforesaid, and also in overruling his motion for a new trial.

The exceptions to the charge of the judge at the trial, and to his refusal to charge as requested by defendant below, presented the only grounds on which error was alleged.

MR. JUSTICE MILLER delivered the opinion of the court.

A preliminary point is raised by the defendant in error that the exception was not taken at the trial, but was taken afterwards on the overruling of a motion for a new trial.

It seems probable that the formal bill of exceptions was not signed or settled until after the motion was overruled, but it is a common practice, convenient in dispatch of business, to permit the party to claim and note an exception when the occasion arises, but defer reducing it to a formal instrument until the trial is over. We think the language of the bill implies that this was done in the present case, and that it is a reasonable inference from the language used at the beginning and end of this bill, that the exceptions were taken during the trial, as the rulings excepted to were made.

Comment is also made, that the exception does not point out to which instruction it is taken, nor to any special part of the charge which was given. But the instructions prayed by defendant were not offered as a whole, but each one for itself, and the action of the court in refusing them, to which exception is taken, may be fairly held to mean each of them.

As to the charge given by the court, the language of the exception is more general than we could desire. And if the errors of this charge were less apparent, or if there was any reason to suppose they were inadvertent, and might have been corrected if specified by counsel at the time, we would have some difficulty in holding the exception to it sufficient. But the whole charge proceeds from the act of God, on the contract, so different from our views of the law on that subject, that it needs no special effort to draw attention to it, and it is so clearly and frankly stated as to have made it the turning-point of the case.

We are of opinion, then, that both the refusal to charge as requested and the charge actually given are properly before us for examination. As regards the first, we will only notice one of the rejected instructions, the fourth. It was prayed in these words:

"When the damage is shown to have resulted from the immediate act of God, such as a sudden and extraordinary flood, the carrier would be exempt from liability, unless the plaintiff shall prove that the defendant was guilty of some negligence in not providing for the safety of the goods. That he could do so must be proven by the plaintiff, or must appear in the facts of the case."

It is hard to see how the soundness of this proposition can be made clearer than by its bare statement. A common carrier assumes all risks except those caused by the act of God and the public enemy. One of the instances always mentioned by the elementary writers of loss by the act of God is the case of loss by flood and storm. Now, when it is shown that the damage resulted from this cause immediately, he is excused.

What is to make him liable after this? No question of his negligence arises unless it is made by the other party. It is not necessary for him to prove that the cause was such as releases him, and then to prove affirmatively that he did not contribute to it. If, after he had excused himself by showing the presence of the overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it.

The testimony in the case, wholly uncontradicted, shows one of the most sudden, violent, and extraordinary floods ever known in that part of the country. Tobacco was being transported from Salisbury, North Carolina, to Memphis, on a contract through and by several railroad companies, of which defendant was one. At Chattanooga it was received by defendant, and fifteen miles out the train was arrested, blocked by a land slide and broken bridges, and returned to Chattanooga, when the water came over the track into the car and injured the tobacco.

The second instruction given by the court says that if, while the cars were so standing at Chattanooga, they were submerged by a freshet which no human care, skill, and prudence could have avoided, then the defendant would not be liable; but if the cars were brought within the influence of the freshet by the act of defendant, and if the defendant or his agent had not so acted the loss would not have occurred, then it was not the act of God, and defendant would be liable. The fifth instruction given also tells the jury that if the damage could have been prevented by any means within the power of the defendant or his agents, and such means were not resorted to, then the jury must find for plaintiff.

In contrast with the stringent ruling here stated, and as expressive of our view of the law on this point, we cite two decisions by courts of the first respectability in this country.

In Morrison v. Davis & Co., goods being transported on a canal were injured by the wrecking of the boat, caused by an extraordinary flood. It was shown that a lame horse used by defendants delayed the boat, which would otherwise have passed the place where the accident occurred in time to avoid the injury. The court held that the proximate cause of the disaster was the flood, and the delay caused by the lame horse the remote cause, and that the maxim, causa proxima, non remota spectatur, applied as well to contracts of common carriers as to others. The court further held, that when carriers discover themselves in peril by inevitable accident, the law requires of them ordinary care, skill, and foresight, which it defines to be the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them.

In Denny v. New York Central Railroad Co., the defendants were guilty of a negligent delay of six days in transporting wool from Suspension Bridge to Albany, and while in their depot at the latter place a few days after, it was submerged by a sudden and violent flood in the Hudson River. The court says that the flood was the proximate cause of the injury, and the delay in transportation the remote one; that the doctrine

we have just stated governs the liabilities of common carriers as it does other occupations and pursuits, and it cites with approval the case of Morrison v. Davis & Co.

Of the soundness of this principle we are entirely convinced, and it is at variance with the general groundwork of the court's charge in this case.

As the case must go back for a new trial, there is another error which we must notice, as it might otherwise be repeated. It is the third instruction given by the court, to the effect that if defendant had contracted to start with the tobacco the evening before, and the jury believe if he had done so the train would have escaped injury, then the defendant was liable. Even if there had been such a contract the failure to comply would have been only the remote cause of the loss.

But all the testimony that was given is in the record, and we see nothing from which the jury could have inferred any such contract, or which tends to establish it, and for that reason no such instruction should have been given.

Judgment reversed and a new trial ordered.

COLT AND COLT v. M'MECHEN.
(6 John. 160.)

This was an action on the case, against the defendant, as a common carrier of goods for hire, in a certain sloop, called the Margaret, between Kinderhook and New York, on the Hudson river. The declaration stated that the plaintiffs were possessed of certain goods, &c., which the defendant, by his servant Matthew M'Kean, master of the said sloop, received on board to carry, transport and convey from New York to Kinderhook landing, for a reasonable price or compensation, &c., but that the goods were never delivered, &c. Plea, not guilty.

The cause was tried at the Columbia circuit, in October, 1808, before Mr. Justice Spencer.

Several witnessess testified, that the sloop was overladen when she left New York, having fifteen or twenty tons more than her tonnage, which was about 75 tons. Other witnesses said it was usual to load vessels, which sailed on the river, much beyond their tonnage, and it was not regarded as unsafe.

M'Kean, the master, testified that the sloop was loaded wale to, but not overloaded; that she had not more than 80 or 85 tons, &c., on board; she had carried 95 tons with safety. That the wind was adverse, but they met with no difficulty, until they got to the high lands, when the vessel ran aground; but that other vessels, more lightly loaded, at the same time also got aground. That the Margaret, after being lightened, got off, and having reloaded the goods taken out, proceeded to beat up the river, against a head wind; that from the lateness of the season, and for fear of ice, he was anxious to reach Livingston's dock, which was a place of safety, and to which he had nearly arrived, when the accident happened. The wind was light and variable, but sufficient, if it had continued, to enable him to reach the dock. While standing on a tack to the shore, and when they had approached it, as near as was usual and proper, the helm was put down to bring the vessel about; the jib began to fill, and the vessel had partly changed her tack, when the wind suddenly ceased blowing, and the headway under which the vessel then was, carried her on the bank; that while standing to the west shore, there was wind enough to enable him to manage the vessel with safety, and had it continued, the witness was confident the sloop would have come about and proceeded safely; but that the sudden failing of the wind was the cause of her running aground; that they immediately got out the anchor, and tried to get her off, but could not succeed, as she went aground at high water; they removed as much of the cargo forward as they could, and as the tide fell, the stem of the vessel settled; they made every exertion to get her off, from 4 A. M. when she struck, until about 10 A. M. when she sunk. The witness had been several years engaged in navigating the river, and was well acquainted with the navigating of sloops up and down. The vessel was staunch and in good order, and had two men and two boys, who were a competent crew. The vessel had no dead lights; it was expected that she would rise with the flood tide, but she did not; and the water rushed into the cabin windows, and she was filled and logged, but they had no apprehensions of her sinking. The defendant owned a great part of the cargo; and every exertion was made to obtain a lighter, but they could not procure one, until the next morning. The master's evidence was confirmed by the crew.

The plaintiff proved that there were three ferries within a mile of the place where the vessel went aground, and that ferry-boats might have been easily obtained to assist in lightening the vessel, but no application was made for that purpose. It appeared that a sloop was procured from Catskill, to assist the vessel, after she had sunk. The vessel was regarded, by the people on shore, as in a dangerous situation from the time she first struck, and there was some contrariety of evidence as to the conduct of the master, in regard to the vessel, after she went aground.

The damage which the goods of the plaintiff received, was from 10 to 20 per cent. besides some which were wholly lost, amounting to 1,316 dollars.

The judge told the jury, that the common law rule, as to common carriers, applied with full force to the present case. There were only two exceptions to their liability in case of loss; namely, where the loss was occasioned by the act of God, or the enemies of the land; that if the jury were satisfied that the vessel went ashore, in consequence of the sudden failure of the wind, the law would consider it as the act of God, and excuse the defendant, if there was no subsequent neglect or carelessness in the preservation of the cargo; that if the master and crew, by their diligence, could have saved the vessel and cargo, and neglected to do so, the defendant was responsible for the loss.

That if the jury were satisfied that the vessel struck in consequence of the sudden failure of the wind, and that the master and the hands had used due diligence after the accident, the defendant was entitled to a verdict; but that if the jury were not satisfied on these points, they ought to find a verdict for the plaintiffs, for the amount of the damages which had been proved. The jury found a verdict for the defendant.

A motion was made to set aside the verdict, and for a new trial, for the misdirection of the judge, and as against evidence.

SPENCER, J. The plaintiffs have moved for a new trial on two grounds: 1st. For a misdirection to the jury, in stating that the failure of the wind was the act of God; and, 2d. For that the verdict was against evidence, on the point submitted to the jury, in relation to the negligence or carelessness of the master of the sloop, after she struck.

There can be no contrariety of opinion, on the law which renders common carriers liable. However rigid the rule may be, they are responsible for every injury done to goods entrusted to them to carry, unless it proceeds from the act of God, or the enemies of the land. What shall be considered the act of God, as contra-distinguished from an act resulting from human means, affords the only difficulty in the case.

The cause was summed up to the jury on this point, "that if they were satisfied from the whole evidence, that the vessel ran ashore in consequence of the sudden failure of the wind, the law would consider it as the act of God, and exculpate the defendant." By finding a verdict for the defendant, the jury have believed the testimony of Captain M'Kean, and the other witnesses produced by the defendant, in their account of the manner and circumstances under which the vessel grounded. The substance of that testimony is, that the vessel being on her passage from New York to Kinderhook, late in the month of November, 1800, proceeded on the passage to West Camp, where the vessel came to, from thence they weighed anchor and beat against the wind; from the lateness of the season, and for fear of ice, the captain was anxious to make Livingston's dock, which was considered a place of safety, and at which they had nearly arrived, when the accident happened; that the wind was light and variable, but sufficient to enable them to make considerable progress, and would have been sufficient, if it had continued, to have enabled them to have reached the dock, in a few more tacks; they were standing for the west shore, and had approached it, as near as was usual and proper, when they put down the helm to bring her about, the jib sail begun to fill, the vessel partly changed her tack, when the wind suddenly ceased blowing, and the headway under which the vessel was, shot her on the bank. Captain M'Kean states, that he was well acquainted with the shore, and had before approached as near as he did then, when beating to windward; and that, when standing for the west shore, he had wind enough to enable him to manage the vessel with safety; that as the water fell, the stern of the sloop settled, and did not rise until flood tide, in consequence of which, the water rushed in at the windows, and thereby the plaintiff's goods were wet and damaged. He states, distinctly, that the sudden and entire failure of the wind was the sole cause of the vessel's grounding.

The case of Amies v. Stevens (1 Str. 128.) shows that sudden gust of wind, by which the hoy of the carrier, shooting a bridge, was driven against a pier and overset, by the violence of the shock, has been adjudged to be the act of God, or vis divina. The sudden gust, in the case of the hoyman, and the sudden and entire failure of the wind sufficient to enable the vessel to beat, are equally to be considered the acts of God. He caused the gust to blow in the one case; and in the other, the wind was stayed by him.

It has been said, that the captain was guilty of negligence in attempting to beat, and in approaching the shore as near as he did when the disaster happened, the wind being, as he states, light and variable. It may be observed, that the master had his choice of alternatives, either to improve the wind he then had, in order to reach a place of safety, or to be exposed, in the middle of the river, to the effects of ice. The season of the year, and the interests of all concerned, justified the captain in attempting to reach Livingston's dock. It was not, as I recollect, pretended, on the trial, that his conduct was improper and unusual, in approaching the shore as near as he did on the tack in which the vessel grounded; at all events, the case does not show that the judge expressed any opinion on that point; and the plaintiff must have had the full benefit of that objection to the captain's conduct. I should undoubtedly have been of opinion, as the captain was situated, taking into view the lateness of the season, the narrowness of the channel, and the fact, that he was not nearer the shore than is usual and customary in beating, that he was not guilty of negligence or improper conduct in that respect.

No rule of law having been violated, in the charge to the jury, if there even were grounds for saying that there is some degree of negligence imputable to the master, that point has been under the consideration of the jury, or it was not insisted on before them, and, in either case, when the plaintiffs attempt to fix the defendant with a loss from a very rigid rule of law, I should not disturb the verdict of a jury, to give them another opportunity to urge that objection. In the case of the Proprietors of the Trent Navigation v. Wood, the vessel was sunk, by driving against an anchor, in the river Humber, and the goods were considerably damaged by the accident; it was not pretended by the counsel, that this was the act of God, and Lord Mansfield considered it the injury of a private man, within the reason of the instance of robbery. Abbott, in his notice of this case, (Abbott, 256.) observes that both parties were held to have been guilty of negligence, the one in leaving his anchor without a buoy, the other in not avoiding it; as when he saw the vessel in the river, he must have

known that there was an anchor near at hand; or if it was to be taken, that negligence was imputable only to the master, who had left his anchor without a buoy, that he was answerable over to the masters and owners of the vessel, whose cargo had been injured. Again, he observes, (p. 227.) that if a ship is forced on a rock or shallow, by adverse winds or tempests, or if the shallow was occasioned by a recent collection of sand, where ships could before sail with safety, the loss is to be attributed to the act of God, or the perils of the sea. Upon a position so plain, in my apprehension, as that the sudden cessation of a wind which was competent, at the very moment when the vessel began to come about, for the avoidance of the shoal, was the act of God, and did not arise from the fault or negligence of man, I am at a loss for further illustration.

The second point, on which a new trial is sought, was fairly and fully before the jury; and without entering upon it further, I cannot but express my perfect concurrence in opinion with them; the master did every thing which could reasonably be expected of him, to prevent the vessel from sinking. Accordingly, my opinion is against a new trial.

THOMPSON, J., VAN NESS, J., and YATES, J., concurred.

KENT, CH. J. I concur in the general doctrine, that the sudden failure of the wind was an act of God. It was an event which could not happen by the intervention of man, nor be prevented by human prudence. But I think here was a degree of negligence, imputable to the master, in sailing so near the shore under a "light, variable wind," that a failure in coming about, would cast him aground. He ought to have exercised more caution, and guarded against such a probable event, in that case, as the want of wind to bring his vessel about. A common carrier is only to be excused from a loss happening in spite of all human effort and sagacity. (Trent Navigation v. Wood, 3 Esp. N. P. 127.) A casus fortuitus was defined, in the civil law, to be quod facto contingit, cuivis diligentissimo possit contingere. But as this point does not appear to have been particularly urged at the trial, and the verdict negatives the charge of negligence; and as the responsibility of common carriers may be deemed sufficiently strict, I am content not to interfere with the verdict, though I think that the evidence would have warranted the conclusion of negligence to a certain extent.

Judgment for the defendant.

THE SOUTHERN EXPRESS COMPANY, IN ERROR, v. L. A. WOMACK.

(1 Heisk. 256.)

In the Circuit Court. R. R. Butler, J., presiding.

Deaderick, J., having been of counsel, did not sit in this cause.

R. McFARLAND, S. J., delivered the opinion of the Court.

This is an action brought by defendant in error against the plaintiff in error as a common carrier, for failing to carry and deliver a quantity of household goods, notes, bonds, checks, &c., according to contract, from Prospect Depot, in Virginia, to Bristol, Tennessee; and in another count, for failing to deliver said goods at Lynchburg, Virginia.

The plaintiff recovered in the Court below, and a new trial being refused the defendant, an appeal in error has been presented to this Court.

A number of pleas were filed. Upon some of these there was issue, and to others a demurrer was sustained. We do not deem it necessary to consider the questions raised by these pleadings, for, in our opinion, all the defenses therein indicated, so far as they are good in law, might have been made under the first plea, which is non assumpsit. We will, therefore, proceed to enquire whether the plaintiff in error had the full benefit of all the defenses to which he was entitled under the general issue.

The proof tends to show the following state of facts: The plaintiff in error was a common carrier, in the full, legal sense of the term, from Richmond, in Virginia, to Bristol, Tennessee, by way of Lynchburg. Their mode of transportation was by railway. Prospect Depot was a way station between Richmond and Lynchburg. About the middle of March, 1865, the boxes containing the goods in question, were delivered to R. V. Davis, the agent of the Company at Prospect Depot, for transportation to Bristol, the boxes being properly marked. Davis gave Mrs. Womack, the wife of the defendant in error, a receipt simply acknowledging the receipt of the goods for transportation, and received from her the amount of charges for transporting the goods to Lynchburg, in Confederate money, he not being authorized to collect the charges any further.

The proof further shows that the railway trains upon which the plaintiffs in error carried freights, continued to pass daily in the direction of Lynchburg, with, perhaps, some occasional interruption, until near the 7th of April. That, for the first four days after the goods were received, Davis carried them to the track of the railroad, as the train passed, and tendered them to the "Messenger" as he is called, who was the agent of the company, and whose duty it was to receive the goods upon the train, and forward them. That the messenger declined to take the goods on, alleging that he had no room for them, but would try to take them next day. After this, Davis continued each day for some weeks to apply to the messenger to take the goods, but was "put off" from day to day, with substantially the same reply. That towards the 7th of April, one Thomas Agee, who had hauled the goods to the depot, and who was the friend of the defendant in error, finding that the goods were still in the depot, and that hostile armies were approaching, proposed to Davis to take charge of the goods, and haul them away, and take care of them, but this proposal was refused by Davis. On the 7th of April, the depot was captured by the United States forces, and the goods captured or destroyed, except a small

quantity that were afterwards recovered by the defendant in error.

The proof for the plaintiff in error shows that, at the time the goods were received, Prospect Depot was inside the military lines of the Confederate forces, and so remained until the 7th of April. That the line of railroad referred to was not owned by them, but that they hired from the railroad company a car which they used on each trip for the transportation of their freight. The proof further shows that between the 16th of March and the 7th of April, large quantities of freight were sent from Richmond and other points in the direction of Lynchburg; that the Confederate military forces had the preference upon the road, and on some occasions the "Express car" was taken from the plaintiff in error, for the use of the military, and the proof renders it probable that the express cars, during that period, were loaded to their capacity, when going in the direction of Lynchburg, before they reached Prospect Depot.

It was further proven by the plaintiff in error, that they generally used a printed form of receipt which they gave when goods were delivered to them, but at the time of this transaction, the agent, Davis, had none of these blanks on hand.

It was also proved by them, that when Mrs. Womack was asked what the boxes contained, she replied that they contained "beds, bed clothing, wearing apparel," etc., but did not disclose that they contained bonds, notes, or anything of that character, the question being pressed upon her no further.

Upon this, various questions are made and argued as to the action of the Court below.

1. His Honor, the Circuit Judge, was asked to instruct the jury, that if the charges for the transportation of the goods were paid in Confederate Treasury notes, this being the consideration of their undertaking, the contract would be void, and no recovery could be had. This instruction was refused, and we think properly. Conceding, for the argument, that Confederate notes loaned, would not form a good consideration for a promise to pay money, we think the doctrine has no application to this case. The consideration of the undertaking upon the part of the plaintiff in error, was, that the goods should be then and there delivered to them, to be carried for hire, to be then or afterwards paid to them. For this they had a lien upon the goods. If they chose voluntarily to receive the charges in advance, in Confederate money, we hold that this did not relieve them from their obligation to carry the goods according to the contract, or from liability for the loss of them. It has furthermore been held at the present term, that a contract founded upon a consideration of "Confederate money" is not necessarily illegal.

2. The Court was asked to instruct the jury, that if a receipt was executed by the agent of the company, upon the delivery of the goods, this receipt would be the highest evidence of the contract, and no parol evidence could be heard to establish the contract.

In response to this "his Honor told the jury that if the proof showed that a receipt was executed at the time of delivery of the goods, and that it was lost or unintentionally misplaced, then parol evidence is admissible to prove the contents thereof, and that the plaintiff having made oath of the loss or unintentional misplacing of the receipt, parol evidence of its contents might be looked to."

The affidavit referred to does not appear in the record. The record purports to contain all the evidence. This affidavit however was no part of the evidence to be submitted to the jury; it simply serves the purpose of laying the foundation for the introduction of parol evidence of the contents of the paper. The plaintiff in error having failed to incorporate this affidavit in the bill of exceptions, we must presume that the affidavit was made as stated by his Honor in his charge, and met the requirements of the law in such cases, and that the evidence was upon this ground properly admitted.

Again, according to the evidence, this receipt did not purport to contain any contract, but was simply an acknowledgment of the receipt of the goods for transportation. In such a case, on the receipt of the goods, for transportation, without any express stipulations as to the measure of liability, the law supplies the contract and fixes the rights and liabilities of the parties, and the mere delivery of the property, which is the only fact intended to be established by these receipts, may as well be proven by parol evidence as otherwise.

3. The defendant offered in evidence a receipt which seems to have been a printed form, such as the Express Company were in the habit of using. This receipt contains many limitations upon the company's common law liability as carriers, and in fact, provides that they shall only be liable in case of gross negligence, or fraud of their agents, and throws the burden of proving this upon the other party; and upon this, the Court was asked to instruct the jury, that, if Davis was only authorized by the company to execute receipts in this form, then he was only a special agent of the company, and they would not be bound by any receipt he might give in a different form.

Upon this, his Honor instructed the jury that they could not look to this receipt or copy of a receipt at all, "as there was no original;" and further, if Davis assumed to act as the agent of the Express Company at Prospect Depot, and the company recognized his act as such agent, they were bound by his acts; and if the company gave private instructions to Davis their agent, and such instructions were not made public, and brought home to the plaintiff, he would not be bound thereby.

It will be observed, that the receipt offered in evidence, does not purport to be either the original or a copy of the one used in this case.

It is a receipt dated 20th April, 1865, to N. Bleakley, for one bundle valued at $60, marked A. J. Brady, Greensboro, Ga. Whether this receipt was a real transaction, and was

actually given as it purports, or was only a blank filled with fictitious names, does not appear. The object in either case, was the same, merely to show the form of the receipt used by the company. There is no evidence to show that this receipt, or any one like it, was brought to the attention of the defendant in error, or his wife or agent, at the time the goods were delivered, or any intimation given to them at any time, that the company's liability was to be anything less than the law attached in such cases.

The question whether common carriers may limit their liability by notice of this character, or even by an express contract, has been much discussed, and upon it, there is a conflict of judicial opinion. The question is one of great practical importance, owing to the vastly increased number of business transactions of this character, but it need not be definitely settled in this case.

The case of Turner v. Wilson, 7 Yer., 340, was an action of this character, for failing to carry and deliver cotton, according to contract. In that case, a receipt was given, specifying that the dangers of the river only were excepted. Evidence was offered of a custom which was generally known, by which the carrier was to be liable only when the loss occurred from negligence or dishonesty on his part. The Court excluded the evidence and held the carriers bound by the common law liability, except only to the extent it was limited by express contract.

In this case there is no proof that the conditions annexed to this receipt formed any part of the contract; that the defendant in error had any notice, or was in any manner connected therewith, and his Honor was not in error in excluding the evidence, although the true reason for doing so was not fully and accurately stated.

The case of Walker v. Shipwith, Meigs' R., 502, was an action to recover the value of baggage delivered to the agent of the defendants, who were the proprietors of a stage line. The defendants proved that Lyle, the agent, was instructed that "no package or parcel of any kind, should be sent upon the stage, unless it constituted a part of the baggage of a passenger, or was under the care of a passenger, except at the risk of the owner or person sending such package or article," and it was further proven that a notice of this character was posted up in the stage office, and that one Swan, by whom the package was sent, and delivered to the defendants' agent, was also informed of this. The package, however, was allowed to go upon the stage, and was lost.

The Court held that Lyle, having acted as the agent of the defendant at that office, and being authorized to transact all their business of a particular kind, he was a general agent, and that other parties were not bound by private instructions, not brought directly to their notice; and in that case, the defendant was held liable for the property. In this case, the instruction of the Circuit Court was substantially in accordance with the above principle, and we think it was not materially erroneous.

We are of opinion that the plaintiff below having waived his claim to any recovery for the notes, bonds, bills, etc., contained in the boxes, and the court having told the jury that the concealment by the plaintiff's wife of the fact that the boxes contained these articles, if not made with a fraudulent purpose, would not defeat the plaintiff's right to recover for the balance of the property, there was no error in this part of the case.

We further hold that the fact that the plaintiff in error did not have the necessary cars or means of transportation to carry the goods after they were received, is no defense unless it was expressly stipulated at the time that such was to be the extent of their obligation. If they received the goods without any express contract, the law fixes their liability, and they were bound to furnish the transportation and carry the goods, and could only be excused by the act of God or the public enemy. This is a well settled principle of law. Johnson v. Friar, 4 Yer. 48; Turney v. Wilson, 7 Yer., 340; Walker v. Skipwith, Meigs, 502; East Tennessee and Georgia Railroad Co. v. Nelson, 1 Cold., 272.

Many authorities go further, and hold that this liability cannot be limited by notice or express contract. Hollister v. Newland, 19 Wend., 234; Cole v. Godwin, 19 Wend., 251; Gould v. Hill, 2 Hill., (N. Y.,) 623.

In view of the fact of the constantly increasing business of this character, and the great power exercised by common carriers over the lives and property of the citizen, we are not disposed to weaken, in any degree, the force of this rule.

4. Are the United States troops, who, it is alleged, destroyed these goods, to be regarded as "the public enemies," or "the enemies of the country," in the sense of the law, so as to excuse the plaintiff in error for the loss of the goods caused by these acts, without fault on the part of the agents of the company? His Honor, the Circuit Judge, decided this proposition in the negative, and said: "The United States army or troops were not enemies to the Government, or public enemies; they were public friends and friends to the Government; there was but one Government in the United States and that was the United States Government." Consequently the United States troops, under General Stoneman, a United States General, and commanding for the United States, were not the enemies of the United States Government." His Honor further told the jury "that the Confederate States never were recognized by any Government as a Government de jure or de facto. Our Supreme Court recognized them as belligerents so as to regulate criminal intent in robbery and some other felonies, but no further. The army of the so-called Confederate States was an unlawful combination, nothing but a mob, however huge its proportions may have been; consequently if the goods were destroyed by the United States troops that would not exonerate the company."

We are of opinion that the definition, as above given by his Honor, of the character

of the late war, and as to the status of the Confederate Government, is not correct or accurate; but the only question of practical importance, is, was he correct in holding that the United States troops were not to be regarded as the public enemy, against whose acts the plaintiff in error did not insure. If he was in error in this, it was an error affecting the merits, and a new trial should be granted. If, on the other hand, he answered this question correctly, then the error which followed in giving a definition of the character of the rebellion—a definition which was unnecessary—was immaterial, and could not have prejudiced the plaintiff in error. The term "public enemy," or the "enemy of the country, has, in general, a technical legal meaning. It is understood to apply to foreign nations, with whom there is open war, and to pirates, who are considered at war with all mankind; but it does not include robbers, thieves, or rioters or insurgents, whatever be their violence." Story on Contr., 752.

In England, the term "public enemies," or "the King's enemies," as applied to the law of treason, has been held not to apply to insurgents or rebels, they not being enemies. Hawkins' Pleas of the Crown, 55.

It has been held by the Supreme Court of the United States, in a number of cases known as the Prize Cases, that the late rebellion was "a war" in the legal sense, as contradistinguished from a mere insurrection, and that as a consequence of this in the conduct of the war during its pendency, the persons living upon either side of the line dividing the contending forces, were to be regarded as enemies of the other, to the extent to authorize the forfeiture of the property of either captured by the other upon the high seas.

In the case of Thorington v. Smith, 9 Wallace, 1, Chief Justice Chase classes the Confederate Government among that class of cases where a foreign government, at war with our own, for instance, obtains temporary possession of a portion of our country, and establishes their authority over it, and enforces the same by military power; and says: "Belligerent rights were conceded to it, and thereafter its territory, held to be enemy's territory, and for most purposes, its inhabitants held to be enemies."

It is clear that, during the war, the parties upon each side treated each other as enemies, and this was justified by the laws and usages of war.

As an abstract proposition, it can not be doubted that the United States Government was the rightful government, and that the war was rightfully prosecuted for the enforcement of its laws; and the attempted revolution being successful, no portion of the citizens were at any time released from their allegiance to the rightful government, however they may be excused or justified in rendering obedience to the usurped government, in civil matters, so long as this obedience might have been enforced by actual military power; and we are not to be understood as announcing the proposition that, in reality, the United States Government or troops, were the public enemy of its own citizens during the progress of the war.

But in construing this contract, and determining the rights and liabilities of the parties themselves, we must give to the term "public enemy," or "enemy of the country," the meaning that attached to it at the time and place the contract was made. We have seen that at the date of this transaction both, parties resided within the military lines of the "Confederate States." We have also seen that at that time, "for most purposes," the people upon each side of the dividing line were treated as the enemies of the other. So that the term "public enemy," or "enemy of the country," as understood and applied by the contracting parties at the time, included the troops of the United States Government, and that the plaintiffs in error are not, under the circumstances, to be held as insurers against loss that might occur by the act of the United States troops.

Such was not the legal import of the contract they made, or its meanings as they then understood it.

It follows, therefore, that while in one sense the proposition of his Honor was correct, it was not the proper instruction applicable to the facts of the case. For this error alone we reverse the judgment, and remand the cause for a new trial.

There is evidence in the record, upon which the plaintiff in error might well have been held liable for their failure to carry the goods or return them before the time they are alleged to have been destroyed by the United States troops; but as this was a question of fact, they were entitled to have the case submitted to the jury upon a correct charge.

Reverse the judgment.

HART v. CHICAGO & N. W. RY. CO.

(69 Ia. 485, 29 N. W. 597.)

Appeal from Polk circuit court.

On the eighteenth day of April, 1883, plaintiff delivered to defendant, at the city of Des Moines, one car-load of property, which the latter undertook to transport to the town of Miller, in Dakota territory. The property shipped in the car consisted of six horses, two wagons, three sets of harness, a quantity of grain, a lot of household and kitchen furniture, and personal effects. The contract under which the shipment was made provided that the horses should be loaded, fed, watered, and cared for by the shipper at his own expense, and that one man in charge of them would be passed free on the train that carried the car. It also provided that no liability would be assumed by the defendant on the horses for more than $100 each, unless by special agreement noted on the contract, and no such special agreement was noted on the contract. Plaintiff placed a man in charge of the horses, and he was permitted to and did ride in the car with them. When the train reached Bancroft, in this state, it was discovered that the hay which was carried in the car to be fed to the horses on the

trip was on fire. The car was broken open, and the man in charge of the horses was found asleep. The train-men and others present attempted to extinguish the fire, but before they succeeded in putting it out the horses were killed, and the other property destroyed. This action was brought to recover the value of the property. There was a verdict and judgment for plaintiff, and defendant appealed.

REED, J. There was evidence which tended to prove that the fire was communicated to the car from a lantern which the man in charge of the horses had taken into the car. This lantern was furnished by plaintiff, and was taken into the car by his direction. Defendant asked the circuit court to instruct the jury that if the fire which destroyed the property was caused by a lighted lantern in the sole use and control of plaintiff's servant, who was in the car in charge of the property, plaintiff could not recover. The court refused to give this instruction, but told the jury that, if the fire was occasioned by the fault or negligence of plaintiff's servant who was in charge of the property, there could be no recovery. The jury might have found from the evidence that the fire was communicated to the hay from the lantern, but that plaintiff's servant was not guilty of any negligence in the matter. The question presented by this assignment of error, then, is whether a common carrier is responsible for the injury or destruction of property while it is in the course of transportation when the injury is caused by some act of the owner, but which is unattended by any negligence on the part of the owner.

The carrier is held to be an insurer of the safety of the property while he has it in possession as a carrier. His undertaking for the care and safety of the property arises by implication of law out of the contract for its carriage. The rule which holds him to be an insurer of the property is founded upon considerations of public policy. The reason of the rule is that the carrier ordinarily has the absolute possession and control of the property while it is in the course of shipment, he has the most tempting opportunities for embezzlement or for fraudulent collusion with others. If it is lost or destroyed while in his custody, the policy of the law therefore imposes the loss upon him. Cogg v. Bernard, 2 Ld. Raym. 909; Forward v. Pittard, 1 Durn. & E. 27; Riley v. Horne, 5 Bing. 217; Thomas v. Railway Co., 10 Metc. 472; Roberts v. Turner, 12 Johns. 232; Moses v. Railroad Co., 24 N. H. 71; Rixford v. Smith, 52 N. H. 355. His undertaking for the safety of the property, however, is not absolute. He has never been held to be an insurer against injuries occasioned by the act of God, or the public enemy, and there is no reason why he should be; and it is equally clear, we think, that there is no consideration of policy which demands that he should be held to account to the owner for an injury which is occasioned by the owner's own act; and whether the act of the owner by which the injury was caused amounted to negligence is immaterial also. If the immediate cause of the loss was the act of the owner, as between the parties absolute justice demands that the loss should fall upon him, rather than upon the one who has been guilty of no wrong, and it can make no difference that the act cannot be said to be either wrongful or negligent. If, then, the fire which occasioned the loss in question was ignited by the lantern which plaintiff's servant, by his direction, took into the car, and which, at the time, was in the exclusive control and care of the servant, defendant is not liable, and the question whether the servant handled it carefully or otherwise is not material. This view is abundantly sustained by the authorities. See Hutch. Carr. § 216, and cases cited in the note; also Lawson, Carr. §§ 19, 23.

2. Section 1308 of the Code is as follows: "No contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made or entered into." Counsel for plaintiff contend that the provision of the shipping contract by which plaintiff undertook to care for the horses while they were being transported is in violation of this section, and consequently is void. For the purposes of the case this may be conceded, and yet it does not follow that defendant is liable for the loss if it was caused by plaintiff's act. If it should be conceded that defendant was responsible for the proper care of the property while it was being transported, it would follow only that plaintiff was an intermeddler in placing his servant in the car, and in assuming to care for it. If the injury was caused by his act, it is immaterial whether he was proceeding under a valid contract or as an officious volunteer in doing the act.

3. The evidence tended to prove that two of the horses were worth $150 each, and that two others were worth $125 each, and that the others were worth $100 each. Defendant asked the circuit court to instruct the jury that under the contract defendant's liability for the horses could not exceed $100 per head. The court refused to give this instruction; and ruled that, if plaintiff was entitled to recover, the jury should award him the full value of the property. Whether a common carrier, in the absence of any statute restricting his powers in that respect, can, by rule, regulation, or contract, limit his liability for the property received by him for carriage, has been the subject of much discussion, and there is great conflict in the decision of the courts on the question. We have no occasion, however, in this case, to enter into that question. No one would question that, in the absence of a contract limiting the amount of his liability, the shipper would be entitled, in case of the destruction or injury of the property under such circumstances as that the carrier was liable for

the loss, to recover full compensation for injuries sustained. The statute above quoted prohibits the making of any contract that would exempt him from the liability of a common carrier which would exist if no contract, rule, or regulation existed. If the statute is applicable to a contract in which the undertaking is to transport the property from this state into another state or territory of the United States, it cannot be doubted, we think, that the provision of the contract in question by which it was sought to limit the liability of the defendant for the horses to an amount less than the actual value of the property is repugnant to its provisions, and consequently invalid.

It is contended, however, that the state has no power to place a restriction of that character upon the carrier who contracts for the transportation of property from this state into another state or territory. The position is that the restriction, if applicable to a contract of this character, would be a regulation of commerce among the states, a subject which, under the federal constitution, is within the exclusive jurisdiction of the Congress of the United States. In our opinion, however, this proposition cannot be maintained. The provision is in no just or legal sense a regulation of commerce. It prescribes no regulation for the transportation of freight upon any of the channels of communication. It leaves the parties free to make such contracts as they may choose to make with reference to the compensation which shall be paid for the services to be rendered. The carrier is left free to demand such compensation for the carriage of the property as is just, considering the responsibility he assumes when he receives it. He is forbidden to make any contract that would exempt him from any of the liabilities which arise by implication from his undertaking to carry the property. But no burden is placed upon the property which is the subject of the contract; nor is any rule prescribed for his government respecting it. That it is within the power of the state to prescribe such a limitation upon his power to contract, we have no doubt. The statute was enacted by the state in the exercise of the police power with which it is vested, and it is applicable to all contracts entered into within its jurisdiction. The question involved is not different in principle from that decided by the supreme court of the United States, in what are known as the Granger Cases. See Munn v. State, 94 U. S. 113; Chicago, B. & Q. Ry. Co. v. Iowa. Id. 155; Peik v. Chicago & N. W. Ry. Co., Id. 164.

The judgment of the circuit court will be reversed.

MILTIMORE AND OTHERS vs. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY.

(37 Wis. 190.)

Appeal from the Circuit court for Rock County.

Action for damages alleged to have been caused by the negligence of the defendant company in transporting a wagon for the plaintiffs, on its cars from Janesville to Chicago. The answer denied negligence, and alleged a special contract that the wagon should be transported wholly at the owners' risk in respect to the cause from which the damage resulted.

The evidence showed the facts to be, that the plaintiffs, by one Ripley, their agent, applied for transportation of the wagon in an open or platform car, as they desired it shipped without taking it apart; that the price was agreed upon, and the company agreed that it should be sent on the train which was to leave the same evening at 9:15 o'clock, provided it was received in time, and that, if there was a flat car in the yard, it should be placed where he could run it on; that Ripley applied to the employee of the company, whose duty was to make up trains, for a car, who informed him that they would have a car placed for him, and if he got the wagon there before 5 o'clock, they would help him load the wagon upon the car; that he took the wagon up to be loaded a little after 5 o'clock. The employees of the plaintiff loaded it upon the car. Two of the employees of the company went back, at Ripley's request, after hours, and helped load it; and one suggested that he take off the wheels, but Ripley said he could fasten them so they would not roll, and tied the wheels, and nailed down blocks upon the floor to keep it from rolling. The company gave a receipt for the wagon which contained the agreement that the company should not be "responsible for loss or damage to any * * * article whose bulk rendered it necessary to transport in open cars, * * * unless it can be shown that such damage or loss occurred through negligence or default of the agents of the company." The train, with the car containing the wagon, left for Chicago that evening while a high wind was prevailing. The wagon, being in the condition in which the plaintiffs' agent had left it, was blown off from the car in transit, and injured.

The issue was tried by the court, who found that the defendant was negligent in removing the wagon during the prevalence of the high wind, without taking precaution to secure it to the car, so as to prevent its being blown off; and that by reason of such negligence the injury occurred. From judgment on the finding the defendant appealed.

COLE, J. The learned circuit judge found from the evidence that the defendant company was guilty of negligence in removing the wagon from Janesville, the place of shipment, and in carrying it forward toward Chicago, its point of destination, without taking the precaution to secure it to the car, so as to prevent it from being thrown from the car by the violence of the wind prevailing at the time. Upon this ground the company was held liable for the injury to the wagon upon being blown off the car.

We feel constrained to dissent from this

view of the case. The evidence shows, beyond all doubt or question, that the plaintiffs themselves chose an open or platform car upon which to transport the wagon to Chicago. They did not wish to have the wagon taken apart so that it could be transported in a box car, but chose the platform car, upon which the wagon could be carried standing, as the cheaper mode of conveyance. The company certainly was not at fault for this manner of transporting the wagon. The evidence clearly shows that the plaintiffs assumed the labor and responsibility of loading the wagon. Ripley was told when he bargained for the car, by the agents of the company, that if he got the wagon to the cars before five o'clock, they would help him load it, but if he got there after that time, he would find his car by the freight house platform, upon which to place the wagon. He got to the freight depot late, but met a couple of the workmen coming away, who went back and helped him in loading the wagon. But Ripley himself took the entire charge and responsibility of loading the wagon, as it was understood he would do, and of securing it to the car. Whatever means and appliances he deemed necessary and proper to be used to secure the property while in transit, he used, or might have used, without the control or interference of any one. The state of the weather, the nature of the property, its exposure to violent winds, he should have considered and provided for. It seems to us there is no reason for saying that the company was guilty of negligence, and did not take due precautions to secure the wagon, in view of the established fact that the plaintiffs undertook to attend to these matters themselves. The company received the property for transportation, loaded and secured as the plaintiffs saw fit to load and secure; and why should negligence be imputed to it for not taking precautions to guard against the plaintiffs' want of care? It is said the company was exceedingly careless and negligent in attempting to carry this covered wagon at the time and in the manner it did, without making any effort to attach the same more firmly to the car. But the obvious answer to this argument is, that the plaintiffs themselves assumed the risk and responsibility of loading and securing the wagon, and the company was not called upon to see that they had properly performed their duty in that regard. The plaintiffs had ordered that the wagon should be sent by the night train, and the agents of the company had agreed to take it, if loaded. According to the testimony of Carter, one of the plaintiffs, the wind blew very hard between eight and nine, while the train on which the wagon was to go did not leave Janesville until 9:15. There was ample time to countermand the order to ship the wagon that night, or to see that it was so secured that it could not be blown from the car by the violence of the wind. It seems to us that whatever negligence there was in securing the wagon, must be imputed to the plaintiffs. The case is not distinguishable in principle from Betts v. The Farmers' Loan & Trust Company, 21 Wis., 81, and the decision there made is controlling here. There the owner of cattle shipped by railroad, who had undertaken to put them in the car, knew that the door of the car was in an unsafe condition, but neglected to inform the station agent, who was ignorant of the fact; and it was held that he could not recover for injuries received by the cattle in escaping from the car in consequence of such defect. So, under the circumstances of this case, it seems to us, the company was not obliged to take further precautions to fasten or secure the wagon on the car. The plaintiffs had taken upon themselves that care and responsibility, and if they failed properly to secure it against the violence of the wind, and it was injured, the loss is attributable to their fault.

It follows from these views that the judgment of the circuit court must be reversed, and the cause remanded with directions to dismiss the complant.

By the Court.—It is so ordered.

FRANKLIN EVANS vs. FITCHBURG RAILROAD COMPANY.

(111 Mass. 142.)

Tort against common carriers to recover for injuries to the plaintiff's horse. At the trial in the Superior Court, before Rockwell, J., the plaintiff offered evidence that he delivered to the defendants to be carried on their road two horses, which were kept and used as a span; that he saw them placed and fastened by their halters at the end of a car in separate corners; that when the horses arrived they were in the same position, but one was seriously injured on his hind legs, and his halter rope was hitched so tightly around his lower jaw as evidently to have caused him pain; that the injuries were caused by kicks from the other horse; and that the horses had been previously kind and well behaved.

The defendants introduced evidence tending to show that the car was suitable for transporting horses; that it was usual to fasten horses in the corners as was done with these; that the plaintiff fastened the horses, and the defendants did not change the fastening and knew of nothing peculiar about it.

It appeared that the horses were shod, and the defendants offered testimony that although it was customary to transport horses in that condition, the owners for greater safety sometimes had the shoes removed.

The defendants requested the judge to instruct the jury "that if the defendants used due care, and provided a suitable car, and the injuries were caused by the peculiar character and propensities of the animals, such as fright or bad temper, the defendants were not liable; and that if the injuries were caused by the fault or neglect of the plaintiff, or his agents, in attaching the halter rope to the horse's jaw, or in not removing the shoes, the defendants were not liable."

The judge declined so to instruct the jury, and instructed them as follows: "The defendants being common carriers, and the horses

being intrusted to them as such, if there is legal excuse for them in regard to the injury, the burden of proof is upon them to show it, it being proved that the injury happened while the horses were in transit. The defendants had the charge of stowage in their cars, and were responsible for the way the horses were put into the cars, unless there was some special agreement about the stowage, or unless the matter of placing and securing the horses in the cars was directed by the plaintiff. But there may be such an outburst of viciousness on the part of one of the horses, or both, occasioning the injury, as may relieve the defendants from liability, and if the defendants have satisfied the jury that a proper disposition of the horses in the car was made and proper precautions and care used by the defendants during the journey, and that the injured horse was attacked and kicked in the severe manner described by the evidence, in an outburst of viciousness on the part of his mate, quite unusual in horses worked together, the jury may find the defendants not liable.

The jury returned a verdict for the plaintiff and the defendants alleged exceptions.

AMES, J. According to the established rule as to the liability of a common carrier, he is understood to guarantee that (with the well known exception of the act of God and of public enemies) the goods entrusted to him shall seasonably reach their destinations, and that they shall receive no injury from the manner in which their transportation is accomplished. But he is not, necessarily and under all circumstances, responsible for the condition in which they may be found upon their arrival. The ordinary and natural decay of fruit, vegetables and other perishable articles; the fermentation, evaporation or unavoidable leakage of liquids; the spontaneous combustion of some kinds of goods; are matters to which the implied obligation of the carrier, as an insurer, does not extend. Story on Bailments, §§ 492 a, 576. He is liable for all accidents and mismanagement incident to the transportation and to the means and appliances by which it is effected; but not for injuries produced by, or resulting from, the inherent defects or essential qualities of the articles which he undertakes to transport. The extent of his duty in this respect is to take all reasonable care and use all proper precautions to prevent such injuries, or to diminish their effect, as far as he can; but his liability, in such cases, is by no means that of an insurer.

Upon receiving these horses for transportation, without any special contract limiting their liability, the defendants incurred the general obligation of common carriers. They thereby became responsible for the safe treatment of the animals, from the moment they received them, until the carriages in which they were conveyed were unloaded. Moffat v. Great Western Railway Co. 15 Law T. (N. S.) 630. They would be unconditionally liable for all injuries occasioned by the improper construction or unsafe condition of the carriage in which the horses were conveyed, or by its improper position in the train, or by the want of reasonable equipment, or by any mismanagement, or want of due care, or by any other accident (not within the well known exception) affecting either the train generally or that particular carriage. But the transportation of horses and other domestic animals is not subject to precisely the same rules as that of packages and inanimate chattels. Living animals have excitabilities and volitions of their own which greatly increase the risks and difficulties of management. They are carried in a mode entirely opposed to their instincts and habits; they may be made uncontrollable by fright, or, notwithstanding every precaution, may destroy themselves in attempting to break loose, or may kill each other. If the injury in this case was produced by the fright, restiveness, or viciousness of the animals, and if the defendants exercised all proper care and foresight to prevent it, it would be unreasonable to hold them responsible for the loss. Clarke v. Rochester & Syracuse Railroad Co. 4 Kern. 570. Thus it has been held that if horses or other animals are transported by water, and in consequence of a storm they break down the partition between them, and by kicking each other some of them are killed, the carrier will not be held responsible. Laurence v. Aberdein, 5 B. & Ald. 107. Story on Bailments § 576. Angell on Carriers, 214 a. The carrier of cattle is not responsible for injuries resulting from their viciousness of disposition, and the question what was the cause of injury is one of fact for the jury. Hall v. Renfro, 3 Met. (Ky.) 51. And in a New York case, Conger v. Hudson River Railroad Co. 6 Duer, 375, Mr. Justice Woodruff says, in behalf of the court: "We are not able to perceive any reason upon which the shrinkage of the plaintiff's cattle, their disposition to become restive, and their trampling upon each other when some of them lie down from fatigue, is not to be deemed an injury arising from the nature and inherent character of the property carried, as truly as if the property had been of any description of perishable goods."

It appears to us therefore that the first instruction which the defendants requested the court to give should have been given. If the jury found that the defendants provided a suitable car, and took all proper and reasonable precautions to prevent the occurrence of such an accident, and that the damage was caused by the kicking of one horse by another, the defendants were entitled to a verdict. That is to say, they might be held to great vigilance, foresight and care, but they were not absolutely liable as insurers against injuries of that kind. As there was evidence also tending to show that the halter was attached by the plaintiff to the jaw of one of the horses in a manner which might cause or increase restiveness and bad temper, and also evidence that their shoes were not taken off, the defendants were entitled to the instruction that if the injuries were caused by the fault or neglect of the plaintiff in these particulars, he could not recover. This court has recently decided that for unavoidable injuries done by cattle to themselves or each other, in their passage, the common carrier is not liable. Smith v. New Haven & Northampton Railroad Co.

12 Allen, 531. This is another mode of saying that a railroad corporation, in undertaking the transportation of cattle, does not insure their safety against injuries occasioned by their viciousness and unruly conduct. Kendall v. London & Southwestern Railway Co. L. R. 7 Ex. 373. The jury should therefore have been instructed that if the injury happened in that way, and if the defendants exercised proper care and foresight in placing and securing the horses while under their charge, they are not to be held liable in this action. Upon this point the burden of proof may be upon the defendants, but they should have been permitted to go to the jury upon the question whether there had been reasonable care on their part.

It appears to us also that the instruction actually given was not a full equivalent for that which was requested, and which, as we have seen, should have been given. It was not necessary to the defence to show that the injury was caused in "an outburst of viciousness." The proposition should have been stated much more generally, and the jury should have been told that if from fright, bad temper, viciousness, or any other cause without fault on the part of the defendants, the horses became refractory and unruly, and the kicking and injury were occasioned in that manner, it was an unavoidable accident, for which the defendants were not liable.

Exceptions sustained.

STILES vs. DAVIS & BARTON.

(1 Black. 101.)

Writ of error to the District Court of the United States for the northern district of Illinois.

Solomon Davis and Joseph Barton brought trover in the Circuit Court of the United States for the northern district of Illinois, against Edmund G. Stiles, for twelve boxes, one trunk, and one bale containing dry goods, of the value of four thousand dollars. On the trial it was proved that Stiles, who was a common carrier, had by his agents, Scofield and Curtis, received the goods in question from Benjamin Cooley, attorney for Davis & Barton, (the plaintiffs,) to be forwarded to Ilion, New York, at two dollars and fifty cents per cwt., subject to the order of the plaintiffs, upon the surrender of the receipt and payment of charges. It appeared on the trial that they purchased the goods, or took an assignment of them, from a bankrupt firm in Janesville, (composed of D. W. C. Davis, who was a son of one plaintiff, and Davies A. Barton, a son of the other,) and made the contract above mentioned with the defendant for carrying them to Ilion, New York, the place of the plaintiff's own residence. The receipt is dated at Janesville, on the 2d of November, 1857. The goods arrived in Chicago on the next day, and were received by the defendant (Stiles) at his proper place of business, whence they were to be despatched by him to the place of their ultimate destination. But before they were forwarded, Andrew Cameron and others, creditors, or claiming to be creditors of the Junior Davis and Barton, attached the goods in the hands of Stiles, the transporter. Shortly before this suit was brought, (the precipe is dated on the 16th of November, 1857,) G. W. Davenport, attorney of the plaintiffs, presented the receipt to the defendant, and demanded the goods. The defendant said they had been attached, and declined to give them up until the suit in which the process issued should be decided; the goods, he said, were in his possession in a warehouse or stored; he asserted no personal interest in them, but claimed that he was protected by the garnishee process.

The counsel for the defendant requested the court to instruct the jury: 1. That a common carrier could not be guilty of conversion by a qualified refusal when he claimed no interest in the goods himself, and he had shown reasonable grounds of dispute as to the title. 2. That a qualified refusal by the defendant, after he was garnisheed, he only claiming to hold them to await the decision of the title, when there was reasonable ground of dispute as to the title, was no conversion.

The court refused to give these instructions; but said: 1. That the jury were to determine from the evidence whether there had been a conversion. As a general rule, if the right of property was in the plaintiffs, a demand on the defendant, and a refusal by him to deliver up property in his possession, were circumstances from which the jury might infer a conversion, open, of course, to explanation. 2. That if the plaintiffs were the owners of the goods, and they were delivered by the plaintiffs, or their agent, to the defendants, and received by him or his agents to be transported for the plaintiffs to their residence in New York, then the defendant was liable under and according to the terms of the contract. And if he did not so transport them or comply with his contract, the plaintiffs had the right to call on him to deliver up to them the goods; and if upon such demand he refused, it was for the jury to say whether it constituted, under the circumstances of this case, a conversion. 3. That in the contingency contemplated by the last preceding instruction, if the defendant declined to return or surrender the goods to the plaintiffs, it was to be considered at his own risk or peril. 4. That any proceedings in the State court to which the plaintiffs were not parties, and of which they had no notice, did not bind them or their property. 5. The court left it to the jury to say whether there was any connivance or collusion between the attaching creditors and the defendant; and if there was, then the defendant could not rely upon those proceedings as an excuse for not delivering up the goods. The judge added, that though the attachment was not a bar to the action, the jury might consider that fact as a circumstance in determining whether there was a conversion or not.

The jury found for the plaintiff $3,041.14. The court gave judgment on the verdict,

and the defendant sued out this writ of error.

MR. JUSTICE NELSON. The case was this: The plaintiffs below, Davis and Barton, had purchased the remnants of a store of dry goods of the assignee of a firm at Janesville, Wisconsin who had failed, and made and assignment for the benefit of their creditors. The goods were packed in boxes, and delivered to the agents of the Union Despatch Company to be conveyed by railroad to Ilion, Herkimer county, New York.

On the arrival of the goods in Chicago, on their way to the place of destination, they were seized by the sheriff, under an attachment issued in behalf of the creditors of the insolvent firm at Janesville, as the property of that firm, and the defendant, one of the proprietors and agent of the Union Despatch Company at Chicago, was summoned as garnishee. The goods were held by the sheriff, under the attachment, until judgment and execution, when they were sold. They were attached, and the defendant summoned on the third of November, 1857; and some days afterwards, and before the commencement of this suit, which was on the sixteenth of the month, the plaintiffs made a demand on the defendant for their goods, which was refused, on the ground he had been summoned as garnishee in the attachment suit.

The court below charged the jury, that any proceedings in the State court to which the plaintiffs were not parties, and of which they had no notice, did not bind them or their property; and further, that the fact of the goods being garnisheed, as the property of third persons, of itself, under the circumstances of the case, constituted no bar to the action; but said the jury might weigh that fact in determining whether or not there was a conversion.

We think the court below erred. After the seizure of the goods by the sheriff, under the attachment, they were in the custody of the law, and the defendant could not comply with the demand of the plaintiffs without a breach of it, even admitting the goods to have been, at the time, in his actual possession. The case, however, shows that they were in the possession of the sheriff's officer or agent, and continued there until disposed of under the judgment upon the attachment. It is true, that these goods had been delivered to the defendant, as carriers, by the plaintiffs, to be conveyed for them to the place of destination, and were seized under an attachment against third persons; but this circumstance did not impair the legal effect of the seizure or custody of the goods under it, so as to justify the defendant in taking them out of the hands of the sheriff. The right of the sheriff to hold them was a question of law, to be determined by the proper legal proceedings, and not at the will of the defendant, nor that of the plaintiffs. The law on this subject is well settled, as may be seen on a reference to the cases collected in sections 453, 290, 350, of Drake on Attach't, 2d edition.

This precise question was determined in Verrall vs. Robinson, (Turwhitt's Exch. R., 1069; 4 Dowling, 242, S. C.) There the plaintiff was a coach proprietor, and the defendant the owner of a carriage depository in the city of London. One Banks hired a chaise from the plaintiff, and afterwards left it at the defendant's depository. While it remained there, it was attached in an action against Banks; and, on that ground, the defendant refused to deliver it up to the plaintiff on demand, although he admitted it to be his property.

Lord Abinger, C. B., observed, that the defendant's refusal to deliver the chaise to the plaintiff was grounded on its being on his premises, in the custody of the law. That this was no evidence of a wrongful conversion to his own use. After it was attached as Banks's property, it was not in the custody of the defendant, in such a manner as to permit him to deliver it up at all. And Alderson, B., observed: Had the defendant delivered it, as requested, he would have been guilty of a breach of law.

The plaintiffs have mistaken their remedy. They should have brought their action against the officer who seized the goods, or against the plaintiffs in the attachment suit, if the seizure was made under their direction. As to these parties, the process being against third persons, it would have furnished no jurisdiction, if the plaintiff could have maintained a title and right to possession in themselves.

Judgment of the court below reversed, and venire de novo, &c.

SPRAGUE v. MISSOURI PAC. RY. CO.

(34 Kan. 347, 8 Pac. 465.)

Error from Cloud county.

JOHNSTON, J. S. Sprague brought this action in the district court of Cloud county against the Missouri Pacific Railway Company, alleging, in substance, that the defendant was a common carrier, and that on or about the second day of March, 1883, for a valuable consideration, the railway company undertook and agreed with the plaintiff to safely carry over its road from Atchison to Concordia certain stock, goods, wares, and merchandise; that he delivered the property mentioned for shipment, in good condition, at Atchison; but the defendant negligently and carelessly managed the car upon which the property was shipped, and by reason of such negligence, and without any fault on the part of the plaintiff, four of the horses so shipped by the plaintiff were thrown down, bruised, and injured, so that one of them died, and the others were more or less disabled, to the damage of plaintiff in the sum of $500. The railway company denied the allegations of negligence, and the terms of the contract as stated by the plaintiff, and alleged that the property had been shipped in accordance with the terms of a special agreement entered into be-

tween the plaintiff and the defendant, wherein it was stated that the company transported live-stock only in accordance with certain rules and regulations, which were mentioned; and that, in consideration that the defendant company would transport for the said plaintiff the said property at the rate of $30 per car, the same being a special rate lower than the regular rate mentioned in the freight tariff of the railway company, and other considerations, the plaintiff agreed to release the defendant from some of the responsibility and risks imposed by law upon the railway company when acting as a common carrier. The contract is set out at length in the answer; and it provided that the plaintiff should load and unload his stock at his own risk, and feed, water, and attend to the same at his own expense. He was also to accompany and care for the stock while it was being transported over the defendant's road, and for that purpose the railway company was to furnish the plaintiff free transportation over its road for one person from the point of shipment to the destination. Among the stipulations of the contract is the following:

"And for the consideration before mentioned said party of the second part further agrees that, as a condition precedent to his right to recover any damages for any loss or injury to said stock, he will give notice in writing of his claim therefor to some officer of said party of the first part, or its nearest station agent, before said stock is removed from place of destination above mentioned, or from the place of delivery of the same to the said party of the second part, and before such stock is mingled with other stock."

The defendant then alleged that the horses were unloaded and taken from the car at Clifton by the duly-authorized agent of the plaintiff, who refused the defendant the right to transport the same to Concordia, and that when he obtained possession of the same he was well aware of their condition and well knew whether they had sustained any injury or damage; and that neither the plaintiff, nor any one acting for him, prior to the commencement of this action, made any demand in writing for any damages sustained by said stock, and never at any time gave any notice in writing of plaintiff's claim for any damages, loss, or injuries to said stock to defendant, or any of its officers or agents. The reply of the plaintiff was a general denial, not verified. Upon the trial it was expressly admitted that the special contract set up in defendant's answer was signed and executed by the duly-authorized agents of the parties; and it was further admitted that if the plaintiff is entitled to recover under the contract for the injuries alleged by the plaintiff, the amount of such recovery should be $300. Testimony was then offered by the plaintiff to the effect that the horses were in good condition when delivered to the railway company at Atchison, Kansas. His brother was given a free pass over the road, and accompanied the train upon which the horses were shipped for the purpose of caring for the stock while it was being transported over the defendant's road. At several points on the route he inspected them and found them to be still in good condition. At the station named "Palmer," some distance east of Concordia, the horses were again examined by the plaintiff's brother, and were then all right; and that after returning to the caboose, and before leaving the station, he felt several jars, but was unable to state what occasioned them, or whether the horses were injured thereby. Upon arriving at Clifton, the next station, he again examined the horses and found that some of them were lying down and apparently injured. He then demanded of the conductor that the car in which the horses were shipped should be backed up to the stock-yards in order that the horses might be removed from the car. This was done, when the horses were unloaded and found to be considerably bruised. He then refused to reload the horses upon the car, took possession of them, and caused them to be taken across the country to the plaintiff's farm, which was not far distant. The plaintiff further testified that when the car reached Concordia, he paid the price agreed upon for the transportation of the same; but that no notice has ever been given to the conductor of that train, or to any officer or agent of the railway company, prior to the commencement of this action, that he claimed any damages for the injury to his stock; that he knew the condition of the horses, and the extent of the injury to them, before they were taken to the farm, and yet he had not given any notice of any claim therefor.

When the plaintiff closed his testimony the railway company interposed a demurrer to the evidence, which the court, after consideration, sustained. Upon this ruling the plaintiff raises and discusses several questions here, but as one of them disposes of the case the others require no attention. If the contract of the parties is to be upheld, by which it was agreed that before the plaintiff could recover damages for any injury to his horses he must give notice in writing of his claim therefor to some officer of the railway company, or to its nearest station agent, before the horses were removed from the place of destination, or from the place of the delivery of the same to the plaintiff, and before they were mingled with other stock, then the demurrer to the evidence was rightly sustained, and the judgment should be affirmed.

The plaintiff contends that the agreement is not binding upon him, because it is not one permitted by the laws to be made, and for the further reason that it is without consideration. As a general rule common carriers are held liable as insurers, and are absolutely responsible for any loss to the property intrusted to them, unless such

loss is occasioned by the act of God or the public enemy. It is now a well-established rule of law that this liability may be limited to a certain extent; but to accomplish this it must clearly appear that the shipper understood and assented to the limitation. Common carriers are not permitted, by agreement or otherwise, to exempt themselves from liability for loss occasioned by their negligence or misconduct. Such limitations are held to be against the policy of the law, and would be void. But it is no longer questioned that they may, by special agreement, stipulate for exemption from the extreme liability imposed by the common-law, provided that such stipulations are just and reasonable and do not contravene any law or a sound public policy. That the agreement in question was executed by the plaintiff is admitted, not only by the pleadings, but it was expressly agreed to by him upon the trial. There is no pretense that any deceit or fraud was practiced upon him by the railway company in obtaining his assent to the agreement. So far as appears in the testimony it was fairly and understandingly entered into and executed. His authorized agent, who accompanied the horses, and who had them in charge while passing over defendant's road, knew of this provision of the contract, and was acquainted with the condition of the stock before they were taken from the possession of the railway company. And the plaintiff, with full knowledge of this requirement, paid the freight charges agreed upon after the injury had been done without complaint, and without claiming any damages therefor, and gave no notice, nor did he make any claim for damages prior to the commencement of this action.

The stipulation requiring notice of any claim for damages to be given cannot be regarded as an attempt to exonerate the company from negligence, or from the negligence or misfeasance of any of its servants. The company concede that such an agreement would be ineffectual for that purpose. It is to be regarded rather as a regulation for the protection of the company from fraud and imposition in the adjustment and payment of claims for damages by giving the company a reasonable opportunity to ascertain the nature of the damage and its cause. After the property has been taken from their possession and mingled with other property of a like kind, the difficulty of inquiring into the circumstances and character of the injury would be very greatly increased. That such a provision does not contravene public policy, and that it is just and reasonable, has been expressly adjudicated by this court. In Goggin v. Kansas Pac. Ry. Co., 12 Kan. 416, a limitation substantially like the one in question was under consideration, and the circumstances of that case were much like those of the present one. It was there, as here, urged, in support of the reasonableness and justice of the regulation, that the defendant was, at the time of the alleged injury, engaged in transporting great numbers of cattle and horses over its line of road, and which were being shipped to different points thereon, and that it would have been impossible for it to have distinguished one car-load from another, unless its attention was called immediately thereto, and that the object of the notice and demand mentioned in the contract was to relieve it from any false or fictitious claim, and to give it an opportunity to have an inspection of the stock before they were removed or mingled with others, and the company could thus have an opportunity to ascertain and allow the actual damages suffered. These reasons are said to be cogent; and the agreement is there held to be reasonable, just and valid. The decision in that case governs the one at bar, and the view which we have taken of the validity of this limitation accords with the decisions of other courts, among which the following may be cited: Rice v. Kansas Pac. Ry. Co., 63 Mo. 314; Oxley v. St. Louis, K. C. & N. Ry., 65 Mo. 629; Express Co. v. Caldwell, 21 Wall. 264; Dawson v. St. Louis, K. C. & N. Ry. Co., 76 Mo. 514; Texas Cent. Ry. v. Morris, 16 Amer. & Eng. R. R. Cas. 259, and cases there cited.

The plaintiff makes the further objection to the special agreement that it is without consideration. It appears that the rate to be paid for the car in which the horses were shipped was omitted from the contract, and the plaintiff urges that as the price is not stated, it does not appear that any concession or reduction was made from the established rates, and therefore there was no consideration for the stipulation in question. But that position cannot be maintained. The contract was in writing, and signed by the parties to be bound thereby, and by virtue of our statute it imports a consideration. Gen. St. c. 21, § 7.

If more was needed to show that the objection is not well founded, it might be found in the plaintiff's petition, where he alleges that the contract was based upon a valuable consideration, and in his testimony, where it appears that $30 was the rate agreed upon, and the amount that was paid by him under the contract. When these things are taken in connection with the statement in the written contract that the price agreed upon was a reduction from the established rates; the consideration for the stipulation in question is sufficiently shown. It follows from what has been said that the judgment of the district court should be affirmed.

(All the justices concurring.)

LIVERPOOL & G. W. STEAM CO. v. PHENIX INS. CO.

(129 U. S. 397, 9 Sup. Ct. 469.)

Appeal from the Circuit Court of the United States for the Eastern District of New York.

GRAY, J. This is an appeal by a steamship company from a decree rendered against it upon a libel in admiralty, "in a

cause of action arising from breach of contract," brought by an insurance company, claiming to be subrogated to the rights of the owners of goods shipped on board the Montana, one of appellant's steam-ships, at New York, to be carried to Liverpool, and lost or damaged by her stranding, because of the negligence of her master and officers, in Holyhead bay, on the coast of Wales, before reaching her destination. In behalf of the appellant, it was contended that the loss was caused by perils of the sea, without any negligence on the part of master and officers; that the appellant was not a common carrier; that it was exempt from liability by the terms of the bills of lading; and that the libelant had not been subrogated to the rights of the owners of the goods.

It is to be remembered that the jurisdiction of this court to review the decree below is limited to questions of law, and does not extend to questions of fact. Act Feb. 16, 1875, c. 77, § 1, 18 St. 315; The Gazelle, 128 U. S. 474, 484, ante, 139, and cases there cited. In the findings of fact the circuit court, after stating, in much detail, the course of the ship's voyage, the conduct of her master and officers, the position and character of the various lighthouses and other safeguards which she passed, and other attendant circumstances immediately preceding the stranding, distinctly finds as facts: "Those in charge of the navigation of the Montana were negligent, in that, without having taken cross-bearings of the light at South Stack, and so determined their distance from the light, they took an east three-quarters south course before passing the Skerries, and without seeing the Skerries light; and in that they continued at full speed after hearing the fog-gun at North Stack; and in that they took a north-east by east magnetic course on hearing said fog-gun, instead of stopping and backing and taking a westerly course out of Holyhead bay; and in that they did not ascertain their position in Holyhead bay by means of the lights and fog-signals, or by the use of the lead, or by stopping until they should, by those means or otherwise, learn where their ship was." "On the foregoing facts," the only conclusion of law stated by the circuit court (except those affecting the right of subrogation and the amount to be recovered) is in these words: "The stranding of the Montana, and the consequent damage to her cargo, having been the direct result of the negligence of the master and officers of the steamer, the respondent is liable therefor." Negligence is not here stated as a conclusion of law, but assumed as a fact already found. The conclusion of law is, in effect, that, such being the fact, the respondent is liable, notwithstanding any clause in the bills of lading.

The question of negligence is fully and satisfactorily discussed in the opinion of the district court reported in 17 Fed. Rep. 377, and in that of the circuit court, reported in 22 Blatchf. 372, 22 Fed. Rep. 715. It is largely, if not wholly, a question of fact, the decision of which by the circuit court cannot be reviewed here; and, so far as it can possibly be held to be or to involve a question of law, it is sufficient to say that the circumstances of the case, as found by the circuit court, clearly warrant, if they do not require, a court or jury, charged with the duty of determining issues of fact, to find that the stranding was owing to the negligence of the officers of the ship.

The contention that the appellant is not a common carrier may also be shortly disposed of. By the settled law, in the absence of some valid agreement to the contrary, the owner of a general ship, carrying goods for hire, whether employed in internal, in coasting, or in foreign commerce, is a common carrier, with the liability of an insurer against all losses, except only from such irresistible causes as the act of God and public enemies. Moll. De J. Mar. bk. 2, c. 2, § 2; 2 Bac. Abr. "Carrier," A; Barclay v. Cucullay Gana, 3 Doug. 389; 2 Kent, Comm. 598, 599; Story, Bailm. § 501; The Niagara, 21 How. 7, 23; The Lady Pike, 21 Wall. 1, 14. In the present case the circuit court has found as facts: "The Montana was an ocean steamer, built of iron, and performed regular service as a common carrier of merchandise and passengers between the ports of Liverpool, England, and New York, in the line commonly known as the 'Guion Line.' By her, and by other ships in that line, the respondent was such common carrier. On March 2, 1880, the Montana left the port of New York, on one of her regular voyages, bound for Liverpool, England, with a full cargo, consisting of about twenty-four hundred tons of merchandise, and with passengers." The bills of lading, annexed to the answer and to the findings of fact, show that the four shipments in question amounted to less than 130 tons, or hardly more than one-twentieth part of the whole cargo. It is clear, therefore, upon this record, that the appellant is a common carrier, and liable as such, unless exempted by some clause in the bills of lading. In each of the bills of lading, the excepted perils, for loss or damage from which it is stipulated that the appellant shall not be responsible, include "barratry of master or mariners," and all perils of the seas, rivers, or navigation, described more particularly in one of the bills of lading as "collision, stranding, or other peril of the seas, rivers, or navigation, of whatever nature or kind soever, and howsoever such collision, stranding, or other peril may be caused," and in the other three bills of lading described more generally as any "accidents of the seas, rivers, and steam navigation, of whatever nature or kind soever"; and each bill of lading adds, in the following words in the one, and in equivalent words in the others, "whether arising from the negligence, default, or error in judgment of the master, mariners, engineers, or others of the crew, or otherwise howso-

ever." If the bills of lading had not contained the clause last quoted, it is quite clear that the other clauses would not have relieved the appellant from liability for the damage to the goods from the stranding of the ship through the negligence of her officers. Collision or stranding is, doubtless, a peril of the seas; and a policy of insurance against perils of the seas covers a loss by stranding or collision, although arising from the negligence of the master or crew, because the insurer assumes to indemnify the assured against losses from particular perils, and the assured does not warrant that his servants shall use due care to avoid them. Insurance Co. v. Sherwood, 14 How. 351, 364, 365; Insurance Co. v. Adams, 123 U. S. 67, 73, 8 Sup. Ct. Rep. 68; Copeland v. Insurance Co., 2 Metc. 432, 448-450. But the ordinary contract of a carrier does involve an obligation on his part to use due care and skill in navigating the vessel and carrying the goods; and, as is everywhere held, an exception, in the bill of lading, of perils of the sea or other specified perils does not excuse him from that obligation, or exempt him from liability for loss or damage from one of those perils to which the negligence of himself or his servants has contributed. Navigation Co. v. Bank, 6 How. 344; Express Co. v. Kountze, 8 Wall. 342; Transportation Co. v. Downer, 11 Wall. 129; Grill v. Screw Co., L. R. 1 C. P. 600, and L. R. 3 C. P. 476; The Xantho, L. R. 12 App. Cas. 503, 510, 515.

We are then brought to the consideration of the principal question in the case, namely, the validity and effect of that clause in each bill of lading by which the appellant undertook to exempt itself from all responsibility for loss or damage by perils of the sea, arising from negligence of the master and crew of the ship. This question appears to us to be substantially determined by the judgment of this court in Railroad Co. v. Lockwood, 17 Wall. 357. That case, indeed, differed in its facts from the case at bar. It was an action brought against a railroad corporation by a drover who, while being carried with his cattle on one of its trains under an agreement which it had required him to sign, and by which he was to pay certain rates for the carriage of the cattle, to pass free himself, and to take the risks of all injuries to himself or to them, was injured by the negligence of the defendant or its servants. The judgment for the plaintiff, however, was not rested upon the form of the agreement, or upon any difference between railroad corporations, and other carriers, or between carriers by land and carriers by sea, or between carriers of passengers and carriers of goods, but upon the broad ground that no public carrier is permitted by law to stipulate for an exemption from the consequences of the negligence of himself or his servants. The very question there at issue, defined at the beginning of the opinion as "whether a railroad company, carrying passengers for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage," was stated a little further on in more general terms as "the question before propounded, namely, whether common carriers may excuse themselves from liability for negligence"; and a negative answer to the question thus stated was a necessary link in the logical chain of conclusions announced at the end of the opinion as constituting the ratio decidendi. 17 Wall. 359, 363, 384. The course of reasoning, supported by elaborate argument and illustration, and by copious references to authorities, by which those conclusions were reached, may be summed up as follows:

By the common law of England and America before the declaration of independence, recognized by the weight of English authority for half a century afterwards, and upheld by decisions of the highest courts of many states of the Union, common carriers could not stipulate for immunity for their own or their servants' negligence. The English railway and canal traffic act of 1854, declaring void all notices and conditions made by those classes of common carriers, except such as should be held by the court or judge before whom the case should be tried to be just and reasonable, was substantially a return to the rule of the common law. The only important modification by the congress of the United States of the previously existing law on this subject is the act of 1851, to limit the liability of ship-owners, (act March 3, 1851, c. 43, 9 St. 635; Rev. St. §§ 4282-4289,) and that act leaves them liable without limit for their own negligence, and liable to the extent of the ship and freight for the negligence or misconduct of the master and crew. The employment of a common carrier is a public one, charging him with the duty of accommodating the public in the line of his employment. A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests. Even if the extent of those responsibilities is restricted by law or by contract, the nature of his occupation makes him a common carrier still. A common carrier may become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier is a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of that character. The fundamental principle upon which the law of common carriers was established was to secure the utmost care and diligence in the performance of their duties. That end was effected in regard to goods, by charging

the common carrier as an insurer, and in regard to passengers, by exacting the highest degree of carefulness and diligence. A carrier who stipulates not to be bound to the exercise of care and diligence seeks to put off the essential duties of his employment. Nor can those duties be waived in respect to his agents or servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants. The law demands of the carrier carefulness and diligence in performing the service; not merely an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law. The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgle or stand out, and seek redress in the courts. He prefers rather to accept any bill of lading, or to sign any paper, that the carrier presents, and in most cases he has no alternative but to do this, or to abandon his business. Special contracts between the carrier and the customer, the terms of which are just and reasonable, and not contrary to public policy, are upheld; such as those exempting the carrier from responsibility for losses happening from accident, or from dangers of navigation that no human skill or diligence can guard against; or for money or other valuable articles, liable to be stolen or damaged, unless informed of their character or value; or for perishable articles or live animals, when injured without default or negligence of the carrier. But the law does not allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions which are unreasonable and improper, amounting to an abnegation of the essential duties of his employment. It being against the policy of the law to allow stipulations which will relieve the railroad company from the exercise of care or diligence, or which, in other words, will excuse it for negligence in the performance of its duty, the company remains liable for such negligence. This analysis of the opinion in Railroad Co. v. Lockwood shows that it affirms and rests upon the doctrine that an express stipulation by any common carrier for hire, in a contract of carriage, that he shall be exempt from liability for losses caused by the negligence of himself or his servants, is unreasonable and contrary to public policy, and consequently void. And such has always been the understanding of this court, expressed in several later cases. Express Co. v. Caldwell, 21 Wall. 264, 268; Railroad Co. v. Pratt, 22 Wall. 123, 134; Bank v. Express Co., 93 U. S. 174, 183; Railway Co. v. Stevens, 95 U. S. 655; Hart v. Railroad Co., 112 U. S. 331, 338, 5 Sup. Ct. Rep. 151; Insurance Co. v. Transportation Co., 117 U. S. 312, 322, 6 Sup. Ct. Rep. 750, 1176; Inman v. Railway Co., 129 U. S. 128, ante, 249.

The general doctrine is nowhere stated more explicitly than in Hart v. Railroad Co. and Insurance Co. v. Transportation Co., just cited, and there does not appear to us to be anything in the decision or opinion in either of those cases which supports the appellant's position. In the one case, a contract fairly made between a railroad company and the owner of the goods, and signed by the latter, by which he was to pay a rate of freight based on the condition that the company assumed liability only to the extent of an agreed valuation of the goods, even in case of loss or damage by its negligence, was upheld as just and reasonable, because a proper and lawful mode of securing a due proportion between the amount for which the carrier might be responsible and the compensation which he received, and of protecting himself against extravagant or fanciful valuations, which is quite different from exempting himself from all responsibility whatever for the negligence of himself and his servants. In the other, the decision was that, as a common carrier might lawfully obtain from a third person insurance on the goods carried against loss by the usual perils, though occasioned by negligence of the carrier's servants, a stipulation in a bill of lading that the carrier, when liable for the loss, should have the benefit of any insurance effected on the goods, was valid as between the carrier and the shipper, even when the negligence of the carrier's servants was the cause of the loss. Upholding an agreement by which the carrier receives the benefit of any insurance obtained by the shipper from a third person is quite different from permitting the carrier to compel the shipper to obtain insurance, or to stand his own insurer, against negligence on the part of the carrier.

It was argued for the appellant that the law of New York, the lex loci contractus, was settled by recent decisions of the court of appeals of that state in favor of the right of a carrier of goods or passengers, by land or water, to stipulate for exemption from all liability for his own negligence. Mynard v. Railroad Co., 71 N. Y. 180; Spinetti v. Steamsnip Co., 80 N. Y. 71. But on this subject, as on any question depending upon mercantile law and not upon local statute or usage, it is well settled that the courts of the United States are not bound by decisions of the courts of the state, but will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law of which the courts of the state have concurrent jurisdiction, and upon a contract made and to be performed within the state. Railroad Co. v. Lockwood, 17 Wall. 357, 368; Myrick v. Railroad Co., 107 U. S. 102, 1 Sup. Ct. Rep. 425; Carpenter v. Insurance Co., 16 Pet. 495, 511; Swift v. Tyson, Id. 1; Railroad Co. v. Bank, 102 U. S. 14; Burgess v. Selig-

man, 107 U. S. 20, 33, 2 Sup. Ct. Rep. 10; Smith v. Alabama, 124 U. S. 465, 478, 8 Sup. Ct. Rep. 564; Bucher v. Railroad Co., 125 U. S. 555, 583, 8 Sup. Ct. Rep. 974. The decisions of the state courts certainly cannot be allowed any greater weight in the federal courts when exercising the admiralty and maritime jurisdiction exclusively vested in them by the constitution of the United States.

It was also argued in behalf of the appellant that the validity and effect of this contract, to be performed principally upon the high seas, should be governed by the general maritime law, and that by that law such stipulations are valid. To this argument there are two answers: First. There is not shown to be any such general maritime law. The industry of the learned counsel for the appellant has collected articles of codes, decisions of courts, and opinions of commentators in France, Italy, Germany, and Holland, tending to show that, by the law administered in those countries, such a stipulation would be valid. But those decisions and opinions do not appear to have been based on general maritime law, but largely, if not wholly, upon provisions or omissions in the codes of the particular country, and it has been said by many jurists that the law of France, at least, was otherwise. See 2 Pard. Droit Com. No. 542; 4 Goujet & Meyer Dict. Droit Com. (2d Ed.) Voiturier, Nos. 1, 81; 2 Troplong Droit Civil, Nos. 894, 910, 942, and other books cited in Navigation Co. v. Shand, 3 Moore, P. C. (N. S.) 272, 278, 285, 286; 25 Laurent Droit Civil Français, No. 532; Mellish, L. J., in Cohen v. Railway Co., L. R. 2 Exch. Div. 253, 257. Second. The general maritime law is in force in this country, or in any other, so far only as it has been adopted by the laws or usages thereof; and no rule of the general maritime law (if any exists) concerning the validity of such a stipulation as that now before us has ever been adopted in the United States or in England, or recognized in the admiralty courts of either. The Lottawanna, 21 Wall. 558; The Scotland, 105 U. S. 24, 29, 33; The Belgenland, 114 U. S. 355, 369, 5 Sup. Ct. Rep. 860; The Harrisburg, 119 U. S. 199, 7 Sup. Ct. Rep. 140; The Hamburg, 2 Moore, P. C. (N. S.) 289, 319, Brown & L. 253, 272; Lloyd v. Guibert, L. R. 1 Q. B. 115, 123, 124, 6 Best & S. 100, 134, 136; The Gaetano, L. R. 7 Prob. Div. 137, 143.

It was argued in this court, as it had been below, that as the contract was to be chiefly performed on board of a British vessel, and to be finally completed in Great Britain, and the damage occurred in Great Britain, the case should be determined by the British law, and that by that law the clause exempting the appellant from liability for losses occasioned by the negligence of its servants was valid. The circuit court declined to yield to this argument, upon two grounds: (1) That as the answer expressly admitted the jurisdiction of the circuit court asserted in the libel, and the law of Great Britain had not been set up in the answer nor proved as a fact, the case must be decided according to the law of the federal courts as a question of general commercial law; (2) that there was nothing in the contracts of affreightment to indicate a contracting in view of any other law than the recognized law of such forum in the United States as should have cognizance of suits on the contracts. 22 Blatchf. 397, 22 Fed. Rep. 728. The law of Great Britain since the declaration of independence is the law of a foreign country, and, like any other foreign law, is matter of fact, which the courts of this country cannot be presumed to be acquainted with, or to have judicial knowledge of, unless it is pleaded and proved. The rule that the courts of one country cannot take cognizance of the law of another without plea and proof has been constantly maintained, at law and in equity, in England and America. Church v. Hubbart, 2 Cranch, 187, 236; Ennis v. Smith, 14 How. 400, 426, 427; Dainese v. Hale, 91 U. S. 13, 20, 21; Pierce v. Indseth, 106 U. S. 546, 1 Sup. Ct. Rep. 418; Ex parte Cridland, 3 Ves. & B. 94, 99; Lloyd v. Guibert, L. R. 1 Q. B. 115, 129, 6 Best & S. 100, 142. In the case last cited, Mr. Justice Willes, delivering judgment in the exchequer chamber, said: "In order to preclude all misapprehension, it may be well to add that a party who relies upon a right or an exemption by foreign law is bound to bring such law properly before the court, and to establish it in proof. Otherwise the court, not being entitled to notice such law without judicial proof, must proceed according to the law of England." The decision in Lamar v. Micou, 112 U. S. 452, 5 Sup. Ct. Rep. 221, and 114 U. S. 218, 5 Sup. Ct. Rep. 857, did not in the least qualify this rule, but only applied the settled doctrine that the circuit courts of the United States, and this court on appeal from their decisions, take judicial notice of the laws of the several states of the Union as domestic laws; and it has since been adjudged, in accordance with the general rule as to foreign law, that this court, upon writ of error to the highest court of a state, does not take judicial notice of the law of another state, not proved in that court and made part of the record sent up, unless by the local law that court takes judicial notice of it. Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. Rep. 242; Renaud v. Abbott, 116 U. S. 277, 285, 6 Sup. Ct. Rep. 1194.

The rule is as well established in courts of admiralty as in courts of common law or courts of equity. Chief Justice Marshall, delivering judgment in the earliest admiralty appeal in which he took part, said: "That the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to facts, is limited to the statement made in the court below, cannot be questioned." Talbot v. Seeman, 1 Cranch, 1, 38. And in a recent

case in admiralty, Mr. Justice Bradley said: "If a collision should occur in British waters, at least between British ships, and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the rights and liabilities of the parties were concerned, provided it were shown what that law was. If not shown, we would apply our own law to the case. In the French or Dutch tribunals they would do the same." The Scotland, 105 U. S. 24, 29. So Sir William Scott, in the high court of admiralty, said: "Upon all principles of common jurisprudence, foreign law is always to be proved as a fact." Le Louis, 2 Dod. 210, 241. To the same effect are the judgments of the judicial committee of the privy council in The Prince George, 4 Moore, P. C. 21, and The Peerless, 13 Moore, P. C. 484. And in a more recent case, cited by the appellant, Sir Robert Phillimore said: "I have no doubt whatever that those who rely upon the difference between the foreign law and the law of the forum in which the case is brought are bound to establish that difference by competent evidence." The Duero, L. R. 2 Adm. & Ecc. 393, 397. It was therefore rightly held by the circuit court, upon the pleadings and proofs upon which the case had been argued, that the question whether the British law differed from our own was not open.

But it appears by the supplemental record, certified to this court in obedience to a writ of certiorari, that after the circuit court had delivered its opinion and filed its findings of fact and conclusions of law, and before the entry of a final decree, the appellant moved for leave to amend the answer by averring the existence of the British law, and its applicability to this case, and to prove that law; and that the motion was denied by the circuit court, because the proposed allegation did not set up any fact unknown to the appellant at the time of filing the original answer, and could not be allowed under the rules of that court. 22 Blatchf. 402-404, 22 Fed. Rep. 730. On such a question we should be slow to overrule a decision of the circuit court. But we are not prepared to say that if, upon full consideration, justice should appear to require it, we might not do so, and order the case to be remanded to that court, with directions to allow the answer to be amended and proof of the foreign law to be introduced. The Adeline, 9 Cranch, 244, 284; The Marianna Flora, 11 Wheat. 1, 38; The Charles Morgan, 115 U. S. 69, 5 Sup. Ct. Rep. 1172; Insurance Co. v. Allen, 121 U. S. 67, 7 Sup. Ct. Rep. 821; The Gazelle, 128 U. S. 474, ante, 139. And the question of the effect which the law of Great Britain, if duly alleged and proved, should have upon this case has been fully and ably argued. Under these circumstances, we prefer not to rest our judgment upon technical grounds of pleading or evidence, but, taking the same course as in Insurance Co. v. Allen, just cited, proceed to consider the question of the effect of the proof offered, if admitted.

It appears by the cases cited in behalf of the appellant, and is hardly denied by the appellee, that under the existing law of Great Britain, as declared by the latest decisions of her courts, common carriers, by land or sea, except so far as they are controlled by the provisions of the railway and canal traffic act of 1854, are permitted to exempt themselves by express contract from responsibility for losses occasioned by negligence of their servants. The Duero, L. R. 2 Adm. & Ecc. 393; Taubman v. Pacific Co., 26 Law T. (N. S.) 704; Steel v. Steam-Ship Co., L. R. 3 App. Cas. 72; Railway Co. v. Brown, L. R. 8 App. Cas. 703. It may therefore be assumed that the stipulation now in question, though invalid by our law, would be valid according to the law of Great Britain. The general rule as to what law should prevail, in case of a conflict of laws concerning a private contract, was concisely and exactly stated before the declaration of independence by Lord Mansfield, (as reported by Sir William Blackstone, who had been of counsel in the case,) as follows: "The general rule, established ex comitate et jure gentium, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception, where the parties (at the time of making the contract) had a view to a different kingdom." Robinson v. Bland, 1 W. Bl. 234, 256, 258, 2 Burrows, 1077, 1078.

The recent decisions by eminent English judges, cited at the bar so clearly affirm and so strikingly illustrate the rule, as applied to cases more or less resembling the case before us, that a full statement of them will not be inappropriate.

In Navigation Co. v. Shand, 3 Moore, P. C. (N. S.) 272, 290, Lord Justice Turner, delivering judgment in the privy council, reversing a decision of the supreme court of Mauritius, said: "The general rule is that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it. The parties to a contract are either the subjects of the power there ruling, or as temporary residents owe it a temporary allegiance. In either case, equally, they must be understood to submit to the law there prevailing, and to agree to its action upon their contract. It is, of course, immaterial that such agreement is not expressed in terms. It is equally an agreement in fact, presumed de jure, and a foreign court interpreting or enforcing it on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognized comity of nations." It was accordingly held that the law of England, and not the French law in force at Mauritius, governed the validity and construction of a contract made in an English port between an English company and an English subject to carry him thence by way of

Alexandria and Suez to Mauritius, and containing a stipulation that the company should not be liable for loss of passengers' baggage, which the court in Mauritius had held to be invalid by the French law. Id. 278. Lord Justice Turner observed that it was a satisfaction to find that the court of cassation in France had pronounced a judgment to the same effect, under precisely similar circumstances, in the case of a French officer taking passage at Hong Kong, an English possession, for Marseilles in France, under a like contract, on a ship of the same company, which was wrecked in the Red sea, owing to the negligence of her master and crew. Julien v. Oriental Co., imperfectly stated in 3 Moore P. C. (N. S.) 282, note, and fully reported in 75 Journal du Palais, 225, (1864.)

The case of Lloyd v. Guibert, 6 Best & S. 100, L. R. 1 Q. B. 115, decided in the queen's bench before, and in the exchequer chamber after, the decision in the privy council just referred to, presented this peculiar state of facts: A French ship owned by Frenchmen was chartered by the master, in pursuance of his general authority as such, in a Danish West India island, to a British subject, who knew her to be French, for a voyage from St. Marc, in Hayti, to Havre, London, or Liverpool, at the charterer's option, and he shipped a cargo from St. Marc to Liverpool. On the voyage, the ship sustained damage from a storm which compelled her to put into a Portugese port. There the master lawfully borrowed money on bottomry, and repaired the ship, and she carried her cargo safe to Liverpool. The bondholder proceeded in an English court of admiralty against the ship, freight, and cargo, which being insufficient to satisfy the bond, he brought an action at law to recover the deficiency against the owners of the ship; and they abandoned the ship and freight in such manner as by the French law absolved them from liability. It was held that the French law governed the case, and therefore the plaintiff could not recover. It thus appears that in that case the question of the intent of the parties was complicated with that of the lawful authority of the master; and the decision in the queen's bench was put wholly upon the ground that the extent of his authority to bind the ship, the freight, or the owners was limited by the law of the home port of the ship, of which her flag was sufficient notice. 6 Best & S. 100. That decision was in accordance with an earlier one of Mr. Justice Story, in Pope v. Nickerson, 3 Story, 465, as well as with later ones in the privy council, on appeal from the high court of admiralty, in which the validity of a bottomry bond has been determined by the law prevailing at the home port of the ship, and not by the law of the port where the bond was given. The Karnak, L. R. 2 P. C. 505, 512; The Gaetano, L. R. 7 Prob. Div. 137. See, also, The Woodland, 7 Ben. 110, 118, 14 Blatchf. 499, 503, and 104 U. S. 180.

The judgment in the exchequer chamber in Lloyd v. Guibert was put upon somewhat broader ground. Mr. Justice Willes, in delivering that judgment, said: "It is generally agreed that the law of the place where the contract is made is prima facie that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immovable property situated in another country, and so forth; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made; which intention is inferred from the subject-matter and from the surrounding circumstances, so far as they are relevant to construe and determine the character of the contract." L. R. 1 Q. B. 122, 123, 6 Best & S. 133.

It was accordingly held conformably to the judgment in Navigation Co. v. Shand, above cited, that the law of England, as the law of the place of final performance or port of discharge, did not govern the case, because it was "manifest that what was to be done at Liverpool was but a small portion of the entire service to be rendered, and that the character of the contract cannot be determined thereby," although as to the mode of delivery the usages of Liverpool would govern. L. R. 1 Q. B. 125, 126, 6 Best & S. 137. It was then observed that the law of Portugal, in force where the bottomry bond was given, could not affect the case; that the law of Hayti had not been mentioned or relied upon in argument; and that, "in favor of the law of Denmark, there is the cardinal fact that the contract was made in Danish territory, and, further, that the first act done towards performance was weighing anchor in a Danish port;" and it was finally, upon a view of all the circumstances of the case, decided that the law of France, to which the ship and her owners belonged, must govern the question at issue. The decision was, in substance, that the presumption that the contract should be governed by the law of Denmark, in force where it was made, was not overcome in favor of the law of England by the fact that the voyage was to an English port and the charterer an Englishman, nor in favor of the law of Portugal by the fact that the bottomry bond was given in a Portugese port; but that the ordinary presumption was overcome by the consideration that French owners and an English charterer, making a charter-party in the French language of a French ship, in a port where both were foreigners, to be performed partly there by weighing anchor for the port of loading, (a place where both parties would also be foreigners,) partly at that port by taking the cargo on board, principally on the high seas, and partly by final delivery in the port of discharge, must have intended to look to the law of France as governing the question of the liability of the owner beyond the value of the ship and freight.

In two later cases, in each of which the

judgment of the queen's bench division was affirmed by the court of appeal, the law of the place where the contract was made was held to govern, notwithstanding some of the facts strongly pointed towards the application of another law,—in the one case, to the law of the ship's flag; and in the other, to the law of the port where that part of the contract was to be performed, for the non-performance of which the suit was brought. In the first case a bill of lading, issued in England, in the English language, to an English subject, by a company described therein as an English company, and in fact registered both in England and in Holland, for goods shipped at Singapore, an English port, to be carried to a port in Java, a Dutch possession, in a vessel with a Dutch name, registered in Holland, commanded by a Dutch master, and carrying the Dutch flag, in order to obtain the privilege of trading with Java, was held to be governed by the law of England, and not by that of Holland, in determining the validity and construction of a clause exempting the company from liability for negligence of master and crew; and Lords Justices Brett and Lindley both considered it immaterial whether the ship was regarded as English or Dutch. Bank v. Navigation Co., L. R. 9 Q. B. Div. 118, and L. R. 10 Q. B. Div. 521, 529, 536, 540, 544. As Lord Justice Lindley observed: "This conclusion is not at all at variance with Lloyd v. Guibert, but rather in accordance with it. It is true that in that case the law of the flag prevailed; but the intention of the parties was admitted to be the crucial test, and the law of the ship's flag was considered as the law intended by the parties to govern their contract, as there really was no other law which they could reasonably be supposed to have contemplated. The plaintiff there was English; the defendant French; the lex loci contractus was Danish; the ship was French; her master was French; and the contract was in the French language. The voyage was from Hayti to Liverpool. The facts here are entirely different, and so is the inference to be deduced from them. The lex loci contractus was here English, and ought to prevail unless there is some good ground to the contrary. So far from there being such ground, the inference is very strong that the parties really intended to contract with reference to English law." L. R. 10 Q. B. Div. 540. In the remaining English case, a contract made in London between two English mercantile houses, by which one agreed to sell to the other 20,000 tons of Algerian esparto, to be shipped by a French company at an Algerian port on board vessels furnished by the purchasers at London, and to be paid for by them in London on arrival, was held to be an English contract, governed by English law, notwithstanding that the shipment of the goods in Algiers had been prevented by vis major, which, by the law of France in force there, excused the seller from performing the contract. Jacobs v. Credit Lyonnais, L. R. 12 Q. B. Div. 589. That result was reached by applying the general rule expressed by Denman, J., in these words: "The general rule is that where a contract is made in England between merchants carrying on business here, as this is, but to be performed elsewhere, the construction of the contract, and all its incidents, are to be governed by the law of the country where the contract is made, unless there is something to show that the intention of the parties was that the law of the country where the contract is to be performed should prevail;" and summed up by the court of appeal, consisting of Brett, M. R., and Bowen, L. J., as follows: "The broad rule is that the law of a country where a contract is made presumably governs the nature, the obligation, and the interpretation of it, unless the contrary appears to be the express intention of the parties." L. R. 12 Q. B. Div. 596, 597, 600.

This court has not heretofore had occasion to consider by what law contracts like those now before us should be expounded. But it has often affirmed and acted on the general rule, that contracts are to be governed, as to their nature, their validity, and their interpretation, by the law of the place where they were made, unless the contracting parties clearly appear to have had some other law in view. Cox v. U. S., 6 Pet. 172; Scudder v. Bank, 91 U. S. 406; Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. Rep. 102; Lamar v. Micou, 114 U. S. 218, 5 Sup. Ct. Rep. 857; Watts v. Camors, 115 U. S. 353, 362, 6 Sup. Ct. Rep. 91. The opinion in Watts v. Camors, just cited, may require a word or two of explanation. It was there contested whether, in a charter-party made at New Orleans between an English owner and an American charterer of an English ship, for a voyage from New Orleans to a port of the continent of Europe, a clause regulating the amount payable in case of any breach of the contract was to be considered as liquidating the damages, or as a penalty only. Such was the question of which the court said that if it depended upon the intent of the parties, and consequently upon the law which they must be presumed to have had in view, they "must be presumed to look to the general maritime law of the two countries, and not to the local law of the state in which the contract is signed." The choice there was not between the American law and the English law, but between the statutes and decisions of the state of Louisiana and a rule of the maritime law common to the United States and England.

Some reliance was placed by the appellant upon the following observations of Mr. Justice Story, sitting in the circuit court: "If a contract is to be performed partly in one country and partly in another country, it admits of a double aspect, nay, it has a double operation, and is, as to the particular parts, to be interpreted distinctively; that is, according to the laws of the country where the particular parts are to be performed or executed. This would be clearly seen in the case of a bill of lading of goods deliverable in portions or parts at ports in different countries. Indeed, in cases of contracts of affreightment and shipment, it must often hap-

pen that the contract looks to different portions of it to be performed in different countries; some portions at the home port, some at the foreign port, and some at the return port." "The goods here were deliverable in Philadelphia; and what would be an effectual delivery thereof, in the sense of the law, (which is sometimes a nice question,) would, beyond question, be settled by the law of Pennsylvania. But to what extent the owners of the schooner are liable to the shippers for a non-fulfillment of a contract of shipment of the master—whether they incur an absolute or a limited liability—must depend upon the nature and extent of the authority which the owners gave him, and this is to be measured by the law of Massachusetts," where the ship and her owners belonged. Pope v. Nickerson, 3 Story, 465, 484, 485. But in that case the last point stated was the only one in judgment; and the previous remarks evidently had regard to such distinct obligations included in the contract of affreightment as are to be performed in a particular port,—for instance, what would be an effectual delivery, so as to terminate the liability of the carrier, which, in the absence of express stipulation on that subject, is ordinarily governed by the law or usage of the port of discharge. Robertson v. Jackson, 2 C. B. 412; Lloyd v. Guibert, L. R. 1 Q. B. Div. 115, 126, 6 Best & S. 100, 137.

In Morgan v. Railroad Co., 2 Woods, 244, a contract made in New York, by a person residing there, with a railroad corporation having its principal office there, but deriving its powers from the laws of other states, for the conveyance of interests in railroads and steam-boat lines, the delivery of property, and the building of a railroad in those states, and which, therefore, might be performed partly in New York, and must be performed partly in the other states, was held by Mr. Justice Bradley, so far as concerned the right of one party to have the contract rescinded on account of non-performance by the other party, to be governed by the law of New York, and not by either of the diverse laws of the other states in which parts of the contract were to be performed.

In Hale v. Navigation Co., 15 Conn. 538, 546, goods were shipped at New York for Providence, in Rhode Island, or Boston, in Massachusetts, on a steam-boat employed in the business of transportation between New York and Providence; and an exemption, claimed by the carrier under a public notice, was disallowed by the supreme court of Connecticut, because by the then law of New York the liability of a common carrier could not be limited by such a notice. Chief Justice Williams, delivering judgment, said: "The question is, by what law is this contract to be governed? The rule upon that subject is well settled, and has been often recognized by this court, that contracts are to be construed according to the laws of the state where made, unless it is presumed from their tenor that they were entered into with a view to the laws of some other state. There is nothing in this case, either from the location of the parties or the nature of the contract, which shows that they could have had any other law in view than that of the place where it was made. Indeed, as the goods were shipped to be transported to Boston or Providence, there would be the most entire uncertainty what was to be the law of the case if any other rule was to prevail. We have therefore no doubt that the law of New York, as to the duties and obligations of common carriers, is to be the law of the case."

In Dyke v. Railway Co., 45 N. Y. 113, 117, a passenger traveling upon a ticket by which a railroad corporation, established in New York, and whose road extended from one place to another in that state, passing through the states of Pennsylvania and New Jersey by their permission, agreed to carry him from one to another place in New York, was injured in Pennsylvania, by the law of which the damages in actions against railroads for personal injury were limited to $3,000. The court of appeals of New York held that the law of Pennsylvania had no application to the case; and Mr. Justice Allen, delivering the opinion, referred to the case of Navigation Co. v. Shand, before cited, as analagous in principle, and said: "The contract was single, and the performance one continuous act. The defendant did not undertake for one specific act, in part performance, in one state, and another specific and distinct act in another of the states named, as to which the parties could be presumed to have had in view the laws and usages of distinct places. Whatever was done in Pennsylvainia was a part of the single act of transportation from Attica or Waverly, in the state of New York, to the city of New York, and in performance of an obligation assumed and undertaken in this state, and which was indivisible. The obligation was created here, and by force of the laws of this state, and force and effect must be given to it in conformity to the laws of New York. The performance was to commence in New York, and to be fully completed in the same state, but liable to breach, partial or entire, in the states of Pennsylvania and New Jersey, through which the road of the defendant passed; but whether the contract was broken, and if broken the consequences of the breach, should be determined by the laws of this state. It cannot be assumed that the parties intended to subject the contract to the laws of the other states, or that their rights and liabilities should be qualified or varied by any diversities that might exist between the laws of those states and the lex loci contractus."

In McDaniel v. Railway Co., 24 Iowa, 412, 417, cattle transported by a railroad company from a place in Iowa to a place in Illinois, under a special contract made in Iowa, containing a stipulation that the company should be exempt from liability for any damage, unless resulting from collision or derailing of trains, were injured in Illinois by the negligence of the company's servants; and the supreme court of Iowa, Chief Justice Dillon presiding, held the case to be

governed by the law of Iowa, which permitted no common carrier to exempt himself from the liability which would exist in the absence of contract. The court said: "The contract being entire and indivisible, made in Iowa, and to be partly performed here, it must, as to its validity, nature, obligation, and interpretation, be governed by our law. And by our law, so far as it seeks to change the common law, it is wholly nugatory and inoperative. The rights of the parties, then, are to be determined under the common law, the same as if no such contract had been made."

So in Pennsylvania Co. v. Fairchild, 69 Ill. 260, where a railroad company received in Indiana goods consigned to Leavenworth, in Kansas, and carried them to Chicago, in Illinois, and there delivered them to another railroad company, in whose custody they were destroyed by fire, the supreme court of Illinois held that the case must be governed by the law of Indiana, by which the first company was not liable for the loss of the goods after they had passed into the custody of the next carrier in the line of transit.

The other cases in the courts of the several states cited at the bar afford no certain or satisfactory guide. Two cases, held not to be governed by a statute of Pennsylvania, providing that no railroad corporation should be liable for a loss of passenger's baggage beyond $300, unless the excess in value was disclosed and paid for, were decided (whether rightly or not we need not consider) without much reference to authority, and upon their peculiar circumstances,—the one case, on the ground that a contract by a New Jersey corporation to carry a passenger and his baggage from a wharf in Philadelphia across the Delaware river, in which the states of Pennsylvania and New Jersey had equal rights of navigation and passage, and thence through the state of New Jersey to Atlantic City, was a contract to be performed in New Jersey and governed by the law of that state; (Brown v. Railroad Co., 83 Pa. St. 316;) and the other case, on the ground that the baggage received at a town in Pennsylvania, to be carried to New York city, having been lost after its arrival by negligence on the part of the railroad company, the contract, so far as concerned the delivery, was to be governed by the law of New York, (Curtis v. Railroad Co., 74 N. Y. 116.) The suggestion in Barter v. Wheeler, 49 N. H. 9, 29, that the question, whether the liability of a railroad corporation for goods transported through parts of two states was that of a common carrier or of a forwarder only, should be governed by the law of the state in which the loss happened, was not necessary to the decision, and appears to be based on a strained inference from the observations of Mr. Justice Story in Pope v. Nickerson, above cited. In a later case, the supreme court of New Hampshire reserved any expression of opinion upon a like question. Gray v. Jackson, 51 N. H. 9, 39.

This review of the principal cases demonstrates that, according to the great preponderance, if not the uniform concurrence, of authority, the general rule that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country. There does not appear to us to be anything in either of the bills of lading in the present case tending to show that the contracting parties looked to the law of England, or to any other law than that of the place where the contract was made. The bill of lading for the bacon and hams was made and dated at New York, and signed by the ship's agent there. It acknowledges that the goods have been shipped "in and upon the steam-ship called 'Montana,' now lying in the port of New York, and bound for the port of Liverpool," and are to be delivered at Liverpool. It contains no indication that the owners of the steam-ship are English, or that their principal place of business is in England, rather than in this country. On the contrary, the only description of the line of steamships, or of the place of business of their owners, is in a memorandum in the margin, as follows: "Guion Line. United States Mail Steamers. New York: 29 Broadway. Liverpool: 11 Rumford St." No distinction is made between the places of business at New York and at Liverpool, except that the former is named first. The reservation of liberty, in case of an interruption of the voyage, "to transship the goods by any other steamer," would permit transshipment into a vessel of any other line, English or American. And general average is to be computed, not by any local law or usage, but "according to York-Antwerp rules," which are the rules drawn up in 1864 at York, in England, and adopted in 1877 at Antwerp, in Belgium, at international conferences of representatives of the more important mercantile associations of the United States, as well as of the maritime countries of Europe. Lown Av. (3d Ed.) app. Q.

The contract being made at New York, the ship-owner having a place of business there, and the shipper being an American, both parties must be presumed to have submitted themselves to the law there prevailing, and to have agreed to its action upon their contract. The contract is a single one, and its principal object, the transportation of the goods, is one continuous act, to begin in the port of New York, to be chiefly performed on the high seas, and to end at the port of Liverpool. The facts that the goods are to be delivered at Liverpool, and the freight and primage, therefore, payable there in ster-

ling currency, do not make the contract an English contract, or refer to the English law the question of the liability of the carrier for the negligence of the master and crew in the course of the voyage. Navigation Co. v. Shand, Lloyd v. Guibert, and Bank v. Navigation Co., before cited.

There is even less ground for holding the three bills of lading of the cotton to be English contracts. Each of them is made and dated at Nashville, an inland city, and is a through bill of lading, over the Louisville & Nashville Railroad and its connections, and by the Williams and Guion Steam-Ship Company, from Nashville to Liverpool; and the whole freight from Nashville to Liverpool is to be "at the rate of fifty-four pence sterling per 100 lbs. gross weight." It is stipulated that the liability of the Louisville & Nashville Railroad and its connections as common carriers "terminates on delivery of the property to the steam-ship company at New York, when the liability of the steam-ship commences, and not before;" and that "the property shall be transported from the port of New York to the port of Liverpool by the said steam-ship company, with liberty to ship by any other steam-ship or steam-ship line." And in the margin is this significant reference to a provision of the statutes of the United States, applicable to the ocean transportation only: "Attention of shippers is called to the act of congress of 1851: 'Any person or persons shipping oil of vitriol, unslacked lime, inflammable matches, [or] gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering at the time of shipment a note in writing, expressing the nature and character of such merchandise, to the master, mate, or officer, or person in charge of the loading of the ship or vessel, shall forfeit to the United States one thousand dollars.'" Act March 3, 1851, c. 43, § 7, 9 St. 636; Rev. St. § 4288. It was argued that as each bill of lading, drawn up and signed by the carrier and assented to by the shipper, contained a stipulation that the carrier should not be liable for losses by perils of the sea arising from the negligence of its servants, both parties must be presumed to have intended to be bound by that stipulation, and must therefore, the stipulation being void by our law and valid by the law of England, have intended that their contract should be governed by the English law; and one passage in the judgment in Navigation Co. v. Shand gives some color to the argument. 3 Moore, P. C. (N. S.) 291. But the facts of the two cases are quite different in this respect. In that case, effect was given to the law of England, where the contract was made, and both parties were English, and must be held to have known the law of their own country. In this case, the contract was made in this country, between parties one residing and the other doing business here; and the law of England is a foreign law, which the American shipper is not presumed to know. Both parties or either of them may have supposed the stipulation to be valid; or both or either may have known that by our law, as declared by this court, it was void. In either aspect, there is no ground for inferring that the shipper, at least, had any intention, for the purpose of securing its validity, to be governed by a foreign law, which he is not shown, and cannot be presumed, to have had any knowledge of.

Our conclusion on the principal question in the case may be summed up thus: Each of the bills of lading is an American, and not an English, contract, and, so far as concerns the obligation to carry the goods in safety, is to be governed by the American law, and not by the law, municipal or maritime, of any other country. By our law, as declared by this court, the stipulation by which the appellant undertook to exempt itself from liability for the negligence of its servants is contrary to public policy, and therefore void; and the loss of the goods was a breach of the contract, for which the shipper might maintain a suit against the carrier. This being so, the fact that the place where the vessel went ashore, in consequence of the negligence of the master and officers in the prosecution of the voyage, was upon the coast of Great Britain, is quite immaterial. This conclusion is in accordance with the decision of Judge Brown in the district court of the United States for the Southern district of New York in The Brantford City, 29 Fed. Rep. 373, which appears to us to proceed upon more satisfactory grounds than the opposing decision of Mr. Justice Chitty, sitting alone in the chancery division, made since this case was argued, and, so far as we are informed, not reported in the law reports, nor affirmed or considered by any of the higher courts of Great Britain. In re Steam-Ship Co., 58 Law T. (N. S.) 377.

The present case does not require us to determine what effect the courts of the United States should give to this contract, if it had expressly provided that any question arising under it should be governed by the law of England. The question of the subrogation of the libelant to the rights of the shippers against the carrier presents no serious difficulty. From the very nature of the contract of insurance as a contract of indemnity, the insurer, upon paying to the assured the amount of a loss, total or partial, of the goods insured, becomes, without any formal assignment, or any express stipulation to that effect in the policy, subrogated in a corresponding amount to the assured's right of action against the carrier or other person responsible for the loss, and in a court of admiralty may assert in his own name that right of the shipper. The Potomac, 105 U. S. 630, 634; Insurance Co. v. Transportation Co., 117 U. S. 312, 321, 6 Sup. Ct. Rep. 750, 1176. In the present case the libelant, before the filing of the libel, paid to each of the shippers the greater part of his insurance, and thereby became entitled to recover so much, at least, from the carrier. The rest of the insurance money was paid by the libelant before the argument in the district court, and that amount might have been claimed by amendment, if not under the original libel. The Charles Morgan, 115 U. S. 69, 75, 5 Sup. Ct. Rep. 1172; The Gazelle, 128 U. S. 474,

ante, 139. The question of the right of the libelant to recover to the whole extent of the insurance so paid was litigated and included in the decree in the district court, and in the circuit court on appeal; and no objection was made in either of those courts, or at the argument in this court, to any insufficiency of the libel in this particular.

The appellant does, however, object that the decree should not include the amount of the loss on the cotton shipped under through bills of lading from Nashville to Liverpool. This objection is grounded on a clause in those bills of lading which is not found in the bill of lading of the bacon and hams shipped at New York; and on the adjudication in Insurance Co. v. Transportation Co., 117 U. S. 312, 6 Sup. Ct. Rep. 750, 1176, that a stipulation in a bill of lading that a carrier, when liable for a loss of the goods, shall have the benefit of any insurance that may have been effected upon them, is valid as between the carrier and the shipper, and therefore limits the right of an insurer of the goods, upon paying to the shipper the amount of a loss by stranding, occasioned by the negligence of the carrier's servants, to recover over against the carrier. But it behooves a carrier setting up such a defense to show clearly that the insurance on the goods is one which by the terms of his contract he is entitled to the benefit of. Inman v. Railway Co., 129 U. S. 128, ante, 249. The through bills of lading of the cotton are signed by an agent of the railroad companies and the steam-ship company, "severally, but not jointly," and contain, in separate columns, two entirely distinct sets of "terms and conditions," the first relating exclusively to the land carriage by the railroads and their connections, and the second to the ocean transportation by the steamship. The clause relied on, providing that in case of any loss or damage of the goods, whereby any legal liability shall be incurred, that company only shall be held answerable in whose actual custody the goods are at the time, "and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods," is inserted in the midst of the terms and conditions defining the liability of the railroad companies, and is omitted in those defining the liability of the steam-ship company, plainly signifying an intention that this clause should not apply to the latter. It is quite clear, therefore, that the appellant has no right to claim the benefit of any insurance on the goods. See Railroad Co. v. Androscoggin Mills, 22 Wall. 594, 602. The result of these considerations is that the decree of the circuit court is in all respects correct and must be affirmed.

FULLER, C. J., and LAMAR, J., were not members of the court when this case was argued, and took no part in its decision.

CHESTER H. GRAVES & OTHERS vs. LAKE SHORE AND MICHIGAN SOUTHERN RAILROAD COMPANY.

(137 Mass. 33.)

MORTON, C. J. The defendant, as a common carrier, received at Peoria, Illinois, seventy-five barrels of high wines, and agreed to deliver them to the plaintiffs at Boston, in this Commonwealth. The bill of lading contained the stipulation that the goods were "shipped at an agreed valuation of $20 per bbl., owner's risk of leakage." It also contained the agreement, that, "in the event of the loss of any property for which responsibility attaches under this bill of lading to the carriers, the value or cost of the same at the time and point of shipment is to govern the settlement, except the value of the articles has been agreed upon with the shipper, or is determined by the classification upon which the rates are based."

The defendant had no knowledge of the value of the goods except that furnished by the statement of the shippers, and the charge for transportation was based upon this statement and valuation. The goods were destroyed during the transit by a collision of two trains, occasioned by the negligence of the servants of the defendant. The only question presented is whether the plaintiffs can recover any more than the agreed valuation of the goods.

The question whether a carrier can, by a special contract, exempt himself from liability for a loss arising from the negligence of himself or his servants, is one which has been much discussed, and upon which the adjudications are conflicting. If we adopt the general rule, that a carrier cannot thus exempt himself from responsibility, we are of opinion that it does not cover the case before us, which must be governed by other considerations. The defendant has not attempted to exempt itself from liability for the negligence of its servants. It has made no contract for that purpose, but admits its responsibility; its claim is, that the plaintiffs, having represented and agreed that the goods are of a specified value, and having thus obtained the benefit of a diminished rate of transportation, are now estopped to claim, in contradiction of their representation and agreement, that the goods are of a greater value.

It is the right of the carrier to require good faith on the part of those persons who deliver goods to be carried, or enter into contracts with him. The care to be exercised in transporting property, and the reasonable compensation for its carriage, depend largely on its nature and value, and such persons are bound to use no fraud or deception which would mislead him as to the extent of the duties or the risks which he assumes. It is just and reasonable that a carrier should base his rate of compensation, to some extent, upon the value of the goods carried; this measures his risks, and is an important element in fixing his compensation. If a person voluntarily represents and agrees that the goods delivered to a carrier are of a certain value, and the carrier is thereby induced to grant him a reduced rate of compensation for the carriage, such person ought to be barred by his representation and agreement. Otherwise, he imposes upon the carrier the ob-

ligations of a contract different from that into which he has entered. Dunlap v. International Steamboat Co. 98 Mass. 371. Judson v. Western Railroad, 6 Allen, 486.

The plaintiffs admit that their valuation of the goods would be conclusive against them in case of a loss from any other cause than the negligence of the carrier or its servants; but contend that the contract does not fairly import a stipulation of exemption from responsibility for such negligence. We cannot see the justice of this distinction. Looking at the matter practically, everybody knows that the charges of a carrier must be fixed with reference to all the risks of the carriage, including the risk of loss from the negligence of servants. In the course of time, such negligence is inevitable, and the business of a carrier could not be carried on unless he includes this risk in fixing his rates of compensation. When the parties in this case made their contract, it is fair to assume that both had in mind all the usual risks of the carriage. It savors of refinement to suppose that they understood that the valuation of the goods was to be deemed to be fixed if a loss occurred from some causes, but not fixed if it occurred from the negligence of the servants of the carrier. Such does not seem to us to be the fair construction of the contract.

The plaintiffs voluntarily entered into the contract with the defendant; no advantage was taken by them; they deliberately represented the value of the goods to be $20 per barrel. The compensation for carriage was fixed upon this value; the defendant is injured and the plaintiffs are benefited by this valuation, if it can now be denied. We are of opinion that the plaintiffs are estopped to show that it was of greater value than that represented. The plaintiffs cannot recover a larger sum without violating their own agreement. Although one of the indirect effects of such a contract is to limit the extent of the responsibility of the carrier for the negligence of his servants, this was not the purpose of the contract. We cannot see that any considerations of a sound public policy require that such contracts should be held invalid, or that a person, who in such contract fixes a value upon his goods which he entrusts to the carrier, should not be bound by his valuation. M'Cance v. London & North Western Railway, 7 H. & N. 437; S. C. 3 H. & C. 343. Railroad v. Fraloff, 100 U. S. 24. Muser v. Holland, 17 Blatchf. C. C. 412; S. C. 1 Fed. Rep. 382. Hart v. Pennsylvania Railroad, 2 McCrary, 333; S. C. 7 Fed. Rep. 630. Magnin v. Dinsmore, 70 N. Y. 410.

We are therefore of opinion, upon the facts of this case, that it was not competent for the plaintiffs to show that the value of the goods lost was greater than $20 per barrel.

Judgment affirmed.

HART v. PENNSYLVANIA RAILROAD COMPANY.

(112 U. S. 331, 5 Sup. Ct. 151.)

Lawrence Hart brought this suit in a State court in Missouri, against the Pennsylvania Railroad Company, to recover damages from it, as a common carrier, for the breach of a contract to transport, from Jersey City to St. Louis, five horses and other property. The petition alleges that, by the negligence of the defendant, one of the horses was killed and the others were injured, and the other property was destroyed, and claims damages to the amount of $19,800. After an answer and a reply, the plaintiff removed the suit into the Circuit Court of the United States for the Eastern District of Missouri, where it was tried by a jury.

It appeared that the property was transported under a bill of lading issued by the defendant to the plaintiff, and signed by him, and reading as follows:

"Bill of Lading.
Form No. 39, N. J.
Limited Liability Live-Stock Contract for
United Railroads of New Jersey
Division. No. 206.
Jersey City Station, P. R. R.,——, 187—.

Lawrence Hart delivered into safe and suitable cars of the Pennsylvania Railroad Company, numbered M. L. 224, for transportation from Jersey City to St. Louis, Mo., live stock, of the kind, as follows: one (1) car, five horses, shipper's count, which has been received by said company for themselves and on behalf of connecting carriers, for transportation, upon the following terms and conditions, which are admitted and accepted by me as just and reasonable:

First. To pay the freight thereon to said company at the rate of ninety-four (94) cents per one hundred pounds (company's weight), and all back freight and charges paid by them, on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation:

If horses or mules, not exceeding two hundred dollars each.

If cattle or cows, not exceeding seventy-five dollars each.

If fat hogs or fat calves, not exceeding fifteen dollars each.

If sheep, lambs, stock hogs, or stock calves, not exceeding five dollars each.

If a chartered car, on the stock and contents in same, twelve hundred dollars for the car-load.

But no carrier shall be liable for the acts of the animals themselves, or to each other, such as biting, kicking, goring, and smothering, nor for loss or damage arising from condition of the animals themselves, which risks, being beyond the control of the company, are hereby assumed by the owner, and the carrier released therefrom.

Second. Upon the arrival of the cars or boats containing said stock at point of destination, the shipper, owner or consignee shall forthwith pay said freights and charges, and receive said stock therein, and unload the

same therefrom; and if, from any cause, he or they shall fail or refuse to pay, receive, or unload, as aforesaid, then said company or other carrier, as the agent of such shipper, owner or consignee, may thereupon have them put and provided for in some suitable place, at the cost and risk of such shipper, owner or consignee, and at any time or times thereafter may sell the same, or any number of them, at public or private sale, with or without notice, as said agent may deem necessary or expedient, and apply the proceeds arising therefrom, or so much thereof as may be needed, to the payment of such freight and charges and other necessary and proper costs and expenses.

Third. When necessary for said stock to be transported over the line or lines of any other carrier or carriers to the point of destination, delivery of the said stock may be made to such other carrier or carriers for transportation, upon such terms and conditions as the carrier may be willing to accept; provided that the terms and conditions of this bill of lading shall inure to such carrier or carriers, unless they shall otherwise stipulate; but in no event shall one carrier be liable for the negligence of another.

Fourth. All live stock transported under this contract shall be subject to a lien, and may be retained and sold for all freight or charges due for transportation on other live stock or property transported for the same owner, shipper or consignee.

Fifth. This company's liability is limited to the transportation of said animals, and shall not begin until they shall be loaded on board the boats or cars of the company. The owner of said animals, or some person appointed by him, shall go with and take all requisite care of the said animals during their transportation and delivery, and any omission to comply herewith shall be at the owner's risk. Witness my hand and seal, this 20th day of October, 1879.

Lawrence Hart, Shipper. (L. S.)"

Attest:

E. Butler.

W. J. Charmers,

Company's Agent."

At the trial the plaintiff put in evidence the bill of lading, and gave testimony to prove the alleged negligence and how the loss and injury occurred. He then offered to show that the actual value of the horse killed was $15,000; that the other horses were worth from $3,000 to $3,500 each; and that they were rendered comparatively worthless in consequence of their injuries. The defendant objected to this testimony, on the ground that it was not competent for the plaintiff to prove any damage or loss in excess of that set out in the bill of lading. The court sustained the objection and the plaintiff excepted. It appeared, on the trial, that the horses were race-horses, and that they and the other property were all in one car.

It was admitted by the defendant that the damages sustained by the plaintiff were equal to the full amount expressed in the bill of lading. The court charged the jury as follows: "It is competent for a shipper, by entering into a written contract, to stipulate the value of his property, and to limit the amount of his recovery in case it is lost. This is the plain agreement, that the recovery shall not exceed the sum of two hundred dollars each for the horses, or twelve hundred dollars for a car-load. It is admitted here, by counsel for the defendant, under this charge, that the plaintiff is entitled to recover a verdict for twelve hundred dollars, and, also, under the charge of the court, the plaintiff agrees that that is all. It is simply your duty to find a verdict for that amount." The plaintiff excepted to this charge. The jury found a verdict of $1,200 for the plaintiff (see 2 McCrary, 333); and after a judgment accordingly the plaintiff brought this writ of error.

The errors assigned are, that the court erred in refusing to permit the plaintiff to show the actual damages he had sustained, and in so charging the jury as to restrict their verdict to $1,200.

MR. JUSTICE BLATCHFORD delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

It is contended for the plaintiff that the bill of lading does not purport to limit the liability of the defendant to the amounts stated in it, in the event of loss through the negligence of the defendant. But we are of opinion that the contract is not susceptible of that construction. The defendant receives the property for transportation on the terms and conditions expressed, which the plaintiff accepts "as just and reasonable." The first paragraph of the contract is that the plaintiff is to pay the rate of freight expressed, "on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding two hundred dollars each. . . . If a chartered car, on the stock and contents in same, twelve hundred dollars for the car load." Then follow in the first paragraph, these words: "But no carrier shall be liable for the acts of the animals themselves, or to each other, such as biting, kicking, goring, or smothering, nor for the loss or damage arising from condition of the animals themselves, which risks, being beyond the control of the company, are hereby assumed by the owner, and the carrier released therefrom." This statement of the fact that the risks from the acts and condition of the horses are risks beyond the control of the defendant, and are, therefore, assumed by the plaintiff, shows, if more were needed than the other language of the contract, that the risks and liability assumed by the defendant in the remainder of the same paragraph are those not beyond, but within, the control of the defendant, and, therefore, apply to loss through the negligence of the defendant.

It must be presumed from the terms of the bill of lading, and without any evidence on the subject, and especially in the absence of any evidence to the contrary, that, as the rate of freight expressed is stated to be on the condition that the defendant assumes a

liability to the extent of the agreed valuation named the rate of freight is graduated by the valuation. Especially is this so, as the bill of lading is what its heading states it to be, "a limited liability live-stock contract," and is confined to live-stock. Although the horses, being race-horses, may, aside from the bill of lading, have been of greater real value than that specified in it, whatever passed between the parties before the bill of lading was signed was merged in the valuation it fixed; and it is not asserted that the plaintiff named any value, greater or less, otherwise than as he assented to the value named in the bill of lading, by signing it. The presumption is conclusive that, if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation. If the rate of freight named was the only one offered by the defendant, it was because it was a rate measured by the valuation expressed. If the valuation was fixed at that expressed, when the real value was larger, it was because the rate of freight named was measured by the low valuation. The plaintiff cannot claim a higher valuation, on the agreed rate of freight.

It is further contended by the plaintiff, that the defendant was forbidden, by public policy, to fix a limit for its liability for a loss by negligence, at an amount less than the actual loss by such negligence. As a minor proposition, a distinction is sought to be drawn between a case where a shipper, on requirement, states the value of the property, and a rate of freight is fixed accordingly, and the present case. It is said, that, while in the former case the shipper may be confined to the value he so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation previously named by the shipper. But we see no sound reason for this distinction. The valuation named was the "agreed valuation," the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further.

We are, therefore, brought back to the main question. It is the law of this court, that a common carrier may, by special contract, limit his common-law liability; but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants. New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344; York Co. v. Central R. R. Co., 3 Wall. 107; Railroad Co. v. Lockwood, 17 Wall. 357; Express Co. v. Caldwell, 21 Wall. 264; Railroad Co. v. Pratt, 22 Wall. 123; Bank of Kentucky v. Adams Express Co., 93 U. S. 174; Railway Co. v. Stevens, 95 U. S. 655.

In York Co. v. Central Railroad, 3 Wall. 107, a contract was upheld exempting a carrier from liability for loss by fire, the fire not having occurred through any want of due care on his part. The court said, that a common carrier may "prescribe regulations to protect himself against imposition and fraud, and fix a rate of charges proportionate to the magnitude of the risks he may have to encounter."

In Railroad Co. v. Lockwood, 17 Wall. 357, the following propositions were laid down by this court: (1) A common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable, in the eye of the law; (2) It is not just and reasonable in the eye of the law, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants; (3) These rules apply both to carriers of goods and to carriers of passengers for hire, and with special force to the latter. The basis of the decision was, that the exemption was to have applied to it the test of its justness and reasonable character. It was said, that the contracts of the carrier "must rest upon their fairness and reasonableness;" and that it was just and reasonable that carriers should not be responsible for losses happening by sheer accident, or chargeable for valuable articles liable to be damaged, unless apprised of their character or value. That case was one of a drover travelling on a stock train on a railroad, to look after his cattle, and having a free pass for that purpose, who had signed an agreement taking all risk of injury to his cattle and of personal injury to himself, and who was injured by the negligence of the railroad company or its servants.

In Express Co. v. Caldwell, 21 Wall. 264, this court held, that an agreement made by an express company, a common carrier in the habit of carrying small packages, that it should not be held liable for any loss or damage to a package delivered to it, unless claim should be made therefor within ninety days from its delivery to the company, was an agreement which the company could rightfully make. The court said: "It is now the settled law, that the responsibility of a common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable and not inconsistent with sound public policy." It was held that the stipulation as to the time of making a claim was reasonable and intrinsically just, and could not be regarded as a stipulation for exemption from responsibility for negligence, because it did not relieve the carrier from any obligation to exercise diligence, fidelity and care.

On the other hand, in Bank of Kentucky v. Adams Express Co., 93 U. S. 174, it was held that a stipulation by an express company that it should not be liable for loss by fire could not be reasonably construed as exempting it from liability for loss by fire occurring through the negligence of a railroad company which it had employed as a carrier.

To the views announced in these cases we

adhere. But there is not in them any adjudication on the particular question now before us. It may, however, be disposed of on principles which are well established and which do not conflict with any of the rulings of this court. As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them. If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed. 2 Kent's Comm. 603, and cases cited; Relf v. Rapp, 3 Watts & Sergeant, 21; Dunlap v. International Steamboat Co., 98 Mass. 371; Railroad Co. v. Fraloff, 100 U. S. 24. This qualification of the liability of the carrier is reasonable and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in the case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract.

The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purpose of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.

This principle is not a new one. In Gibbon v. Paynton, 4 Burrow, 2298, the sum of £100 was hidden in some hay in an old mail-bag and sent by a coach and lost. The plaintiff knew of a notice by the proprietor that he would not be answerable for money unless he knew what it was, but did not apprise the proprietor that there was money in the bag. The defence was upheld, Lord Mansfield saying: "A common carrier in respect of the premium he is to receive runs the risque of the goods, and must make good the loss, though it happen without any fault in him, the reward making him answerable for their safe delivery. His warranty and insurance is in respect of the reward he is to receive, and the reward ought to be proportionable to the risque. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of more guards or other methods of security; and, therefore, he ought, in reason and justice, to have a greater reward." To the same effect is Batson v. Donovan, 4 B. & A. 21.

The subject-matter of a contract may be valued, or the damages in case of a breach may be liquidated in advance. In the present case, the plaintiff accepted the valuation as "just and reasonable." The bill of lading did not contain a valuation of all animals at a fixed sum for each, but a graduated valuation according to the nature of the animal. It does not appear that an unreasonable price would have been charged for a higher valuation.

The decisions in this country are at variance. The rule which we regard as the proper one in the case at bar is supported in Newburger v. Howard, 6 Philadelphia Rep. 174; Squire v. New York Central R. R. Co., 98 Mass. 239; Hopkins v. Westcott, 6 Blatchford, 64; Belger v. Dinsmore, 51 N. Y. 166; Oppenheimer v. United States Express Co., 69 Ill. 62; Magnin v. Dinsmore, 56 N. Y. 168, and 62 Id. 35, and 70 Id. 410; Earnest v. Express Co., 1 Woods, 573; Elkins v. Empire Transportation Co., 81* Penn. St. 315; South & North Ala. R. R. Co. v. Henlein, 52 Ala. 606; Same v. Same, 56 Id. 368; Muser v. Holland, 17 Blatchford, 412; Harvey v. Terre Haute R. R. Co., 74 Missouri, 538; and Graves v. Lake Shore Ry. Co., 137 Mass. 33. The contrary rule is sustained in Southern Express Co. v. Moon, 39 Miss. 822; The City of Norwich, 4 Ben. 271; United States Express Co. v. Backman, 28 Ohio St. 144; Black v. Goodrich Transportation Co., 55 Wis. 319; Chicago, St. Louis & N. O. R. R. Co. v. Abels, 60 Miss. 1017; Kansas City &c., Railroad Co. v. Simpson, 30 Kansas, 645; and Moulton v. St. Paul &c., R. R. Co., 31 Minn. 85. We have given consideration to the views taken in these latter cases, but are unable to concur in their conclusions. Applying to the case in hand the proper test to be applied to every limitation of the common-law liability of a car-

rier—its just and reasonable character—we have reached the result indicated. In Great Britain, a statute directs this test to be applied by the courts. The same rule is the proper one to be applied in this country, in the absence of any statute.

As relating to the question of the exemption of a carrier from liability beyond a declared value, reference may be made to section 4281 of the Revised Statutes of the United States (a re-enactment of section 69 of the act of February 28, 1871, ch. 100, 16 Stat. 458), which provides, that if any shipper of certain enumerated articles, which are generally articles of large value in small bulk, "shall lade the same, as freight or baggage, on any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same, a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner, nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered." The principle of this statute is in harmony with the decision at which we have arrived.

The plaintiff did not, in the course of the trial, or by any request to instruct the jury, or by any exception to the charge, raise the point that he did not fully understand the terms of the bill of lading, or that he was induced to sign it by any fraud or under any misapprehension. On the contrary, he offered and read in evidence the bill of lading, as evidence of the contract on which he sued.

The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. Squire v. New York, Central R. R. Co., 98 Mass. 239, 245, and cases cited.

There was no error in excluding the evidence offered, or in the charge to the jury, and the judgment of the Circuit Court is

Affirmed.

EXPRESS COMPANY v. CALDWELL.
(21 Wall. 264.)

Error to the Circuit Court for the Western District of Tennessee.

Caldwell sued the Southern Express Company in the court below, as a common carrier, for its failure to deliver at New Orleans a package received by it on the 23d day of April, 1862, at Jackson, Tennessee; places the transit between which requires only about one day. The company pleaded that when the package was received "it was agreed between the company and the plaintiff, and made one of the express conditions upon which the package was received, that the company should not be held liable for any loss of, or damage to, the package whatever, unless claim should be made therefor within ninety days from its delivery to it." The plea further averred that no claim was made upon the defendant, or upon any of its agents, until the year 1868, more than ninety days after the delivery of the package to the company, and not until the present suit was brought. To the plea thus made the plaintiff demurred generally, and the Circuit Court sustained the demurrer, giving judgment thereon against the company. Whether this judgment was correct was the question now to be passed on here.

MR. JUSTICE STRONG delivered the opinion of the court.

Notwithstanding the great rigor with which courts of law have always enforced the obligations assumed by common carriers, and notwithstanding the reluctance with which modifications of that responsibility, imposed upon them by public policy, have been allowed, it is undoubtedly true that special contracts with their employers limiting their liability are recognized as valid, if in the judgment of the courts they are just and reasonable—if they are not in conflict with sound legal policy. The contract of a common carrier ordinarily is an assumption by him of the exact duty which the law affixes to the relation into which he enters when he undertakes to carry. That relation the law regards as substantially one of insurance against all loss or damage except such as results from what is denominated the act of God or of the public enemy. But the severe operation of such a rule in some cases has led to a relaxation of its stringency, when the consignor and the carrier agree to such a relaxation. All the modern authorities concur in holding that, to a certain extent, the extreme liability exacted by the common law originally may be limited by express contract. The difficulty is in determining to what extent, and here the authorities differ. Certainly it ought not to be admitted that a common carrier can be relieved from the full measure of that responsibility which ordinarily attends his occupation without a clear and express stipulation to that effect obtained by him from his employer. And even when such a stipulation has been obtained the court must be able to see that it is not unreasonable. Common carriers do not deal with their employers on equal terms. There is, in a very important sense, a necessity for their employment. In many cases they are corporations chartered for the promotion of the public convenience. They have possession of the railroads, canals, and means of transportation on the rivers. They can and they do carry at much cheaper rates than those which private carriers must of necessity demand. They have on all im-

portant routes supplanted private carriers. In fact they are without competition, except as between themselves, and that they are thus is in most cases a consequence of advantages obtained from the public. It is, therefore, just that they are not allowed to take advantage of their powers, and of the necessities of the public to exact exemptions from that measure of duty which public policy demands. But that which was public policy a hundred years ago has undergone changes in the progress of material and social civilization. There is less danger than there was of collusion with highwaymen. Intelligence is more rapidly diffused. It is more easy to trace a consignment than it was. It is more difficult to conceal a fraud. And, what is of equal importance, the business of common carriers has been immensely increased and subdivided. The carrier who receives goods is very often not the one who is expected to deliver them to the ultimate consignees. He is but one link of a chain. Thus his hazard is greatly increased. His employers demand that he shall be held responsible, not merely for his own acts and omissions, and those of his agents, but for those of other carriers whom he necessarily employs for completing the transit of the goods. Hence, as we have said, it is now the settled law that the responsibility of a common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable and not inconsistent with sound public policy. This subject has been so fully considered of late in this court that it is needless to review the authorities at large. In York Company v. The Central Railroad Company, it is ruled that the common law liability of a common carrier may be limited and qualified by special contract with the owner, provided such special contract do not attempt to cover losses by negligence or misconduct. And in a still later case, Railroad Company v. Lockwood, where the decisions are extensively reviewed, the same doctrine is asserted. The latter case, it is true, involved mainly an inquiry into the reasonableness of an exemption stipulated for, but it unequivocally accepted the rule asserted in the first-mentioned case. The question, then, which is presented to us by this record is, whether the stipulation asserted in the defendant's plea is a reasonable one, not inconsistent with sound public policy.

It may be remarked, in the first place, that the stipulation is not a conventional limitation of the right of the carrier's employer to sue. He is left at liberty to sue at any time within the period fixed by the statute of limitations. He is only required to make his claim within ninety days, in season to enable the carrier to ascertain what the facts are, and having made his claim, he may delay his suit.

It may also be remarked that the contract is not a stipulation for exemption from responsibility for the defendants' negligence, or for that of their servants. It is freely conceded that had it been such, it would have been against the policy of the law, and inoperative. Such was our opinion in Railroad Company v. Lockwood. A common carrier is always responsible for his negligence, no matter what his stipulations may be. But an agreement that in case of failure by the carrier to deliver the goods, a claim shall be made by the bailor, or by the consignee, within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity, which the strictest rules of the common law ever required. And it is intrinsically just, as applied to the present case. The defendants are an express company. We cannot close our eyes to the nature of their business. They carry small parcels, easily lost or mislaid and not easily traced. They carry them in large numbers. Express companies are modern conveniences, and notoriously they are very largely employed. They may carry, they often do carry hundreds, even thousands of packages daily. If one be lost, or alleged to be lost, the difficulty of tracing it is increased by the fact that so many are carried, and it becomes greater the longer the search is delayed. If a bailor may delay giving notice to them of a loss, or making a claim indefinitely, they may not be able to trace the parcels bailed, and to recover them, if accidentally missent, or if they have in fact been properly delivered. With the bailor the bailment is a single transaction, of which he has full knowledge; with the bailee, it is one of a multitude. There is no hardship in requiring the bailor to give notice of the loss if any, or make a claim for compensation within a reasonable time after he has delivered the parcel to the carrier. There is great hardship in requiring the carrier to account for the parcel long after that time, when he has had no notice of any failure of duty on his part, and when the lapse of time has made it difficult, if not impossible to ascertain the actual facts. For these reasons such limitations have been held valid in similar contracts, even when they seem to be less reasonable than in the contracts of common carriers.

Policies of fire insurance, it is well known, usually contain stipulations that the insured shall give notice of a loss, and furnish proofs thereof within a brief period after the fire, and it is undoubted that if such notice and proofs have not been given in the time designated or have not been waived, the insurers are not liable. Such conditions have always been considered reasonable, because they give the insurers an opportunity of inquiring into the circumstances and amount of the loss, at a time

when inquiry may be of service. And still more, conditions in policies of fire insurance that no action shall be brought for the recovery of a loss unless it shall be commenced within a specified time, less than the statutory period of limitations, are enforced, as not against any legal policy.

Telegraph companies, though not common carriers, are engaged in a business that is in its nature almost, if not quite, as important to the public as is that of carriers. Like common carriers they cannot contract with their employers for exemption from liability for the consequences of their own negligence. But they may by such contracts, or by their rules and regulations brought to the knowledge of their employers, limit the measure of their responsibility to a reasonable extent. Whether their rules are reasonable or unreasonable must be determined with reference to public policy, precisely as in the case of a carrier. And in Wolf v. The Western Union Telegraph Company, a case where one of the conditions of a telegraph company, printed in their blank forms, was that the company would not be liable for damages in any case where the claim was not presented in writing within sixty days after sending the message, it was ruled that the condition was binding on an employer of the company who sent his message on the printed form. The condition printed in the form was considered a reasonable one, and it was held that the employer must make claim according to the condition, before he could maintain an action. Exactly the same doctrine was asserted in Young v. The Western Union Telegraph Company.

In Lewis v. The Great Western Railway Company, which was an action against the company as common carriers, the court sustained as reasonable stipulations in a bill of lading, that "no claim for deficiency, damage, or detention would be allowed, unless made within three days after the delivery of the goods, nor for loss, unless made within seven days from the time they should have been delivered." Under the last clause of this condition the onus was imposed upon the shipper of ascertaining whether the goods had been delivered at the time they should have been, and in case they had not, of making his claim within seven days thereafter. In the case we have now in hand the agreement pleaded allowed ninety days from the delivery of the parcel to the company, within which the claim might be made, and no claim was made until four years thereafter. Possibly such a condition might be regarded as unreasonable, if an insufficient time were allowed for the shipper to learn whether the carrier's contract had been performed. But that cannot be claimed here. The parcel was received at Jackson, Tennessee, for delivery at New Orleans. The transit required only about one day. We think, therefore, the limitation of the defendants' common-law liability to which the parties agreed, as averred in the plea, was a reasonable one, and that the plea set up a sufficient defence to the action.

We have been referred to one case which seems to intimate, and perhaps should be regarded as deciding that a stipulation somewhat like that pleaded here is insufficient to protect the carrier. It is the Southern Express Company v. Caperton. There the receipts for the goods contained a provision that there should be no liability for any loss unless the claim therefor should be made in writing, at the office of the company at Stevenson, within thirty days from the date of the receipt, in a statement to which the receipt should be annexed. The receipt was signed by the agent of the company alone. It will be observed that it was a much more onerous requirement of the shipper than that made in the present case, and more than was necessary to give notice of the loss to the carrier. The court, after remarking that a carrier cannot avoid his responsibility by any mere general notice, nor contract for exemption from liability for his negligence or that of his servants, added that he could not be allowed to make a statute of limitations so short as to be capable of becoming a means of fraud; that it was the duty of the "defendant to deliver the package to the consignee, and that it was more than unreasonable to allow it to appropriate the property of another by a failure to perform a duty, and that too under the protection of a writing signed only by its agent, the assent to which by the other party was only proven by his acceptance of the paper." This case is a very unsatisfactory one. It appears to have regarded the stipulation as a statute of limitations, which it clearly was not, and it leaves us in doubt whether the decision was not rested on the ground that there was no sufficient evidence of a contract. The case cited from 36 Georgia, 532, has no relation to the question before us. It has reference to the inquiry, what is sufficient proof of an agreement between the shipper and the carrier, an inquiry that does not arise in the present case, for the demurrer admits an express agreement.

Our conclusion, then, founded upon the analogous decisions of courts, as well as upon sound reason, is that the express agreement between the parties averred in the plea was a reasonable one, and hence that it was not against the policy of the law. It purported to relieve the defendants from no part of the obligations of a common carrier. They were bound to the same diligence, fidelity, and care as they would have been required to exercise if no such agreement had been made. All that the stipulation required was that the shipper, in case the package was lost or damaged, should assert his claim in season to enable the defendants to ascertain the facts; in other words, that he should assert it within ninety days. It follows that the Circuit Court erred in sustaining the plaintiff's demurrer to the plea.

Judgment reversed, and the cause remanded for further proceedings,

In conformity with this opinion.

RICHARD GRACE vs. ALVIN ADAMS & OTHERS.

(100 Mass. 505.)

Contract, against the defendants, who carried on business under the name of the Adams Express Company, to recover the value of a package of money. In the superior court, judgment was ordered for the plaintiff on agreed facts, and the defendants appealed. The agreed facts were as follows:

"It is agreed that the plaintiff delivered to the Adams Express Company, as common carriers, at Wilmington, in the State of North Carolina, March 21, 1865, a package containing one hundred and fifty dollars, directed to Patrick Corbett, Taunton, Massachusetts, and the said Express Company at the same time delivered to the plaintiff a bill of lading, a copy whereof is hereto annexed, and which makes part of this statement; that the said Express Company shipped said package with other packages from Wilmington by the steamship General Lyon, which ship was accidentally burnt at sea, and said package thereby destroyed. It is further agreed, if evidence of the fact be admissible, that the plaintiff would testify that when the plaintiff delivered the package and took the bill of lading, a copy of which is annexed, he did not read the same."

The material parts of the bill of lading, of which the copy was annexed, were as follows:

"Adams Express Company. Great Eastern, Western & Southern Express Forwarders. $150. Form 5. Wilmington, March 21, 1865. Received from ——— One P., sealed and said to contain one hundred and fifty dolls. Addressed, Patrick Corbett, Taunton, Mass.

"Upon the special acceptance and agreement that this company is to forward the same to its agent nearest or most convenient to destination only, and there to deliver the same to other parties to complete the transportation—such delivery to terminate all liability of this company for such package; and also, that this company is not to be liable in any manner or to any extent for any loss, damage, or detention of such package, or of its contents, or of any portion thereof, . . . occasioned by the dangers of railroad transportation, or ocean or river navigation, or by fire or steam. For the company. Robinson."

COLT, J. It is to be received as now settled by the current and weight of authority, that a common carrier may, by special contract, avoid or limit his liability at common law as an insurer of property intrusted to him against loss or damage by fire, occurring without fault on his part. It is not necessary to discuss here, how far in this or other respects he may escape those liabilities which the policy of the law imposes, by mere notices brought home to the employer, or whether the effect of such notices may not be held to vary according as it is attempted to avoid those extraordinary responsibilities which are peculiar to common carriers, or those other liabilities under which they are held in common with all other bailees for hire. Judson v. Western Railroad Co. 6 Allen, 486. York Co. v. Central Railroad Co. 3 Wallace, 107. Hooper v. Wells, 27 Calif. 11; and see article by Redfield, with collection of authorities, 5 Am. Law Reg. (N. S.) 1.

It is claimed here that the shipping receipt or bill of lading constituted a valid and binding contract between the parties, and that, upon the loss at sea of the plaintiff's package in the course of its transportation under the contract, by an accidental fire, the defendants were discharged from any obligation to the plaintiff in regard to it; and the court are of opinion that this claim must be sustained.

The receipt was delivered to the plaintiff as the contract of the defendants; it is in proper form; and the terms and conditions are expressed in the body of it in a way not calculated to escape attention. The acceptance of it by the plaintiff, at the time of the delivery of his package, without notice of his dissent from its terms, authorized the defendants to infer assent by the plaintiff. It was his only voucher and evidence against the defendants. It is not claimed that he did not know, when he took it, that it was a shipping contract or bill of lading. It was his duty to read it. The law presumes, in the absence of fraud or imposition, that he did read it, or was otherwise informed of its contents, and was willing to assent to its terms without reading it. Any other rule would fail to conform to the experience of all men. Written contracts are intended to preserve the exact terms of the obligations assumed, so that they may not be subject to the chances of a want of recollection or an intentional misstatement. The defendants have a right to this protection, and are not to be deprived of it by the wilful or negligent omission of the plaintiff to read the paper. The case of Rice v. Dwight Manufacturing Co. 2 Cush. 80, 87, is an authority in point. In an action to recover for work done, the defence was that the work was performed under a special contract, and a paper of printed regulations was shown to have been given to and accepted by the plaintiff as containing the terms of the contract, but which was not signed by either party. The plaintiff denied knowledge of its contents; but it was said by Forbes, J., that where a party enters into a written contract, in the absence of fraud he is conclusively presumed to understand the terms and legal effect of it, and to consent to them. See also Lewis v. Great Western Railway Co. 5 H. & N. 867; Squire v.

New York Central Railroad Co. 98 Mass. 239.

This case, then, is brought within the rule which authorizes carriers to relieve themselves from losses of this description by express contracts with the employer. It differs from the cases of Brown v. Eastern Railroad Co. 11 Cush. 97, and Malone v. Boston & Worcester Railroad Co. 12 Gray, 388. The limitation relied on in both those cases was in the form of a notice printed on the back of a passenger ticket, relating to baggage; and it was held that there was no presumption of law that the party, at the time of receiving the ticket, had knowledge of the contents of the notice. It is obvious that in those cases the ticket was not designed to be held as the evidence of the contract between the parties. The contract, which was of passenger transportation, was not attempted to be set forth. At most, it was but a check, to be used temporarily and then delivered to the conductor as his voucher, with these notices on the back. The presumption that every man knows the terms of a written contract which he enters into, therefore, did not apply. Nor was the acceptance of the ticket conclusive evidence of assent to its terms.

The recent case of Buckland v. Adams Express Co. 97 Mass. 124, requires notice, because, upon a case in most respects similar to this, a different result was reached by the court. The legal principles upon which that case was decided are those here stated. It was a case upon an agreed statement of acts; and the difference resulted in the application of the law to the facts then presented. It is to be noticed that the receipt containing the limitation relied on was in that case delivered to a workman in the employ of a stranger, who, so far as it appears, had, in that particular instance only, been requested by the plaintiffs to deliver the parcel in their absence, and as a mere favor to them. And it further appeared that the previous course of dealing between the parties was such that, in a majority of instances in which the plaintiffs had employed the defendants to transport like packages, no receipt was made out, and no special contract insisted upon. Under such circumstances, it was held that it could not fairly be inferred that the plaintiffs understood and assented to the contents of the receipt as fixing the terms on which the defendants were to transport the merchandise, or that the workman had authority to make an unusual contract.

The same remarks apply to the case of Perry v. Thompson, 98 Mass. 249, which is to be distinguished from the case at bar by the fact that, in the previous dealings of the parties, property had been received and carried without any notice relating to the carrier's liability having been given, and by the further fact that, when the notice in that instance was received, the printed parts of it were so covered up by the revenue stamp affixed to the receipt that it could not be read intelligibly.

So in Fillebrown v. Grand Trunk Railway Co. 55 Maine, 462, it was held that, when a verbal contract for transportation was made without restriction, its legal effect would not be changed by the conditions in a receipt which was subsequently given to the clerk of the consignor, who delivered the goods at the station, but who had no express authority either to deliver or to contract with the defendants.

These cases do not reach the case at bar, where the delivery of the receipt was directly to the plaintiff; nor would they be held decisive in a case where the delivery was made and the receipt accepted under ordinary circumstances by a special or general agent of the owner, not a mere servant or porter, and who might be regarded as clothed with authority to bind the owner in giving instructions and making conditions affecting the transportation. Squire v. New York Central Railroad Co. 98 Mass. 239.

Judgment for the defendants.

THE DELAWARE.

(14 Wall. 579.)

Appeal from the Circuit Court for the District of California; the case being thus:

The Oregon Iron Company, on the 8th of May, 1868, shipped on board the bark Delaware, then at Portland, Oregon, 76 tons of pig-iron, to be carried to San Francisco, at a freight of $4.50 a ton. The bill of lading was in these words:

"Shipped, in good order and condition, by Oregon Iron Company, on board the good bark Delaware, Shillaber, master, now lying in the port of Portland, and bound to San Francisco, to say seventy-five tons pig-iron, more or less (contents, quality, and weight, unknown), being marked as in the margin, and are to be delivered in like good order and condition at the aforesaid port of San Francisco, at ship's tackles (the dangers of the seas, fire, and collision excepted) unto ——, or assigns, he or they paying freight for the said goods in the United States gold coin (before delivery, if required), as per margin, with 5 per cent. primage and average accustomed.

"In witness whereof the master or agent of said vessel hath affirmed to three bills of lading, all of this tenor and date; one of which being accomplished, the others to stand void. Vessel not accountable for breakage, leakage, or rust.

C. E. Shillaber,
"For the captain.

Portland, May 8th, 1868."

The iron was not delivered at San Francisco; and on a libel filed by the Iron Company, the defence set up was that by a verbal agreement made between the Iron Company and the master of the ship before the shipment or the signing of the bill of lading, the iron was stowed on deck, and that the whole of it, with the exception

of 6 tons and 90 lbs., had been jettisoned in a storm.

On the trial, the owners of the vessel offered proof of this parol agreement. The libellants objected, and the court excluded the evidence on the ground that parol proof was inadmissible to vary the bill of lading, and decreed in favor of the libellants for the iron that was thrown overboard. On appeal the case was disposed of in the same way in the Circuit Court. It was now here; the question being as in the two courts below, whether in a suit upon a bill of lading like the one here for non-delivery of goods stowed on deck, and jettisoned at sea, it is competent in the absence of a custom to stow such goods on deck, to prove by parol a verbal agreement for such a stowage.

The District Court, in its opinion, among other things, said as follows:

"It is not disputed that the ordinary bill of lading imports that the goods are to be safely stowed under deck. It must also be admitted that if they are stowed on deck with the consent of the shipper, or in accordance with a well-established and generally recognized usage, either of the particular trade or in respect of a particular kind of goods, the ship will not be liable. The point presented is, whether the consent of the shipper can be proved by parol.

"The case of Creery v. Holly, is directly in point. In that case Mr. Justice Nelson says:

"'It is true that in this case nothing is said in the bill of lading as to the manner of stowing the goods, whether on deck or under deck; but the case concedes that the legal import of the contract, as well as the understanding and usage of merchants, impose upon the master the duty of putting them under deck, unless otherwise stipulated; and if such is the judgment of the law upon the face of the instrument, parol evidence is as inadmissible to alter it as if the duty was stated in expressed terms. It was part of the contract. It seems to me it would be extremely dangerous, and subject to the full force of every objection that excludes the admission of this species of evidence, to permit any stipulation, express or implied, in these instruments, to be thus varied. . . . If the implied obligation of the master in this case, arising out of the conceded construction of the bill of lading, may be varied by parol evidence, I do not see how any other stipulation included in it could be sustained upon an offer to impeach it in the same way.'"

In Niles v. Culver, the same principle was applied to a memorandum, which imported a contract.

"In White v. Van Kirk, parol proof offered by a shipper of goods to show that the master agreed to take a particular route was held to be inadmissible.

"In the Waldo, the language of Mr. Justice Ware is nearly identical with that of Mr. Justice Nelson, above quoted:

"'It is true that the bill of lading does not say in express terms that the goods shall be stowed under deck, but this is a condition tacitly annexed to the contract by operation of law; and it is equally binding on the master, and the shipper is equally entitled to its benefit, although it was stated in express terms. The parol evidence, then, is offered to control the legal operation of the bill of lading, and it is as inadmissible as though it were to contradict its words.'"

"In Garrison v. The Memphis Insurance Company, it was held that, where the bill of lading mentioned that the carrier was not to be responsible for injuries caused by the 'perils of the river,' parol evidence was inadmissible to show that by usage 'fire' was included among those perils.

"Where a promissory note mentions no time of payment, the law adjudges it to be due immediately, and parol evidence is not admissible to show a different time of payment agreed upon by the parties at the time it was executed."

These and other cases were relied on by the court, and in addition to them Barber v. Brace, in the Supreme Court of Connecticut, was cited by counsel, to show that "a parol agreement anterior to a written contract is inadmissible."

The question, as the reader familiar with the decisions on the subject will see, is one upon which opinions not consistent with some of those thus above quoted have been given in certain courts. In this court the question had never been specifically passed upon. On that account and for the importance of the question, the argument against the view in the courts below, is presented with more than ordinary fulness.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Ship-owners, as carriers of merchandise, contract for the safe custody, due transport and right delivery of the goods; and the shipper, consignee, or owner of the cargo contracts to pay the freight and charges; and by the maritime law, as expounded by the decisions of this court, the obligations of the ship-owner and the shipper are reciprocal, and it is equally well settled that the maritime law creates reciprocal liens for the enforcement of those obligations, unless the lien is waived by some express stipulation, or is displaced by some inconsistent and irreconcilable provision in the charter-party or bill of lading. Shippers should in all cases require a bill of lading, which is to be signed by the master, whether the contract of affreightment is by charter-party or without any such customary written instrument. Where the goods of a consignment are not all sent on board at the same time, it is usual for the master, mate, or other person in charge of the deck, and acting for the carrier, to give a receipt for the parcels as they are received, and when the whole consignment is delivered, the master, upon these receipts being given up, will sign two or three, or,

if requested, even four bills of lading in the usual form, one being for the ship and the others for the shipper. More than one is required by the shipper, as he usually sends one by mail to the consignee or vendee, and if four are signed he sends one to his agent or factor, and he should always retain one for his own use. Such an instrument acknowledges the bailment of the goods, and is evidence of a contract for the safe custody, due transport, and right delivery of the same, upon the terms, as to freight, therein described, the extent of the obligation being specified in the instrument. Where no exceptions are made in the bill of lading, and in the absence of any legislative provisions prescribing a different rule, the carrier is bound to keep and transport the goods safely, and to make right delivery of the same at the port of destination, unless he can prove that the loss happened from the act of God or the public enemy, or by the act of the shipper or owner of the goods. Stipulations in the nature of exceptions may be made limiting the extent of the obligation of the carrier, and in that event the bill of lading is evidence of the ordinary contract of affreightment, subject, of course, to the exceptions specified in the instrument; and in view of that fact the better description of the obligation of such a carrier is that, in the absence of any Congressional legislation upon the subject, he is in the nature of an insurer, and liable in all events and for every loss or damage, however occasioned, unless it happened by the act of God or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading.

Seventy-five tons of pig-iron were shipped by the libellants, on the 8th of May, 1868, on board the bark Delaware, then lying in the port of Portland, Oregon, to be transported from that port to the port of San Francisco, for the freight of four dollars and fifty cents per ton, to be delivered to the shippers or their assigns at the port of destination, they paying freight as therein stipulated, before delivery if required, with five per cent. primage and average accustomed. Dangers of the sea, fire and collision were excepted in the bill of lading, and the statement at the close of the instrument was "vessel not accountable for breakage, leakage, or rust."

Process was served and the claimant appeared and filed an answer, in which he admits the shipment of the iron and the execution of the bill of lading exhibited in the record. Sufficient also appears in the record to show that the voyage was performed and that but a small portion of the iron shipped, to wit, some thirteen or fourteen thousand pounds, was ever delivered to the consignees, and that all the residue of the shipment was thrown overboard as a jettison during the voyage, which became necessary by a peril of the sea, for the safety of the other associated interests and for the preservation of the lives of those on board. Sacrificed as all that portion of the shipment was as a jettison in consequence of a peril of the sea, excepted in the bill of lading, the claimant insists that the libellants have no claim against the ship, and that libellants as the shippers of the iron must bear their own loss.

Evidence was exhibited by the claimant sufficient to show that the allegations of the answer that the iron, not delivered, was sacrificed during the voyage as a jettison in consequence of a peril of the sea are true, but the libellants allege that the iron was improperly stowed upon the deck of the vessel, and that the necessity of sacrificing it as a jettison arose solely from that fact, and that no such necessity would have arisen if it had been properly stowed under deck, as it should have been by the terms of the contract specified in the bill of lading. That the iron not delivered was stowed on deck is admitted, and it is also conceded that where goods are stowed in that way without the consent of the shipper the carrier is liable in all events if the goods are not delivered, unless he can show that the goods were of that description, which by the usage of the particular trade, are properly stowed in that way, or that the delivery was prevented by the act of God or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier and expressly excepted in the bill of lading.

Goods, though lost by the perils of the sea, if they were stowed on deck without the consent of the shipper, are not regarded as goods lost by the act of God within the meaning of the maritime law, nor are such losses regarded as losses by the perils of the sea which will excuse the carrier from delivering the goods shipped to the consignee unless it appears that the manner in which the goods were stowed is sanctioned by commercial usage, or unless it affirmatively appears that the manner of stowage did not, in any degree, contribute to the disaster; that the loss happened without any fault or negligence on the part of the carrier, and that it could not have been prevented by human skill and prudence, even if the goods had been stowed under deck, as required by the general rules of the maritime law.

Enough appears in the record to show that all the iron not delivered to the consignees was stowed on deck, and there is no proof in the case to show that the usage of the trade sanctioned such a stowage in this case, or that the manner in which it was stowed did not contribute both to the disaster and to the loss of the goods.

None of these principles are controverted by the claimant, but he insists that the iron not delivered was stowed on deck by the consent of the shippers and in pursuance of an oral agreement between the carrier and the shippers consummated before the iron was sent on board, and before the bill of lading was executed by the master. Pur-

suant to that theory testimony was offered in the District Court showing that certain conversations took place between the consignee of the bark and the agent of the shippers tending to prove that the shippers consented that the iron in question should be stowed on the deck of the vessel. Whether any express exception to the admissibility of the evidence was taken or not does not distinctly appear, but it does appear that the question whether the evidence was or was not admissible was the principle question examined by the District Court, and the one upon which the decision in the case chiefly turned. Apparently it was also the main point examined in the Circuit Court, and it is certain that it has been treated by both sides in this court as the principal issue involved in the record and in view of all the circumstances the court here decides that it must be considered that the question as to the admissibility of the evidence is now open for revision, as the decree for the libellant was equivalent to a ruling rejecting the evidence offered in defense or to a ruling granting a motion to strike it out after it had been admitted, which is a course often pursued by courts in cases where the question deserves examination. What the claimant offered to prove was that the iron was stowed on deck with the consent of the shippers, but the libellants objected to the evidence as repugnant to the contract set forth in the bill of lading, and the decree was for the libellants, which was equivalent to a decision that the evidence offered was incompetent. Dissatisfied with that decree the respondent appealed to the Circuit Court, where the decree of the District Court was affirmed, and the same party appealed from that decree and removed the cause into this court for re-examination.

Even without any further explanation it is obvious that the only question of any importance in the case is whether the evidence offered to show that the iron in question was stowed on deck with the consent of the shippers was or was not properly rejected, as it is clear if it was, that the decree must be affirmed; and it is equally clear, if it should have been admitted, that the decree must be reversed.

Different definitions of the commercial instrument, called the bill of lading, have been given by different courts and jurists, but the correct one appears to be that it is a written acknowledgment, signed by the master, that he has received the goods therein described from the shipper, to be transported on the terms therein expressed, to the described place of destination, and there to be delivered to the consignee or to the parties therein designated. Regularly the goods ought to be on board before the bill of lading is signed, but if the bill of lading, through inadvertence or otherwise, is signed before the goods are actually shipped, as if they are received on the wharf or sent to the warehouse of the carrier, or are delivered into the custody of the master or other agent of the owner or charterer of the vessel and are afterwards placed on board, as and for the goods embraced in the bill of lading, it is clear that the bill of lading will operate on these goods as between the shipper and the carrier by way of relation and estoppel, and that the rights and obligations of all concerned are the same as if the goods had been actually shipped before the bill of lading had been signed. Such an instrument is twofold in its character; that is, it is a receipt as to the quantity and description of the goods shipped, and a contract to transport and deliver the goods to the consignee or other person therein designated, and upon the terms specified in the same instrument. Beyond all doubt a bill of lading, in the usual form, is a receipt for the quantity of goods shipped and a promise to transport and deliver the same as therein stipulated. Receipts may be either a mere acknowledgment of payment or delivery, or they may also contain a contract to do something in relation to the thing delivered. In the former case, and so far as the receipt goes only to acknowledge payment or delivery, it, the receipt, is merely prima facie evidence of the fact, and not conclusive, and therefore the fact which it recites may be contradicted by oral testimony, but in so far as it is evidence of a contract between the parties it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol evidence. Text writers mention the bill of lading as an example of an instrument which partakes of a twofold character, and such commentators agree that the instrument may, as between the carrier and the shipper, be contradicted and explained in its recital that the goods were in good order and well conditioned, by showing that their internal state and condition was bad or not such as is represented in the instrument, and in like manner, in respect to any other fact which it erroneously recites, but in all other respects it is to be treated like other written contracts.

Bills of lading when signed by the master, duly executed in the usual course of business, bind the owners of the vessel if the goods were laden on board or were actually delivered into the custody of the master, but it is well settled law that the owners are not liable, if the party to whom the bill of lading was given had no goods, or the goods described in the bill of lading were never put on board or delivered into the custody of the carrier or his agent. Proof of fraud is certainly a good defence of an action claiming damages for the non-delivery of the goods, but it is settled law in this court that a clean bill of lading imports that the goods are to be safely and properly stowed under deck, and that it is the duty of the master to see that the cargo is so stowed and arranged that the different goods may not be injured by each other or

by the motion or leakage of the vessel, unless by agreement that service is to be performed by the shipper. Express contracts may be made in writing which will define the obligations and duties of the parties, but where those obligations and duties are evidenced by a clean bill of lading, that is, if the bill of lading is silent as to the mode of stowing the goods, and it contains no exceptions as to the liability of the master, except the usual one of the dangers of the sea, the law provides that the goods are to be carried under deck, unless it be shown that the usage of the particular trade takes the case out of the general rule applied in such controversies. Evidence of usage is admissible in mercantile contracts to prove that the words in which the contract is expressed, in the particular trade to which the contract refers, are used in a particular sense and different from the sense which they ordinarily import; and it is also admissible in certain cases, for the purpose of annexing incidents to the contract in matters upon which the contract is silent, but it is never admitted to make a contract or to add a new element to the terms of a contract previously made by the parties. Such evidence may be introduced to explain what is ambiguous, but it is never admissible to vary or contradict what is plain. Evidence of the kind may be admitted for the purpose of defining what is uncertain, but it is never properly admitted to alter a general rule of law, nor to make the legal rights or liabilities of the parties other or different from what they are by the common law. Cases may arise where such evidence may be admissible and material, but as none such was offered in this case it is not necessary to pursue that inquiry. Exceptions also exist to the rule that parol evidence is not admissible to vary or contradict the terms of a written instrument where it appears that the instrument was not within the statute of frauds nor under seal, as where the evidence offered tends to prove a subsequent agreement upon a new consideration. Subsequent oral agreements in respect to a prior written agreement, not falling within the statute of frauds, may have the effect to enlarge the time of performance, or may vary any other of its terms, or, if founded upon a new consideration, may waive and discharge it altogether. Verbal agreements, however, between the parties to a written contract, made before or at the time of the execution of the contract, are in general inadmissible to contradict or vary its terms or to affect its construction, as all such verbal agreements are considered as merged in the written contract.

Apply that rule to the case before the court and it is clear that the ruling of the court below was correct, as all the evidence offered consisted of conversations between the shippers and the master before or at the time the bill of lading was executed. Unless the bill of lading contains a special stipulation to that effect the master is not authorized to stow the goods sent on board as cargo on deck, as when he signs the bill of lading, if in common form, he contracts to convey the merchandise safely, in the usual mode of conveyance, which, in the absence of proof of a contrary usage in the particular trade, requires that the goods shall be safely stowed under deck; and when the master departs from that rule and stows them on deck, he cannot exempt himself or the vessel from liability, in the case of loss, by virtue of the exception, of dangers of the seas, unless the dangers were such as would have occasioned the loss even if the goods had been stowed as required by the contract of affreightment. Contracts of the master, within the scope of his authority as such, bind the vessel and give the creditor a lien upon it for his security, except for repairs and supplies purchased in the home port, and the master is responsible for the safe stowage of the cargo under deck, and if he fails to fulfill that duty he is responsible for the safety of the goods, and if they are sacrificed for the common safety the goods stowed under deck do not contribute to the loss. Ship-owners in a contract by a bill of lading for the transportation of merchandise take upon themselves the responsibilities of common carriers, and the master, as the agent of such owners, is bound to have the cargo safely secured under deck, unless he is authorized to carry the goods on deck by the usage of the particular trade or by the consent of the shipper, and if he would rely upon the latter he must take care to require that the consent shall be expressed in a form to be available as evidence under the general rules of law.

Where goods are stowed under deck the carrier is bound to prove the casualty or vis major which occasioned the loss or deterioration of the property which he undertook to transport and deliver in good condition to the consignee, and if he fails to do so, the shipper or consignee, as a general rule, is entitled to his remedy for the non-delivery of the goods. No such consequences, however follow if the goods were stowed on deck by the consent of the shipper, as in that event neither the master nor the owner is liable for any damage done to the goods by the perils of the sea or from the necessary exposure of the property, but the burden to prove such consent is upon the carrier, and he must take care that he has competent evidence to prove the fact. Parol evidence, said Mr. Justice Nelson, in the case of Creery v. Holly, is inadmissible to vary the terms or legal import of a bill of lading free of ambiguity, and it was accordingly held in that case that a clean bill of lading imports that the goods are stowed under deck, and that parol evidence that the vendor agreed that the goods should be stowed on deck could not legally be received even in an action by the vendor against the purchaser for the price of the goods which were lost in

consequence of the storage of the goods in that manner by the carrier. Even where it appeared that the shipper, or his agent who delivered the goods to the carrier, repeatedly saw them as they were stowed in that way and made no objection to their being so stowed, the Supreme Court of Maine held that the evidence of those facts was not admissible to vary the legal import of the contract of shipment; that the bill of lading being what is called a clean bill of lading, it bound the owners of the vessel to carry the goods under deck, but the court admitted that where there is a well-known usage in reference to a particular trade to carry the goods as convenience may require, either upon or under the deck, the bill of lading may import no more than that the cargo shall be carried in the usual manner. Testimony to prove a verbal agreement that the goods might be stowed on deck was offered by the defense in the case of Barber v Brice, but the court rejected the testimony, holding that the whole conversation, both before and at the time the writing was given, was merged in the written instrument, which undoubtedly is the correct rule upon the subject. Written instruments cannot be contradicted or varied by evidence of oral conversations between the parties which took place before or at the time the written instrument was executed; but in the case of a bill of lading or a charter-party, evidence of usage in a particular trade is admissible to show that certain goods in that trade may be stowed on deck as was distinctly decided in that case. But evidence of usage cannot be admitted to control or vary the positive stipulations of a bill of lading, or to substitute for the express terms of the instrument an implied agreement or usage that the carrier shall not be bound to keep, transport, and deliver the goods in good order and condition.

Remarks, it must be admitted, are found in the opinion of the court, in the case of Vernard v. Hudson, and also in the case of Sayward v. Stevens, which favor the views of the appellant, but the weight of authority and all the analogies of the rules of evidence support the conclusion of the court below, and the court here adopts that conclusion as the correct rule of law, subject to the qualifications herein expressed.

Decree affirmed.

THE GARDEN GROVE BANK v. THE HUMESTON & SHENANDOAH R'Y CO.

(67 Iowa 526; 25 N. W. 761.)

Appealed from Lucas District Court.

The plaintiff seeks to recover of the defendant the sum of $550 which it advanced upon a bill of lading issued by the defendant upon the shipment of certain walnut lumber, and which bill of lading was assigned to the plaintiff. The right of action is based upon the claim that the defendant failed to comply with its contract of shipment, and by negligence delivered the lumber to parties not authorized to receive the same, by which the plaintiff was damaged in the amount advanced, and interest. There was a trial by jury, and a verdict and judgment for the defendant. Plaintiff appeals.

ROTHROCK, J. The facts necessary to a determination of the questions of law involved in the case are not disputed. They are as follows: One Henry Zohn was engaged in buying walnut logs and walnut lumber along the line of the railroad of the defendant, and shipping the same to Chicago. About the twentieth day of August, 1881, he caused three cars to be loaded with said lumber, for shipment, at Van Wert, a station on the defendant's railroad. Zohn was indebted to Wells Bros. in the sum of $550 for this lumber, and on the twenty-third day of August, 1881, before any bill of lading was issued for the shipment of the property, Wells Bros. caused the lumber on said cars to be attached to secure their claim against Zohn. On the same day Wells Bros. and Zohn met at said station, and agreed that the bill of lading should be issued to Wells Bros. as consignors, that they should hold it as security for their claim against Zohn, and that they should take such bill of lading to the Garden Grove Bank, and draw a sufficient amount of money thereon to pay the claim of Wells Bros. The conversation in regard to this arrangement was in the presence of the station agent of the defendant, and he knew, when he issued the bill of lading, that Zohn and Wells Bros. expected and intended to use the same at the Garden Grove Bank to draw or receive money thereon. The said agent thereupon issued and delivered to Wells Bros. a bill of lading, of which the following is a copy:

"Humeston and Shenandoah R. R. Co. Bill of Lading.

"Freight Office, Van Wert, August 23, 1881.

"Received from Wells Bros., in apparent good order, by the Humeston & Shenandoah R. R. Co. the following described packages (contents and value unknown) consigned as marked and numbered in the margin, upon the terms and conditions hereinafter contained, and which are hereby made a part of this agreement, also subject to the conditions and regulations of the published tariffs in use by said railroad company, to be transported over the line of this road to Chicago station, and there delivered in like good order to the consignee or owner, at said station, or to such company or carriers (if same are to be forwarded beyond said station) whose line may be considered a part of the route, to the place of destination of said goods or packages; it being distinctly understood and agreed that the responsibility of this company as common carrier shall cease at the station where delivered or tendered

to such person or carrier; but it guaranties that the rate of freight for the transportation of said packages shall not exceed rates as specified below, and charges advanced by this company, upon the following conditions [read the conditions.] The owner or consignee to pay freight or charges as per specified rates upon the goods as they arrive. Freight carried by the company must be removed from the station during business hours on the day of its arrival, or it will be stored at the owner's risk and expense; and, in the event of its destruction or damage from any cause while in the depots of the company, either in transit, or at the terminal point, it is agreed that the company shall not be liable except as warehousemen. It is agreed, and is a part of the consideration of this agreement, that the company will not be responsible for the leakage of liquors or of liquids of any kind; breakage of glass or queensware; the injury or breakage of castings, carriages, furniture, glass show-cases, hollow-ware, looking-glasses, machinery, musical instruments of any kind, packages of eggs, or picture frames; loss of weight of coffee, or grain in bags, or rice in tierces; or for any decay of perisnable articles; nor for damage arising from effects of heat or cold; nor for loss of nuts in bags, lemons or oranges in boxes, unless covered with canvass; nor for loss or damage of hay, hemp, cotton, or any article the bulk of which renders it necessary to transport it in open cars, unless it can be shown that such loss or damage occurred through negligence or default of the agents of this company. Goods in bond subject to custom-house regulations and expenses. The company is not responsible for accidents or delays from unavoidable causes; the responsibility of this company, as carriers, to terminate on the delivery or tender of the freight as per this bill of lading to the company whose line may be considered a part of the route to the place of the destination of said goods or packages. In the event of loss of any property for which the carriers may be responsible under this bill of lading, the value or cost of the same at the point and time of shipment is to govern the settlement for the same, except the value of the article has been agreed upon with the shipper, or is determined by the classification upon which the rates are based. And in the case of loss or damage of any of the goods named in this bill of lading for which the company may be liable, it is agreed and understood that this company may have the benefit of any insurance effected by or on account of the owner of said goods. This receipt to be presented without erasure or alteration.

"* * * Freight to be paid upon the weight by the company's scales but no single shipment to be rated at less than 100 lbs. Car-load freight subject to the current rules as to the minimum and maximum weights. Charges advanced, (if any.) This bill of lading to be surrendered before property is delivered.

"S. O. Campbell, Freight Agent."

This bill of lading was issued and delivered on the evening of the twenty-third day of August. On the next morning Wells Bros. and Zohn appeared at the Garden Grove Bank, and requested the cashier to advance them $550 on said bill of lading. He consented to do so. Thereupon Wells Bros. assigned the bill of lading to Zohn, and he assigned the same to C. S. Stearns, cashier of the bank, and at the same time Zohn executed a draft of $550 in favor of said cashier to one J. H. Wallace of Chicago, and the bill of lading, and draft attached thereto, were delivered to the cashier, in consideration whereof he advanced and paid for said bank to Wells Bros. the sum of $550.

It will be observed that there is no person named as consignee in the bill of lading. The space under the head of "Marks and Consignees" is left blank. The defendant introduced parol evidence by which it was shown that, when the bill of lading was issued, the name of the consignee was intentionally omitted, because Zohn had not then determined to whom he would ship the lumber. He did not intend to return to Van Wert, and he directed the station agent to ship to Stokes & Son, of Chicago, unless he received other instructions from him by telegraph. No such instructions were received, and, on the next day, being the same day the plaintiff advanced the money on the bill of lading, the agent of the railroad company shipped the lumber consigned to Stokes & Son, to whom the same was delivered, and it was shipped immediately to Canada. The plaintiff forwarded the bill of lading and draft to Chicago and demanded the lumber of the C., B. & Q. R. Co., the railroad connecting with defendant, and delivery was refused, because a delivery had already been made to Stokes & Son. Wells Bros. knew of the arrangement between the station agent and Zohn, that the lumber was to be consigned to Stokes & Son unless Zohn should name another consignee; but this arrangement was wholly unknown to the plaintiff until it was too late to prevent the delivery of the lumber to Stokes & Son.

The plaintiff objected to the parol evidence on the ground that it contradicted the written contract as evidenced by the bill of lading. The objection was over-

Marks and Consignees.	Car No.	Description of Articles given by Consignee	Weight, Subject to correction.
	560 A. & N.....	Walnut lumber.....	22,000
	1006 K. S. J. & C. B...	" "	22,000
	9450 S.	" "	22,000

ruled and the evidence received, and the court instructed the jury as follows: "(4) You are instructed that the bill of lading, as shown upon its face, does not name a consignee, and does not express the full agreement between the parties; and you are instructed that if Zohn and Wells Bros. consented that at the time the way-bills should be made to Stokes & Son, unless the agent should be advised to the contrary, then it was proper for the said agent to ship said lumber to Stokes & Son, and your yerdict should be for the defendant. But if there was no such agreement, then the bill of lading is a contract between the parties thereto, whereby said defendant agreed to transfer said lumber to Chicago to Wells Bros. or their assignee. The burden of proof is upon the defendant to establish said agreement. (5) If you find that Wells Bros. and Zohn went to the bank of plaintiff, in order to get money so that Wells Bros.' claim could be satisfied, and you further find that Wells Bros. assigned their interest to said Henry Zohn, that then Zohn drew a draft on Chicago upon said Wallace, which said draft was cashed by the plaintiff, and Zohn then assigned and delivered the bill of lading to the plaintiff, then you are instructed that it was the duty of the plaintiffs, in order to protect their rights, to notify the defendant that they were the owners of said bill of lading; and if you find that the defendant shipped said lumber to Stokes & Son, and said consignment was with the consent of Zohn, and he was satisfied with such assignment, and you further find that the defendant did not know that said bill of lading had been assigned to plaintiff, and had no knowledge of plaintiff's rights, then the plaintiff cannot recover in this action, and your verdict should be for the defendant."

These instructions are complained of by counsel for appellant, and, in connection with the admission of the parol evidence, they present the questions which, in our opinion, are decisive of the rights of the parties. A bill of lading is both a receipt and a contract, and in its character as a contract it is no more open to explanation or alteration by parol than other written contracts. This proposition seems to be conceded by counsel for appellee; and the court below, in the fourth instruction cited above, appears to have been of the opinion that, as the contract did not name any one as consignee, it shows upon its face that it does not express the full agreement between the parties, and the parol evidence was doubtless admitted upon the ground that the contract was partly in writing and partly in parol. It is, however, conceded in the same instruction that, if it was not agreed by parol that Zohn should designate the consignee, then the bill of lading is a contract whereby the defendant agreed to transfer the lumber to Chicago to Wells Bros. or their assignees. We think the proposition that the bill of lading shows on its face that it is an obligation to convey the property to Chicago and deliver to Wells Bros., or the assignees, is correct, and that it is a complete and valid contract not susceptible of explanation by parol, notwithstanding the space left in the instrument for the name of the consignee does not contain the name of any person. It was an obligation to deliver the goods to Chicago to the "consignee or owner." Wells & Co., according to the contract, were consignors, consignees, and owners. In Chandler v. Sprague, 5 Metc., 306, it is said: "Ordinarily the name of a consignee is inserted, and then such consignee or his indorsee may receive the goods and acquire a special property in them. Sometimes the shipper or consignor is himself named as consignee, and then the engagement of the ship-owner or master is to deliver them to him or his assigns. Sometimes no person is named; the name of the consignee being left blank, which is understood to import an engagement on the part of the master to deliver the goods to the person to whom the shipper shall order the delivery, or to the assignee of such person"; citing Abb. Shipp., (4th Amer. Ed.,) 215. See, also, City Bank v. Railroad Co., 44 N. Y. 136; Low v. De Wolf, 8 Pick., 101; Glidden v. Lucas, 7 Cal. 26. In Hutchinson on Carriers, § 134, it is said: "When there has been no agreement to ship the goods which will make the delivery of them to the carrier a delivery to the consignee, and vest the property in him, the shipper may, even after the delivery to the carrier, and after the bill of lading has been signed and delivered, alter their destination, and direct their delivery to another consignee, unless the bill of lading has been forwarded to the consignee first named, or to some one for his use. [Citing Blanchard v. Page, 8 Gray, 285; Mitchell v. Ede, 11 Adol. & E., 888; and other cases.] But, after the carrier or his agent has given one bill of lading or receipt for the goods, he cannot give another, unless the first and all duplicates of the same have been returned to him."

The reason of this rule is obvious. An assignment of a bill of lading operates as a transfer of the title to the property therein described. As is said in Meyerstein v. Barber, L. R., 2 C. P., 45: "While the goods are afloat it is common knowledge, and I would not think of citing authorities to prove it, that the bill of lading represents them; and this indorsement and delivery of the bill of lading, while the ship is at sea, operates exactly the same as the delivery of the goods themselves to the assignee after the ship's arrival would do." Now, it is perfectly manifest that if a carrier may issue a second bill of lading without requiring the return of the first, no reliance can be placed upon any such an instrument by those dealing with the consignor with reference to the property. And the same consequences would ensue if he should be permitted,

without the surrender of a bill of lading to ship the property to any one other than that named in the instrument. In view of the well-known fact that the live-stock, grain, and other products of this country are paid for upon advancements made upon bills of lading, just as was done in this case, the interests of commerce seem to require that the rule that no alteration shall be made in contracts of this character without the production of the original should be strictly enforced. The defendant appears to have had due regard to this rule when preparing its blank bills of lading. The last provision therein contained, to-wit, "This bill of lading to be surrendered before property is delivered," was printed across the face of the instrument. It is claimed by counsel that this part of the contract was no part of the mutual obligation, but that it was a provision for the protection of the defendant which it might well waive. It is true, it could, as it did in this case, deliver the property without the surrender of the bill of lading. But it did so at its peril. This bill of lading was issued with a full knowledge that it was intended to procure an advancement of money upon it; but, whether the agent had such knowledge or not, third persons dealing with Wells & Co. were justified in believing that their assignee would receive the property upon the surrender of the instrument.

It is claimed, however, and the court below seems to have been of the opinion, that because a bill of lading is not negotiable the defendant had the right to ship the property to Stokes & Co. by the direction of Zohn, and is not liable to the plaintiff because it had no notice that the bill of lading had been assigned to plaintiff. It is true that a bill of lading is not negotiable. It is, however, assignable, and the assignor may maintain an action thereon in his own name. It possesses attributes not common to the ordinary non-negotiable instruments enumerated in section 2084 of the Code. The instruments there enumerated are obligations for the payment of money, or promises to discharge obligations or debts by the delivery of property. Such obligations may be assigned, but they are "subject to any defense or counterclaim which the maker or debtor had against any assignor thereof before notice of his assignments."

It is claimed that the defendant, under this statute, may avail itself of any defense it could have interposed against Zohn, because he was the assignor of the plaintiff. A bill of lading is a different character of instrument. It stands for and represents the property, and an assignment of it passes the title to the property. When issued, it can only be altered or changed, as we have seen, by a surrender of the original, and the contract is that the bill of lading must be surrendered before the property is delivered.

This is a plain contract, which persons dealing with the consignor are justified in believing will be performed. They have also the undoubted right to rely upon the rule that no change can be made in the contract which is issued and sent out into the commercial world, as every business man knows, for the very purpose of using it as the means by which to procure money to move the produce of the country to market. If bankers cannot rely upon bills of lading as being what they plainly import, and in order to protect themselves against private oral agreements between the carrier and the shipper, varying and contradicting the bill of lading, must give notice to the carrier of rights acquired in the property as assignees, it would very seriously embarrass the business interests of the country, and would produce a state of affairs that we think is neither warranted by sound legal principles nor by any consideration of public policy.

We think that the parol evidence should not have been admitted, and that the instructions above set out are erroneous.

Reversed.

O'BRIEN vs. GILCHRIST.

(34 Me. 554.)

On exceptions from the District Court, Rice, J.

The defendant was master of the schooner Grecian. She was lying at the port of King William in Virginia. The plaintiff shipped on board of her a quantity of oak timber to go on freight to East Thomaston in Maine. The bill of lading, signed by the defendant, contained the following expressions:—

"Shipped in good order and condition, by Seth O'Brien, in and upon the good schooner called the Grecian, whereof Cornelius Gilchrist is master for the present voyage, and now lying in the port of King William, and bound for East Thomaston, viz.:—

"Three hundred seventy-eight pieces of white oak ship timber, amounting to one hundred and thirty-four tons and thirty-two feet, more or less, and are to be delivered in the like good order and condition, at the said port of East Thomaston," &c.

The timber delivered at East Thomaston was but 351 pieces amounting to one hundred and twenty-three tons, making a deficit from the bill of lading of eleven tons and thirty-two feet. This controversy relates to that deficiency.

The defendant at the trial offered several witnesses to prove that there were not so many pieces nor so many tons received on board as is described in the bill of lading. The plaintiff objected to contradicting the bill of lading by parol, but the Court held that, so far as the bill of lading was in the nature of a receipt, it was very strong prima facie evidence of the truth of its recitals, but not conclusive; and it was therefore, as to the numbers and quantity, liable

to be contradicted and overcome by oral testimony, and that as between the parties, all relevant evidence tending to show that the defendant was induced by misrepresentation or mutual mistake, to sign a bill of lading reciting a larger quantity tnan had in fact been delivered and received, would be proper for the consideration of the jury.

The Judge therefore admitted the witnesses. Some of them testified, that all the timber received at Virginia was delivered at East Thomaston; that the plaintiff, after the timber had been taken on board, brought the bill of lading to the defendant for signature; that the defendant objected to it, because it did not agree with the account which he had taken as to the amount, and because it contained more timber than had been delivered;—that thereupon the plaintiff inserted the words "more or less"; that the defendant then further objected that these words would be held to apply, not to the number of pieces of timber, but only to the number of tons; that the plaintiff then agreed that they should apply as well to the number of pieces as to the number of tons, and that thereupon the plaintiff signed the bill and immediately sailed upon the voyage.

This testimony was objected to. There was other evidence relative to the same matters.

The Judge instructed the jury,—1st, that the bill of lading was an instrument possessing the characteristics of a contract and of a receipt; that, so far as it acknowledges the receipt of a certain number of sticks, amounting to a certain number of tons, it is in the nature of a receipt, and, though evidence of a high character of the truth of its recitals, yet is not conclusive on those points, but, like other receipts, is open to explanation or contradiction by other testimony;—2d, that, while, so far as it was an agreement to transport and deliver the timber actually received, it was in the nature of a contract, and being in writing, could not be explained or controlled by oral testimony;—3d, that if the jury were satisfied that, by the mutual mistake of the parties, the bill of lading recites a larger number of sticks of timber than was actually delivered to the defendant in Virginia, he would not be liable for that excess, but only liable for the safe carriage and delivery of so much timber as was actually delivered to him by the plaintiff;—4th, that the words "more or less," by legal construction of the instrument, applied only to the number of tons and not to the number of sticks, and that the evidence, as to what was said between the parties relative to the meaning that should attach to those words ("more or less,") should be entirely disregarded by the jury, so far as it was designed to control the legal construction of the instrument, and could only be considered by them, as it should bear upon the question, whether the recitals as to the number of sticks of timber were or not erroneous.

The verdict was for the defendant, and the plaintiff excepted.

APPLETON, J. That a receipt may be contradicted by parol evidence, has long been considered well settled law. The bill of lading, so far as regards the condition of the goods shipped, is prima facie evidence of a high nature, but not conclusive. Barrett v. Rogers, 7 Mass. 297. The master of a vessel is not authorized to open the packages to ascertain their condition. The principles of public policy and the convenience of transportation forbid that boxes, bales, &c., should be opened and inspected before receipted for by carriers. They therefore, may show that they were damaged before coming into their possession. Gowdy v. Lyon, 9 B. Mun. 113. The same rule of law has been applied to the quantity of goods therein stated as having been received for transportation. In Bates v. Todd, 1 M. & R. 106, Tindall, C. J., said, that he was of opinion that, as between the original parties, the bill of lading is merely a receipt liable to be opened by the evidence of the real facts and left the question for the jury to determine what number of bags of coffee had been shipped. In Berkely v. Watting, 34 E. C. L. 22, it was held, that the defendants were not estopped by the bill of lading to show that goods purporting to be, were not in fact, shipped. In Dickerson v. Seelye, 21 Barb. 102, Edmonds, J., in delivering the opinion of the Court, says, "as between the shipper of the goods and the owner of the vessel, a bill of lading may be explained so far as it is a receipt; that is, as to the quantity of goods shipped and the like; but as between the owner of the vessel and an assignee for a valuable consideration paid on the strength of the bill of lading, it may not be explained." What may be the rights of an assignee under such circumstances it is not necessary to consider or determine here, as that question does not arise in the present case.

In Wayland v. Mosely, 5 Ala. 430, the Court say, "that a bill of lading in its character is twofold, viz.; a receipt and a contract to carry and deliver goods. So far as it acknowledges the receipt of goods and states their condition, &c., it may be contradicted, but in other respects it is treated like other written contracts." In May v. Babcock, 4 Ohio, 334, the language of the Court is, that "a bill of lading is a contract including a receipt." The same doctrine in New York is likewise fully affirmed in Walfe v. Myers, 3 Sand. 7. The best elementary writers also concur in this view of the law. 1 Greenl. Ev. § 305; Abbott on Shipping, 324. The evidence, so far as relates to this question, was legally admissible and the instructions of the Court in relation thereto were in conformity with well established principles.

The evidence offered by way of giving a construction to the meaning of the words "more or less" in the bill of lading, was most clearly inadmissible. The Court, how-

ever, directed the jury entirely to disregard all evidence, which was designed to control the legal construction of the instrument, and it is to be presumed that the jury in rendering their verdict followed the instructions of the Court.

At the same time, the construction of these words, as given in the charge of the Judge, was most favorable to the plaintiff.

Exceptions overruled. Judgment on the verdict.

SHEPLEY, C. J., and TENNEY and HOWARD, J. J., concurred.

POLLARD v. VINTON.
(105 U. S. 7.)

Error to the Circuit Court of the United States for the District of Kentucky.

The facts are stated in the opinion of the court.

MR. JUSTICE MILLER delivered the opinion of the court.

The defendant in error, who was also defendant below, was the owner of a steamboat running between the cities of Memphis, on the Mississippi River, and Cincinnati, on the Ohio River, and is sued on a bill of lading for the non-delivery at Cincinnati of one hundred and fifty bales of cotton, according to its terms. The bill of lading was in the usual form, and signed by E. D. Cobb & Co., who were the general agents of Vinton for shipping purposes at Memphis, and was delivered to Dickinson, Williams, & Co., at that place. They immediately drew a draft on the plaintiffs in New York, payable at sight, for $5,900, to which they attached the bill of lading, which draft was duly accepted and paid. No cotton was shipped on the steamboat, or delivered at its wharf or to its agents for shipment, as stated in the bill of lading, the statement to that effect being untrue.

These facts being undisputed, as they are found in the bill of exceptions, the court instructed the jury to find a verdict for the defendant, which was done, and judgment rendered accordingly. This instruction is the error complained of by the plaintiffs, who sued out the present writ.

A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without indorsement, and it is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into hands of persons who have innocently paid value for it. The doctrine of bona fide purchasers only applies to it in a limited sense.

It is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgement of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver.

To these elementary truths the reply is that the agent of defendant has acknowledged in writing the receipt of the goods, and promised for him that they should be safely delivered, and that the principal cannot repudiate the act of his agent in this matter, because it was within the scope of his employment.

It will probably be conceded that the effect of the bill of lading and its binding force on the defendant is no stronger than if signed by himself as master of his own vessel. In such case we think the proposition cannot be successfully disputed that the person to whom such a bill of lading was first delivered cannot hold the signer responsible for goods not received by the carrier.

Counsel for plaintiffs, however, say that in the hands of subsequent holders of such a bill of lading, who have paid value for it in good faith, the owner of the vessel is estopped by the policy of the law from denying what he has signed his name to and set afloat in the public market. However this may be, the plaintiffs' counsel rest their case on the doctrine of agency, holding that defendant is absolutely responsible for the false representations of his agent in the bill of lading.

But if we can suppose there was testimony from which the jury might have inferred either mistake or bad faith on the part of Cobb & Co., we are of opinion that Vinton, the ship-owner, is not liable for the false statement in the bill of lading, because the transaction was not within the scope of their authority.

If we look to the evidence of the extent of their authority, as found in the bill of exceptions, it is this short sentence:—

"During the month of December, 1873" (the date of the bill of lading), "the firm of E. D. Cobb & Co., of Memphis, Tennessee, were authorized agents of the defendant at Memphis, with power to solicit freights and to execute and deliver to shippers bills of lading for freight shipped on defendant's steamboat, 'Ben Franklin.'"

This authority to execute and deliver bills of lading has two limitations; namely, they could only be delivered to shippers, and they could only be delivered for freight shipped on the steamboat.

Before the power to make and deliver a bill of lading could arise, some person must have shipped goods on the vessel. Only

then could there be a shipper, and only then could there be goods shipped. In saying this we do not mean, that the goods must have been actually placed on the deck of the vessel. If they came within the control and custody of the officers of the boat for the purpose of shipment, the contract of carriage had commenced, and the evidence of it in the form of a bill of lading would be binding. But without such a delivery there was no contract of carrying, and the agents of defendant had no authority to make one.

They had no authority to sell cotton and contract for delivery. They had no authority to sell bills of lading. They had no power to execute these instruments and go out and sell them to purchasers. No man had a right to buy such a bill of lading of them who had not delivered them the goods to be shipped.

Such is not only the necessary inference from the definition of the authority under which they acted, as found in the bill of exceptions, but such would be the legal implication if their relation to defendant had been stated in more general terms. The result would have been the same if it had been merely stated that they were the shipping agents of the owner of the vessel at that point.

It appears to us that this proposition was distinctly adjudged by this court in the case of Schooner Freeman v. Buckingham, 18 How. 182.

In that case the schooner was libelled in admiralty for failing to deliver flour for which the master had given two bills of lading, certifying that it had been delivered on board the vessel at Cleveland, to be carried to Buffalo and safely delivered. The libellants, who resided in the city of New York, had advanced money to the consignee on these bills of lading, which were delivered to them. It turned out that no such flour had ever been shipped, and that the master had been induced, by the fraudulent orders of a person in control of the vessel at the time, to make and deliver the bills of lading to him, and that he had sold the drafts on which libellants had paid the money and received the bills of lading in good faith.

A question arose how far the claimant, who was the real owner, or general owner, of the vessel could be bound by the acts of the master appointed by one to whom he had confided the control of the vessel; and the court held that, having consented to this delivery of the vessel, he was bound by all the acts by which a master could lawfully bind a vessel or its owner.

The court, in further discussing the question, says: "Even if the master had been appointed by the claimant, a wilful fraud committed by him on a third person by signing false bills of lading would not be within his agency. If the signer of a bill of lading was not the master of the vessel, no one would suppose the vessel bound; and the reason is, because the bill is signed by one not in privity with the owner. But the same reason applies to a signature made by a master out of the course of his employment. The taker assumes the risk, not only of the genuineness of the signature, and of the fact that the signer was master of the vessel, but also of the apparent authority of the master to issue the bill of lading. We say the apparent authority, because any secret instructions by the owner, inconsistent with the authority with which the master appears to be clothed, would not affect third persons. But the master of a vessel has no more apparent authority to sign bills of lading than he has to sign bills of sale of the ship. He has an apparent authority, if the ship be a general one, to sign bills of lading for cargo actually shipped; and he has also authority to sign a bill of sale of the ship when, in case of disaster, his power of sale arises. But the authority in each case arises out of and depends upon a particular state of facts. It is not an unlimited authority in one case more than in the other; and his act in either case does not bind the owner even in favor of an innocent purchaser, if the facts on which his power depended did not exist; and it is incumbent upon those who are about to change their condition upon the faith of his authority, to ascertain the existence of all the facts upon which his authority depends."

The court cites as settling the law in this way in England the cases of Grant v. Norway, 10 C. B. 665, Coleman v. Riches, 16 id. 104, Hubbersty v. Ward, 8 Exch. Rep. 330, and Walter v. Brewer, 11 Mass. 99. See also McLean & Hope v. Fleming, Law Rep. 2 H. of L. (Sc.) 128; Maclachlan's Law of Merchant Shipping, 368, 369.

It seems clear that the authority of E. D. Cobb & Co., as shipping agents, cannot be greater than that of the master of a vessel transacting business by his ship in all the ports of the world.

And we are unable to see why this case is not conclusive of the one before us, unless we are prepared to overrule it squarely. The very questions of the power of the agent to bind the owner by a bill of lading for goods never received, and of the effect of such a bill of lading as to innocent purchasers without notice, were discussed and were properly in the case, and were decided adversely to the principles on which plaintiffs' counsel insist in this case. Numerous other cases are cited in the brief of counsel in support of these views, but we deem it unnecessary to give them more special notice.

The case of New York & New Haven Railroad Co. v. Schuyler (34 N. Y. 30) is much relied on by counsel as opposed to this principle.

Whatever may be the true rule which characterizes actions of officers of a corporation who are placed in control as the governing force of the corporation, which actions are at once a fraud on the corporation and the parties with whom they deal,

and how far courts may yet decide to hold the corporations liable for such exercise of power by their officers, they can have no controlling influence over cases like the present. In the one before us it is a question of pure agency, and depends solely on the power confided to the agent.

In the other case the officer is the corporation for many purposes. Certainly a corporation can be charged with no intelligent action, or with entertaining any purpose, or committing any fraud, except as this intelligence, this purpose, this fraud, is evidenced by the actions of its officers. And while it may be conceded that for many purposes they are agents, and are to be treated as the agents of the corporation or of the corporators, it is also true that for some purposes they are the corporation, and their acts as such officers are its acts.

We do not think that case presents a rule for this case.

Judgment affirmed.

SHAW vs. RAILROAD COMPANY.

(101 U. S. 557.)

Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This is an action of replevin brought by the Merchants' National Bank of St. Louis, Missouri, against Shaw & Esrey, of Philadelphia, Pennsylvania, to recover possession of certain cotton, marked "W D I." One hundred and forty-one bales thereof having been taken possession of by the marshal were returned to the defendants upon their entering into the proper bond. On Nov. 11, 1874, Norvell & Co., of St. Louis, sold to the bank their draft for $11,947.43 on M. Kuhn & Brother, of Philadelphia, and, as collateral security for the payment thereof indorsed in blank and delivered to the bank an original bill of lading for one hundred and seventy bales of cotton that day shipped to the last-named city. The duplicate bill of lading was on the same day forwarded to Kuhn & Brother by Norvell & Co. The Merchants' Bank forwarded the draft, with the bill of lading thereto attached, to the Bank of North America. On November 14, the last-named bank sent the draft—the original bill of lading still being attached thereto—to Kuhn & Brother by its messenger for acceptance. The messenger presented the draft and bill to one of the members of that firm, who accepted the former, but, without being detected, substituted the duplicate for the original bill of lading.

On the day upon which this transaction occurred, Kuhn & Brother indorsed the original bill of lading to Miller & Brother, and received thereon an advance of $8,500. Within a few days afterwards, the cotton, or rather, that portion of it which is in controversy, was, through the agency of a broker, sold by sample with the approval of Kuhn & Brother to the defendants, who were manufacturers at Chester, Pennsylvania. The bill of lading, having been deposited on the same day with the North Pennsylvania Railroad Company, at whose depot the cotton was expected to arrive, it was on its arrival delivered to the defendants.

The fact that the Bank of North America held the duplicate instead of the original bill of lading was discovered for the first time on the 9th of December, by the president of the plaintiff, who had gone to Philadelphia in consequence of the failure of Kuhn & Brother and the protest of the draft.

The defendants below contended that the bill of lading was negotiable in the ordinary sense of that word; that Miller & Brother had purchased it for value in the usual course of business, and that they thereby had acquired a valid title to the cotton, which was not impaired by proof that Kuhn & Brother had fraudulently got possession of the bill; but the court left it to the jury to determine,—

1st, Whether there was any negligence of the plaintiff or its agents in parting with possession of the bill of lading.

2d, Whether Miller & Brother knew any fact or facts from which they had reason to believe that the bill of lading was held to secure payment of an outstanding draft.

The jury having found the first question in the negative and the second in the affirmative, further found "the value of the goods eloigned" to be $7,015.97, assessed the plaintiff's damages at that sum with costs, for which amount the court entered a judgment. Shaw & Ersey thereupon sued out this writ of error.

The remaining facts are stated in the opinion of the court.

MR. JUSTICE STRONG delivered the opinion of the court.

The defendants below, now plaintiffs in error, bought the cotton from Miller & Brother by sample, through a cotton broker. No bill of lading or other written evidence of title in their vendors was exhibited to them. Hence, they can have no other or better title than their vendors had.

The inquiry, therefore, is, what title had Miller & Brother as against the bank, which confessedly was the owner, and which is still the owner, unless it has lost its ownership by the fraudulent act of Kuhn & Brother. The cotton was represented by the bill of lading given to Norvell & Co., at St. Louis, and by them indorsed to the bank, to secure the payment of an accompanying discounted time-draft. That indorsement vested in the bank the title to the cotton, as well as to the contract. While it there continued, and during the transit of the cotton from St. Louis to Philadelphia, the endorsed bill of lading was stolen by one of the firm of Kuhn & Brother, and by them indorsed over to Miller & Brother, for an advance of $8,500. The jury has found, however, that

there was no negligence of the bank, or of its agents, in parting with possession of the bill of lading, and that Miller & Brother knew facts from which they had reason to believe it was held to secure the payment of an outstanding draft; in other words, that Kuhn & Brother were not the lawful owners of it, and had no right to dispose of it.

It is therefore to be determined whether Miller & Brother, by taking the bill of lading from Kuhn & Brother under these circumstances, acquired thereby a good title to the cotton as against the bank.

In considering this question, it does not appear to us necessary to inquire whether the effect of the bill of lading in the hands of Miller & Brother is to be determined by the law of Missouri, where the bill was given, or by the law of Pennsylvania, where the cotton was delivered. The statutes of both States enact that bills of lading shall be negotiable by indorsement and delivery. The statute of Pennsylvania declares simply, they "shall be negotiable and may be transferred by indorsement and delivery;" while that of Missouri enacts that "they shall be negotiable by written indorsement thereon and delivery, in the same manner as bills of exchange and promissory notes." There is no material difference between these provisions. Both statutes prescribe the manner of negotiation; i. e., by indorsement and delivery. Neither undertakes to define the effect of such a transfer.

We must, therefore, look outside of the statutes to learn what they mean by declaring such instruments negotiable. What is negotiability? It is a technical term derived from the usage of merchants and bankers, in transferring, primarily, bills of exchange and, afterwards, promissory notes. At common law no contract was assignable, so as to give to an assignee a right to enforce it by suit in his own name. To this rule bills of exchange and promissory notes, payable to order or bearer, have been admitted exceptions, made such by the adoption of the law merchant. They may be transferred by indorsement and delivery, and such a transfer is called negotiation. It is a mercantile business transaction, and the capability of being thus transferred, so as to give to the indorsee a right to sue on the contract in his own name, is what constitutes negotiability. The term "negotiable" expresses, at least primarily, this mode and effect of a transfer.

In regard to bills and notes, certain other consequences generally, though not always, follow. Such as a liability of the indorser, if demand be duly made of the acceptor or maker, and seasonable notice of his default be given. So if the indorsement be made for value to a bona fide holder, before the maturity of the bill or note, in due course of business, the maker or acceptor cannot set up against the indorsee any defence which might have been set up against the payee, had the bill or note remained in his hands.

So, also, if a note or bill of exchange be indorsed in blank, if payable to order, or if it be payable to bearer, and therefore negotiable by delivery alone, and then be lost or stolen, a bona fide purchaser for value paid acquires title to it, even as against the true owner. This is an exception from the ordinary rule respecting personal property. But none of these consequences are necessary attendants or constituents of negotiability, or negotiation. That may exist without them. A bill or note past due is negotiable, if it be payable to order, or bearer, but its indorsement or delivery does not cut off the defences of the maker or acceptor against it, nor create such a contract as results from an indorsement before maturity, and it does not give to the purchaser of a lost or stolen bill the rights of the real owner.

It does not necessarily follow, therefore, that because a statute has made bills of lading negotiable by indorsement and delivery, all these consequences of an indorsement and delivery of bills and notes before maturity ensue or are intended to result from such negotiation.

Bills of exchange and promissory notes are exceptional in their character. They are representatives of money, circulating in the commercial world as evidence of money, "of which any person in lawful possession may avail himself to pay debts or make purchases or make remittances of money from one country to another, or to remote places in the same country. Hence, as said by Story, J., it has become a general rule of the commercial world to hold bills of exchange, as in some sort, sacred instrument in favor of bona fide holders for a valuable consideration without notice." Without such a holding they could not perform their peculiar functions. It is for this reason it is held that if a bill or note, endorsed in blank or payable to bearer, be lost or stolen, and be purchased from the finder or thief, without any knowledge of want of ownership in the vendor, the bona fide purchaser may hold it against the true owner. He may hold it though he took it negligently, and when there were suspicious circumstances attending the transfer. Nothing short of actual or constructive notice that the instrument is not the property of the person who offers to sell it; that is, nothing short of mala fides will defeat his right. The rule is the same as that which protects the bona fide indorser of a bill or note purchased for value from the true owner. The purchaser is not bound to look beyond the instrument. Goodman v. Harvey, 4 Ad. & E. 870; Goodman v. Simonds, 20 How. 343; Murray v. Lardner, 2 Wall. 110; Matthews v. Poythress, 4 Ga. 287. The rule was first applied to the case of a lost bank-note (Miller v. Race, 1 Burr. 452), and put upon the ground that the interests of trade, the usual course of business, and the fact that bank-notes pass from hand to hand as coin, require it. It was subsequently held applicable to mer-

chants' drafts, and in Peacock v. Rhodes (2 Doug. 633), to bills and notes, as coming within the same reason.

The reason can have no application to the case of a lost or stolen bill of lading. The function of that instrument is entirely different from that of a bill or note. It is not a representative of money, used for transmission of money, or for the payment of debts or for purchases. It does not pass from hand to hand as bank-notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it,—a representative of those goods. But if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a bona fide purchaser for value, will divest the ownership of the person who lost them, or from whom they were stolen. Why then should the sale of the symbol or mere representative of the goods have such an effect? It may be that the true owner by his negligence or carelessness may have put it in the power of a finder or thief to occupy ostensibly the position of a true owner, and his carelessness may estop him from asserting his right against a purchaser who has been misled to his hurt by that carelessness. But the present is no such case. It is established by the verdict of the jury that the bank did not lose its possession of the bill of lading negligently. There is no estoppel, therefore, against the bank's right.

Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable in the same manner as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them in all respects on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange if not impossible. Such as the liability of indorsers, the duty of demand ad diem, notice on non-delivery by the carrier, &c., or the loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement. No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express. Especially is so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange not to be inferred from words that can be fully satisfied without it. The law has most carefully protected the ownership of personal property, other than money, against misappropriation by others than the owner, even when it is out of his possession. This protection would be largely withdrawn if the misappropriation of its symbol or representative could avail to defeat the ownership, even when the person who claims under a misappropriation had reason to believe that the person from whom he took the property had no right to it.

We think, therefore, that the rule asserted in Goodman v. Harvey, Goodman v. Simonds, Murray v. Lardner (supra), and in Phelan v. Moss (67 Pa. St. 59), is not applicable to a stolen bill of lading. At least the purchaser of such a bill, with reason to believe that his vendor was not the owner of the bill, or that it was held to secure the payment of an outstanding draft, is not a bona fide purchaser, and he is not entitled to hold the merchandise covered by the bill against its true owner. In the present case there was more than mere negligence on the part of Miller & Brother, more than mere reason for suspicion. There was reason to believe Kuhn & Brother had no right to negotiate the bill. This falls very little, if any, short of knowledge. It may fairly be assumed that one who has reason to believe a fact exists, knows it exists. Certainly, if he be a reasonable being.

This disposes of the principal objections urged against the charge given to the jury. They are not sustained. The other assignments of error are of little importance. We cannot say there was no evidence in the case to justify a submission to the jury of the question whether Miller & Brother knew any fact or facts from which they had reason to believe that the bill of lading was held to secure payment of an outstanding draft. It does not appear that we have before us all the evidence that was given, but if we have, there is enough to warrant a submission of that question.

The exceptions to the admission of testimony, and to the cross-examination of Andrew H. Miller, are not of sufficient importance, even if they could be sustained, to justify our reversing the judgment. Nor are we convinced that they exhibit any error.

There was undoubtedly a mistake in entering the verdict. It was a mistake of the clerk in using a superfluous word. The jury found a general verdict for the plaintiff. But they found the value of the goods "eloigned" to have been $7,015.97. The word "eloigned" was inadvertently used, and it might have been stricken out. It should have been, and it may be here. The judgment was entered properly. As the verdict was amendable in the court below, we will regard the amendment as made. It would be quite inadmissible to send the

case back for another trial because of such a verbal mistake.

Judgment affirmed.

NATIONAL BANK OF COMMERCE vs. CHICAGO, B. & N. R. Co. SAME vs. WISCONSIN CENT. RY. CO. CHICAGO, B. & N. R. CO. vs. L. T. SOWLE ELEVATOR CO. WISCONSIN CENT. RY. CO. vs. SAME.

(44 Minn. 224, 46 N. W. 342, 560.)

Appeal from district court, Hennepin county; Lochren and Hooker, Judges.

MITCHELL, J. All of these actions grew out of the same transaction, and involve the same state of facts. They were all determined in the court below upon the same point, viz., the delivery by the defendant elevator company, as vendor, to Moak & Co., as vendees, of certain wheat, the value of which is the subject of the actions. All four appeals may therefore for convenience be considered together.

The first and main question to be considered is whether there had been such a delivery of the wheat in question by the elevator company to Moak & Co. as to pass the title absolutely to the latter. The undisputed facts are substantially these: The defendant elevator company, which appears to have been in the business of buying, selling, and shipping grain, owned and operated a grain elevator in Minneapolis. There were three tracks from the Manitoba Railroad to this elevator, designed for the use of the elevator company in its business. One of these ran through the elevator, and was on the ground of the elevator company. The other two, outside the elevator, belonged to the Manitoba Company, which acted as agent of the other railway companies, in switching all their cars to and from the elevator, for which they charged a certain sum per car. The same person, one Dudgeon, acted as the agent of all three railway companies. The two outside tracks referred to were used exclusively for the business of the elevator, unless some special emergency temporarily required some other use. The usual and invariable course of business between the elevator company and the railway companies, as to all cars loaded out of the elevator and placed on these tracks, had been for the elevator company to "card" the cars and give the railway agent the "switch bills" or "shipping orders," and without such switching orders from the elevator company the agent never removed the cars from the Manitoba tracks. This had been the course of business as to all shipments by the elevator company for Moak & Co., the former giving the railway agent a "switch bill," after Moak & Co. had paid for the grain. The elevator company had made certain executory contracts with Moak & Co. for the sale of large quantities of wheat of a specified grade. By the express terms of these contracts, the sales were to be for cash on delivery of the wheat, free on board the cars at the elevator. Large deliveries had already been made on these contracts, in all of which the terms concerning cash payment on delivery had been strictly insisted upon and enforced.

On the occasion now under consideration, Moak & Co. notified the elevator company that they desired to ship four cars of the wheat contracted for,—two by each of the railway companies, parties to these actions. Thereupon the elevator company ordered the four cars—two of each company—to be switched into its elevator, and there loaded them with wheat of the specified grade, (which was weighed and inspected by the state officers,) and then caused them to be moved by a Manitoba switch engine out from the elevator, and onto one of the tracks devoted to the use of the elevator business, and there left them standing. This loading was finished on September 14th, and on the same day the elevator company sent written notice to Moak & Co. that they had loaded the cars on their account, giving the number of each car and the weight and grade of its contents. Nothing further appears to have been done until September 17th, when the elevator company sent a bill of the wheat to Moak & Co., who gave a check for the amount on their bank, whereupon the elevator company receipted the bill, and delivered it to Moak & Co. On the same day, Moak & Co. gave shipping orders to the railway agent, and obtained from him bills of lading of the wheat, naming themselves as consignors, and certain parties in Wisconsin and Illinois as consignees, and immediately, or at least the same day, drew their drafts on the consignees, which they sold to the plaintiff bank for value, with the bills of lading attached as security. These drafts were duly presented but never paid. The elevator company never "carded" the cars or gave the railway agent any "switch bill" or "shipping orders." The judge who tried the Bank Cases finds that Moak & Co. obtained the bills of lading from the railway companies upon presentation of the receipted bill of the wheat from the elevator company, but this is unsupported by evidence, as there is not a particle of testimony that the railway agent ever saw or knew of the existence of this receipted bill. So far as the railway companies were concerned, the first time Moak & Co. ever appeared in connection with this wheat was when they applied for and received the bills of lading. Why, or under what circumstances, the railway agent took shipping orders from Moak & Co., instead of from the elevator company, in accordance with the usual course of business, is left wholly unexplained. On the same day (September 17th) on which the elevator company received the check from Moak & Co. it deposited it with its banker. This check, according to the usu-

al course of business, passed through the clearing-house, and on the 18th, near noon, was presented at Moak & Co.'s bank for payment, which was refused for want of funds. It appears that on the 17th, Moak & Co. had in bank sufficient funds to pay the check, but that they had drawn them out on the morning or forenoon of the 18th before the check was presented. However, no claim is made that there was any undue delay in presenting the check. On being notified of the dishonor of the check, the elevator company immediately, and on the afternoon of the 18th, caused the four cars (which still stood where they had been placed on the 14th) to be run back into the elevator, and there unloaded them, claiming the right to do so as unpaid vendor. The bank, claiming the wheat under the bills of lading, sued the railway companies for its non-delivery and recovered, whereupon the railway companies sued the elevator company for the wrongful taking of the wheat and also recovered. In the Bank Cases, which were tried together, the court found that there had been a delivery of the wheat by the elevator company, to Moak & Co., by which the title passed to the latter. In the cases against the elevator company, which were also tried together, the court directed verdicts for the plaintiffs, upon the ground, evidently, that in his opinion the evidence showed conclusively that there had been such a delivery. But as the facts are undisputed, and in our opinion present a mere question of law, the difference in the manner in which the cases were disposed of is unimportant. In the Bank Cases the court did not pass upon the question of the effect of the bills of lading upon the liability of the railway companies, but rested its decision entirely upon the delivery of the wheat by the elevator company to Moak & Co.

In the briefs of counsel it is stated that the question in the cases is whether there had been a "delivery" of the wheat by the elevator company to Moak & Co. So general a statement is, we think, both inaccurate and misleading. The word "delivery" is used in different senses; and acts and facts may be sufficient to constitute a delivery for one purpose and not for another purpose. It is not every kind of delivery that will deprive a vendor of the right to retake goods for non-payment of the purchase money. Where goods are sold for cash, delivery and payment are concurrent conditions, and a delivery in expectation of immediate payment is conditional only; and if payment is not made as agreed, the vendor may reclaim the goods. Hence, the real question in these cases is whether there was an unconditional delivery of the wheat to Moak & Co.; or, otherwise expressed, did the elevator company waive the condition of cash payment on delivery, or accept the check as absolute payment? It had the undoubted right to waive this condition, also to waive payment in cash and accept the check as unconditional payment; but we fail to find anything in the facts to support any such conclusion. Nothing is better settled than that a check is not payment, but is only so when the cash is received on it. There is no presumption that a creditor takes a check in payment arising from the mere fact that he accepts it from his debtor. The presumption is just the contrary. Where payment is made by check drawn by a debtor on his banker, this is merely a mode of making a cash payment, and not giving or accepting a security. Such payment is only conditional, or a means of obtaining the money. In one sense the holder of the check becomes the agent of the drawer to collect the money on it; and if it is dishonored there is no accord and satisfaction of the debt. 2 Pars. Cont. 623; Benj. Sales, § 731; Brown v. Leckie, 43 Ill. 497; Woodburn v. Woodburn, 115 Ill. 427, 5 N. E. Rep. 82; Cromwell v. Lovett, 1 Hall, 56. Where goods are sold for cash on delivery, and payment is made by the purchaser by check on his banker, such payment is only conditional, and the delivery of the goods also only conditional; and if the check on due presentation is dishonored, the vendor may retake the goods. Hodgson v. Barrett, 33 Ohio St. 63. Conceding, for the sake of argument, that there was in this case a constructive delivery of the wheat contemporaneously with the receipt of the check, there is an entire absence of evidence to rebut the presumption that it was only conditional upon the check being paid on presentation. Therefore, upon the dishonor of the check, the right of the elevator company to retake the wheat still continued in full force. Much stress is laid by counsel, and apparently by the trial court, upon the facts that the elevator company had loaded the wheat into cars of the carriers designated by Moak & Co., and had placed the cars upon the tracks of the Manitoba Company. It is urged that this amounted to a delivery of the wheat to the railway companies, who thereafter held possession as agents of Moak & Co., for transportation; that the matter of "carding" the cars and furnishing the railway agent with "switch bills" is not material upon the question of possession; that, these things being done after the cars were on the tracks, their only purpose was to furnish the Manitoba Company with vouchers for its switching charges. But it seems to us that this is putting an erroneous interpretation upon the acts of the elevator company, in view of the customary manner of doing business between it and the railway companies. Undoubtedly, in furnishing cars to be loaded, and in furnishing these tracks on which to place them after being loaded, the railway companies anticipated that the grain would be delivered for transportation over their roads; and in loading the cars, and setting them out on the tracks spe-

cially designed for its business, the elevator company doubtless anticipated the future delivery of this wheat to Moak & Co., and its shipment on their account, and had that end in view. But until the elevator company turned the wheat over to Moak & Co., or turned it over to the railway companies for transportation on account of Moak & Co., the property was still as much in its possession as when in the elevator. All that was done merely amounted to its storing its wheat in the railway cars and on the railway tracks, designed for that purpose, preparatory to its shipment or its delivery to the vendees. Until the elevator company turned over control of it to the railway companies for transportation, or to Moak & Co., no one but it, not even the railway companies, had any right to ship out the wheat. The business of the elevator could not be safely conducted on any other basis.

It is clearly evident that the giving of "switch bills" by the elevator company to the railway agent had a double, or perhaps treble, purpose: First, to furnish the Manitoba Company with vouchers for its switching charges; second, to furnish the agent of the railway companies with evidence of authority of the elevator company to ship the wheat; and, third, to furnish him with directions whither and to whom to ship it. It seems to us perfectly clear that, at least up to the 17th, this wheat was in the actual possession and control of the elevator company, and that if there was any delivery of any kind to Moak & Co. on that day, on the receipt of their check, it was only conditional on the check being paid on presentation; and therefore when the check was dishonored the elevator company had an undoubted right to retake or retain the wheat, whichever it may be termed. It is urged that a different rule applies where intermediately the property has been purchased by an innocent subvendee for value. The general rule is that a title, like a stream, cannot rise higher than its source, and it is difficult to see how a person can communicate a better title than he himself has, unless some principle of equitable estoppel comes into operation against the person claiming under what would otherwise be the better title. We have found no case holding that any different rule obtains in cases like the present, as to a subvendee, than as to the original purchaser, except perhaps that as to the former a waiver of the condition, as for example of payment on delivery, will be more readily inferred from the delivery, especially when the condition is not express but implied. See Benj. Sales, (Amer. note,) 269; Coggill v. Railway Co., 3 Gray, 545; Hirschorn v. Canney, 98 Mass. 150; Armour v. Pecker, 123 Mass. 143. It is suggested that Gen. St. 1878, c. 39, § 15, would apply, and that any condition attached to the delivery would be void, as against creditors and purchasers, unless the contract is filed. This statute may establish such a rule as to conditional sales, properly so called, where the condition is that the title is to pass, not upon delivery, but upon payment at some subsequent date. But it can have no application to a case like the present, where the terms of sale are cash on delivery, and the only condition attached to the delivery arises from the fact that payment by check is conditional. In such a case, if the check is dishonored, the vendor, if guilty of no fraud or laches which create an equitable estoppel against him, may retake the property even from an innocent subvendee for value. We are not called upon to decide what would have been the effect if any one had dealt with the wheat in reliance upon the acknowledgment of the elevator company, in the receipted bill, that it had been paid for, for there is no evidence that such was the fact. But it is difficult to see how any negligence or laches can be ascribed to the act of a vendor, giving his vendee a receipted bill of the goods upon receiving his check on his banker, which the vendor has every reason to suppose will be paid on presentation. See Zuchtmann v. Roberts, 109 Mass. 53. The evidence therefore did not justify the conclusion of the trial judge in the Bank Cases, that there had been a delivery of the wheat so as to pass the title absolutely to Moak & Co., and a fortiori it did not justify the direction of verdicts for the plaintiffs in the cases against the elevator company. Whether the evidence would have justified a finding that there was a constructive delivery at the time the check was taken and the bill receipted, it is unnecessary to decide, for if there was it could only have been, as already stated, a conditional delivery, which did not deprive the elevator company of the right to retake the wheat upon the dishonor of the check. There must be a new trial at least in the cases against the elevator company.

It only remains to consider, in the Bank Cases, the effect of the bills of lading upon the liability of the railway companies to the bank, in case no wheat was in fact ever delivered to them for transportation. Of course if the wheat was delivered by the elevator company to Moak & Co., and by the latter to the railway companies for transportation, and the agent of the railway companies in good faith issued the bills of lading, the railway companies would not be liable, for it is always a good defense to a carrier, even against an innocent indorsee of the bill of lading, that the property was taken from its possession by one having a paramount title, as was the title of the elevator company in this case as unpaid vendor. A carrier, in issuing a bill of lading for property delivered to him for transportation, does not warrant the title of the shipper. But what is the rule where no property was ever delivered at all for transportation, and the agent of the carrier, either fraudulently, or

through mistake or negligence, issues a false bill of lading, which passes into the hands of a bona fide consignee or indorsee for value? There is an unbroken line of authorities in England that, even as against a bona fide consignee or indorsee for value, the carrier is not estopped by the statements of the bill of lading, issued by his agent, from showing that no goods were in fact received for transportation. Grant v. Norway, 10 C. B. 665; Coleman v. Riches, 16 C. B. 104; Hubbersty v. Ward, 8 Exch. 330; Brown v. Coal Co., L. R. 10 C. P. 562; McLean v. Fleming, L. R. 2 H. L. Sc. 128; Cox v. Bruce, 18 Q. B. Div. 147; Meyer v. Dresser, 16 C. B. (N. S.) 646; Jessel v. Bath, L. R. 2 Exch. 267. And this has not been at all changed by the "bills of lading act," (18 & 19 Vict. c. 111, § 3.) It is also the settled doctrine of the federal courts. The Freeman v. Buckingham, 18 How. 182; The Lady Franklin, 8 Wall. 326; Pollard v. Vinton, 105 U. S. 7; Railway Co. v. Knight, 122 U. S. 79, 7 Sup. Ct. Rep. 1132; Friedlander v. Railway Co., 130 U. S. 416, 8 Sup. Ct. Rep. 570. What was said on the subject in The Freeman v. Buckingham was probably obiter, for in that case it was sought to hold the interests of the general owner in a ship liable on a bill of lading issued by the special owner, who was not the agent of the former. But what is there said is important both as being the utterance of so eminent a jurist as Curtis, J., and also because so often quoted with approval by the same court in subsequent cases. The case of The Lady Franklin did not involve the question of a bona fide purchaser, but is important as announcing that the principle is the same, whether the false bill of lading is issued fraudulently or by mistake. But, in view of the later cases cited above, there is no room to doubt that that court is firmly committed to the doctrine in its broadest scope. The same rule obtains in Massachusetts, Maryland, Louisiana, Missouri, North Carolina, and apparently Ohio. Sears v. Wingate, 3 Allen, 103; Railway Co. v. Wilkens, 44 Md. 11; Fellows v. The Powell, 16 La. Ann. 316; Hunt v. Railway Co., 29 La. Ann. 446; Bank v. Laveille, 52 Mo. 380; Williams v. Railway Co., 93 N. C. 42; Dean v. King, 22 Ohio St. 118. The text-writers all agree that the overwhelming weight of authority is on this side. See 38 Amer. Dec. 410, (note to Chandler v. Sprague.) The reasoning by which this doctrine is usually supported is that a bill of lading is not negotiable in the sense in which a bill of exchange or promissory note is negotiable, where the purchaser need not look beyond the instrument itself; that so far as it is a receipt for the goods it is susceptible of explanation or contradiction, the same as any other receipt; that the whole question is one of the law of agency; that it is not within the scope of the authority of the shipping agent of a carrier to issue bills of lading where no property is in fact received for transportation; that the extent of his authority, either real or apparent, is to issue bills of lading for freight actually received; that his real and apparent authority—i. e., the power with which his principal has clothed him in the character in which he is held out to the world—is the same, viz., to give bills of lading for goods received for transportation; and that this limitation upon his authority is known to the commercial world, and therefore any person purchasing a bill of lading issued by the agent of a carrier acts at his own risk as respects the existence of the fact (the receipt of the goods) upon which alone the agent has authority to issue the bill, the rule being that, if the authority of an agent is known to be open for exercise only in a certain event, or upon the happening of a certain contingency, or the performance of a certain condition, the occurrence of the event, or the happening of the contingency, or the performance of the condition, must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority. An examination of the authorities also shows that they apply the same principle whether the bill of lading was issued fraudulently and collusively or merely by mistake. The only states that we have found in which a contrary rule has been adopted are New York, Kansas, Nebraska, apparently Illinois, and perhaps Pennsylvania. Armour v. Railway Co., 65 N. Y. 111; Bank of Batavia v. New York, etc., R. Co., 106 N. Y. 195, 12 N. E. Rep. 433; Sioux City, etc., R. Co. v. First Nat. Bank. 10 Neb. 556, 7 N. W. Rep. 311; Railroad Co. v. Larned, 103 Ill. 293; Brooke v. Railroad Co., 108 Pa. St. 529, 1 Atl. Rep. 206. The reasoning of these cases is in substance that the question does not at all depend upon the negotiability of bills of lading, but upon the principle of estoppel in pais; that where a principal has clothed an agent with power to do an act in case of the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, the principal is estopped from denying the existence of the fact, to the prejudice of a third person, who has dealt with the agent or acted on his representation in good faith in the ordinary course of business. This rule this court in effect adopted and applied in McCord v. Telegraph Co., 39 Minn. 181, 39 N. W. Rep. 315, 318. It is urged that force is added to this reasoning in view of the fact that bills of lading are viewed and dealt with by the commercial world as quasi negotiable, and consequently it is desirable that they should be viewed with confidence and not distrust; and that for these considerations it is better to cast the risk of the goods not having been shipped upon the carrier, who has placed it in the power of agents of his own choosing to make these representations, rather

than upon the innocent consignee or indorsee, who, as a rule, has no means of ascertaining the fact. If the question was res integra we confess that it seems to us, that this argument would be very cogent. But on the other hand, it may be said that carriers are not in the business of issuing and dealing in bills of lading in the same sense in which bankers issue and deal in bills of exchange; that their business is transporting property, and that if the statements in the receipt part of bills of lading issued by any of their numerous station or local agents is to be held conclusive upon them, although false, it would open so wide a door for fraud and collusion that the disastrous consequences to the carrier would far outweigh the inconvenience resulting to the commercial world from the opposite rule. It is also to be admitted that it requires some temerity to attack either the policy or the soundness of a rule which seems to have stood the test of experience, which has been approved by so many eminent courts, and under which the most successful commercial nation in the world has developed and conducted her vast commerce ever since the inception of carriers' bills of lading. But on questions of commercial law it is eminently desirable that there be uniformity. It is even more important that the rule be uniform and certain than that it be the best one that might be adopted. Moreover, on questions of general commercial law the federal courts refuse to follow the decisions of the state courts, and determine the law according to their own views of what it is. It is therefore very desirable that on such questions the state courts should conform to the doctrine of the federal courts. The inconvenience and confusion that would follow from having two conflicting rules on the same question in the same state, one in the federal courts and another in the state courts, is of itself almost a sufficient reason why we should adopt the doctrine of the federal courts on this question. To do otherwise, so long as the jurisdiction of those courts so largely depends on the citizenship of suitors, would really result in discrimination against our own citizens. In deference, therefore, to the overwhelming weight of authority, but without committing ourselves to all the reasoning of the decided cases on the subject of the law of agency, we deem it best to hold that a bill of lading issued by a station or shipping agent of a railroad company or other common carrier, without receiving the goods named in it for transportation, imposes no liability upon the carrier, even to an innocent consignee or indorsee for value, and that the rule is the same whether the act of the agent was fraudulent and collusive, or merely the result of mistake. Of course this is predicated upon the assumption that the authority of the agent is limited to issuing bills of lading for freight received before, or concurrent with, the issuing of the bills, which would be the presumption in the absence of evidence to the contrary. No doubt a carrier might adopt a different mode of doing business by giving his agents authority to issue bills of lading for goods not received, so as to render him liable in such cases to third parties.

In each of the first two cases the judgment, and in each of the last two, the order, appealed from is reversed, and in each of the four cases a new trial is directed.

Ordered accordingly.

VANDERBURGH, J., did not sit.

GEORGE C. JUDSON v. WESTERN RAILROAD CORPORATION.

(6 Allen, 486.)

Contract in which the plaintiff seeks to charge the defendants as common carriers, for the loss of a quantity of dressed deer skins, which were in the defendants' freight depot at East Albany on the evening of the 5th of July 1861, when it with all its contents was destroyed by an accidental fire.

At the second trial in the superior court, before Putnam, J., after the decision reported in 4 Allen, 520, there was evidence tending to show, and it was found by the jury, that on the afternoon of the 5th of July 1861 two boxes, marked "G. C. Judson, Springfield, Mass., by railroad," were delivered by the New York Central Railroad Company to the defendants at East Albany, for immediate transportation, with the necessary vouchers and expense bills; and it further appeared that the defendants have for the past ten years issued freight tariffs, which were in force in July 1861, containing among other provisions the following: "No risk assumed beyond $200 on any one package, except by special agreement. All goods and merchandise will be at the risk of the owners while in the corporation's storehouses, and no responsibility will be admitted for any loss or injury except such as may arise by fire from the locomotive engines, or by negligence of the agents of the corporation; nor for a greater amount than $200 on any one package, except by special agreement." These tariffs were posted in all the freight houses of the corporation, and liberally distributed to the public, and, before the 5th of July 1861, a large number of these freight tariffs were delivered by the defendants to the freight agents of the New York Central Railroad Company at Albany. A notice similar to that contained in the freight tariffs was, and for many years had been, inserted in the printed receipts given for goods delivered at the several stations of the defendants for transportation, but the defendants did not propose to bring these notices home to the plaintiff in any other way than as above stated; and the plaintiff himself testified that he had never seen them, and was ignorant of their existence.

The New York Central Railroad Company received the boxes from the plaintiff's agent, at Fonda, in the State of New York, and gave for them a shipping receipt which contained the following stipulation, amongst

others: "Goods or property consigned to any place off the company's line of road, or to any point or place beyond its termini, will be sent forward with as reasonable dispatch as the general business of the corporation at its warehouse within mentioned will admit, by a carrier or freight man, when there are such known to the station agent at said warehouse willing to receive the same unconditionally, for transportation, the company acting, for the purpose of delivery to such carrier or freight man, as the agents of the consignor or consignee, and not as carriers."

The defendants requested the court to instruct the jury that the limitations and conditions contained in their tariff and freight receipts, brought home to the knowledge of the agents of the New York Central Railroad Company as above stated, would exempt them from all liability for the loss of the goods, or in any event would exempt them from liability beyond $200 on each parcel. The judge declined so to rule.

The jury returned a verdict for the plaintiff, with $1020.93 damages, and the case was reported for the consideration of this court.

BIGELOW, C. J. It would not be profitable to enter upon a citation and discussion of the numerous and conflicting cases bearing on the question of the rights of a common carrier, by a general notice, to absolve himself entirely from his common law liability for property intrusted to his care, or to modify and limit his responsibility by a mere constructive notice to those who may have occasion to place goods, wares and merchandise in his keeping for the purpose of transportation. A careful examination of the authorities would not lead to any very satisfactory result, or throw much light on the real principles on which the respective rights and duties of carriers and the public mainly depend. A very full and clear statement of the results arrived at in the leading cases on the subject can be found in the elementary writers, especially in Redfield on Railways, 264; Angell on Carriers §§ 232-245; 1 Parsons on Con. 707.

There is, however, one conclusion which is fully supported by the weight of authority in the American courts, concerning which no serious doubt can be entertained; that is, that a public carrier may enter into a special contract with his employer by which he may stipulate for a partial or entire exoneration from his liability at common law as an insurer of property committed to his custody, and that such contract is not contrary to public policy, or invalid as transcending the just limits of the right of parties to regulate their dealings by special stipulations. As a necessary corollary of his conclusion, it is also held in the best considered cases and by the most approved text writers, that a notice by a carrier that he will not assume the ordinary responsibility imposed on him by law, if brought home to the owner of goods delivered for transportation, and assented to clearly and unequivocally by him, will be binding and obligatory upon him, because it is tantamount to an express contract that the goods shall be carried on the terms specified in such notice. To this extent, the doctrine that a carrier may limit or modify his liability seems to be most just and reasonable. Inasmuch as the rule of law which holds a carrier to the responsibility of an insurer, except in certain special cases, is founded in a policy which is designed solely for the security and benefit of the owner of goods, there can be no sufficient reason for regarding the rule as absolutely inflexible or irrepealable, when the party, in whose favor it will operate, directly or by necessary implication consents to waive it, or agrees to an essential modification of his own rights under it.

But it is a very different proposition to assert that a common carrier may escape his legal liability or materially change it by a general notice to all persons that he will not be responsible for the loss or injury of property intrusted to his custody, or only liable therefor under such conditions and limitations as he may think proper to impose. A common carrier is in a certain sense a public servant, exercising an employment not merely for his own emolument and advantage, but for the convenience and accommodation of the community in which he pursues his calling. The law imposes on him certain duties and responsibilities different from and greater than those which attach to an occupation of a purely private nature, in regard to the conduct of which the public have no interest, and which can be carried on at the option or according to the pleasure of the person who is engaged in it. A common carrier cannot legally refuse to transport property of a kind which comes within the class which he usually carries in the course of his employment, if it is tendered to him at a suitable time and place, with an offer of a reasonable compensation. Like an inn-keeper, he is obliged to exercise his calling upon due request under proper circumstances, and is liable to an action for damages if he wrongfully refuses to do so. A legal obligation rests upon him to assume the duty which he holds himself out as ready to perform, and a correlative right belongs to the owner of goods to ask for and require their reception and transportation upon the terms of liability fixed and defined by the established rules of law. The carrier has not the option to accept or refuse the carriage of the goods at his pleasure; but the person seeking to have them transported can choose whether they shall be carried without any restriction of the carrier's duty as prescribed by law, or whether he will waive a portion of his rights, and consent to a modification of the legal liability which attaches to the carrier. Such being the legal relation which subsists between a common carrier and his employer, it certainly would be inconsistent with it to hold that a carrier, by a mere notice brought home to the owner of goods intrusted to his care that he did not in-

tend to assume all the liabilities of his calling, could escape or materially change the responsibility which the law annexes to the contract of the parties. It would in effect put it in the power of the carrier to abrogate the rules of law by which the exercise of his employment is regulated and governed. Certainly such a notice, even if shown to have been within the knowledge of the owner of goods, would, in the absence of evidence of his direct assent to its terms, afford no sufficient ground for the inference that he had voluntarily agreed without any consideration to relinquish and give up the valuable right of having his goods carried at the risk of the carrier. On the contrary, it would be quite as reasonable to infer under such circumstances that the carrier did not intend to rely upon a notice upon which he could not legally insist, as that the owner of goods meant to surrender a right to which he was entitled by law. In such case, mere silence cannot be said to amount to acquiescence. The leading cases in the American courts in which these doctrines have been recognized and established are New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. (U. S.) 344; Farmers' & Mechanics' Bank v. Champlain Transportation Co. 23 Verm. 186, 205; Kimball v. Rutland & Burlington Railroad, 26 Verm. 247; Moses v. Boston & Maine Railroad, 4 Fost. (N. H.) 71. See also the recent English case of Garton v. Bristol & Exeter Railway, 1 Best & Smith, 112, 161.

The application of these principles to the present case is decisive against the rights of the defendants to insist on the instructions for which they asked at the trial. It is not contended that the plaintiff had any actual knowledge of the notice issued by the defendants, containing a limitation of their common law liability as carriers. If he had any knowledge at all, it was at most only constructive, through the New York Central Railroad Company, who received the goods for transmission over their own road, to be delivered to the defendants to be forwarded over a portion of their route. There is no fact in the case from which any assent by the plaintiff to the terms of the notice can be inferred. One portion of the notice on which the defendants rely goes to the extent of repudiating all liability for the loss or injury of goods delivered to the defendants and in process of transportation, except such as might be caused by fire from the locomotive engines or by the negligence of the agents of the corporation. This certainly was not binding on the plaintiff. Equally invalid was that portion of the notice which announced that the defendants would not be liable for a greater amount than two hundred dollars on any one package, except by special agreement. This was equivalent to a notice that they would not be liable for a greater amount than two hundred dollars on a single package, unless they chose to assume a further liability. It was optional with them, under this notice, whether they would make any such agreement or not. If they refused or omitted to do so, the owner of goods had no power to compel them to enter into any agreement. Nor, if the notice of itself is binding on him, had he any means of obtaining the safe transportation of his goods by the defendants above the value of two hundred dollars, under the liabilities imposed by law upon common carriers.

We do not mean to say that a general notice brought home to an owner of goods may not be available to qualify and limit the responsibility of common carriers to a certain extent and within certain limits. Doubtless they may by such a notice require that information shall be given to them of the nature and value of property which they are required to carry, in order that they may exercise a needful degree of care in its transportation, and may ascertain and demand a reasonable sum for its carriage. So they may give notice that property above a certain amount in value will not be transported for ordinary rates of freight, but that the price for its carriage will be regulated by the nature of the articles and the aggregate value of each package. In like manner they may by a general notice protect themselves against liability for loss or injury of merchandise, unless it is properly packed or arranged for transportation, so that it may with reasonable diligence and care be safely and securely carried. These and other similar notices would be reasonable and perfectly consistent with the nature of the employment of a common carrier, and the rules of law by which it is regulated, and they would be valid and binding on all to whom they were brought home, without any express assent. All that we mean to decide is, that a common carrier cannot by a general notice exonerate himself entirely from his legal liability, nor limit it absolutely to a certain amount beyond which he will not be held responsible in case of injury or loss. This was the legal effect of the notice on which the defendants rely in the present case, as is admitted by their counsel, who puts his defense to this action on the ground that they are not liable at all, or only for the sum of two hundred dollars on each package. Such a notice, being invalid, was not binding on the plaintiff, and he is therefore entitled to judgment on the verdict.

SCOVILL AND OTHERS v. GRIFFITH.
(12 N. Y. 509.)

Action commenced in the supreme court in 1849 against the defendant as a common carrier to recover for his omission to transport to and deliver at Albany merchandise, shipped by the plaintiffs on board the defendant's boat at New York, consigned to Albany whereby, as the plaintiffs alleged, the property, being of the value of three hundred and twenty-four dollars,

became lost to them, and, they also lost the benefit of the sale of the same to one Greenman, to their damage of one hundred dollars; the plaintiffs demanded judgment for four hundred and twenty-four dollars, being the amount of the value of the merchandise and the damages alleged to have been sustained by not selling it.

The cause was tried in the city of New York, before Mr. Justice Edwards and a jury. It appeared that on and prior to the 24th of May, 1849, the defendant was the owner of a line of barges, knows as "Griffith's New York and Troy Line," employed in transporting goods and merchandise on the Hudson river; that the plaintiffs were merchants in the city of New York; that prior to the delivery of the property in question on board the defendant's boat, the plaintiffs had contracted to sell it to one Greenman, they to deliver it to the store of Ainsworth & Northrop, in Albany, when it was to become his. A witness on the part of the plaintiffs testified that on the 23d of May, the defendant agreed with the plaintiffs to transport all the merchandise they might desire to send to Troy or Albany at six cents a package; that the defendant, on this occasion, informed the plaintiffs that his boats did not go to Albany, but that when they wished the goods to go to Albany, to send the carman with them to his office, and he would give directions as to the boat they should be delivered upon. White, a carman, sworn on behalf of the plaintiffs, testified that on the 24th of May he, at the plaintiffs' request, delivered nine packages of medicine on board the barge McCoun, then lying at one of the piers in New York, she being one of the boats belonging to the defendant's line, to be transported and delivered at Albany; that when he received the packages he took with him the plaintiffs' receipt book with the receipt hereinafter set out written therein, except the name of the boat and the signature thereto; that he called with the goods at the office of the defendant's line to get directions as to the boat upon which they should be delivered that he showed the receipt written in the book to a person in the office, who directed him to deliver the packages on board the McCoun; that on going to the boat the captain, Wilson, when he saw the goods were marked for Albany, refused to receive them, saying the boat did not go there; but upon being informed by the witness that there was an understanding with the defendant that they should be taken on the boat, he received them, inserted the name of the boat in the receipt and signed it. The receipt was as follows:

"New York, May 24, 1849.

"Received from A. L. Scovill & Co., in good order, on board the Griffith's line, bound for Albany, marked S., S. H. Greenman.

"Care of Ainsworth & Northrop, No. 15 State street, Albany.

"McCoun, 9 boxes Mdse.

Wilson."

This witness further testified: That when the captain saw the packages marked, as stated in the above receipt, he said they should be marked Troy instead of Albany, and that he, the witness, replied that they were correctly marked, and showed him the above receipt prepared for signature, and also informed him that he was directed at the office to deliver them on that boat; that the captain still declining to receive and receipt them, he commenced reloading them on his cart, when the captain told him that his boat did not go to Albany, but to leave the goods and he would take them; that thereupon they were delivered on board and the receipt signed. The plaintiffs further proved, that the usual time for transporting merchandise from New York to Albany was twenty-four hours; that Greenman, who resided in the western part of the state, advised Ainsworth & Northrop that the property would be delivered there for him about the 26th of May, and that he called and sent there for it several times soon after that date, and that, it not arriving, he gave them no further directions in reference to it. The plaintiffs further proved that the packages were taken by the boat to Troy, where they remained in the defendant's warehouse until the 7th of July, 1849, when they were delivered by the defendant to a carrier to be taken to Albany and delivered to Ainsworth & Northrop; and that the carrier on that day took them to the latter firm at Albany and offered to deliver them, subject to the payment of five shillings, his charge for bringing them from Troy; but the latter firm refused to receive the goods because, as they stated, the time for delivery had passed and they had orders not to receive the property; and that thereupon the carrier stored the packages in Albany, where they remained at the time of the trial. The plaintiff proved the value of the property to be $324.

Wilson, the captain of the McCoun, was sworn on the part of the defendant, and after testifying that she was one of the boats in defendant's line, and that its business was to transport property between New York and Troy, and that the McCoun was not accustomed to take goods to Albany, he was asked by the defendant's counsel to state the circumstances under which the receipt above set out was signed by him. To this the counsel for the plaintiffs objected, and excepted to the ruling of the justice permitting him to do so. The witness then testified, that when the carman came with the property he told him that the boat did not take goods to Albany and refused to sign the receipt, and directed him to take the packages to the Albany and canal line that ran to Albany, the boats of which were in the same slip with the McCoun; that the carman stated that he thought Greenman could receive the property as well at Troy as at Albany; that he took the packages to Troy, and they were placed in the defendant's warehouse there.

On his cross-examination, he testified that he signed the receipt; that they were not accustomed to receive merchandise for points below Troy; that he, the witness, had no authority to make contracts for the transportation of property. The defendant gave further evidence tending to disprove the alleged contract between the plaintiffs and defendant as to transporting merchandise to Albany, and also tending to prove that when the carman called at defendant's office with the packages in question, he was not directed to deliver them to the McCoun or any of the boats of the defendant's line, but that he was then told that defendant s boats did not run to Albany and he had better deliver the property to an Albany line; and that the carman insisted that the goods were to go by defendant's line, and they were received with the understanding that they should be taken to Troy. It further appeared that the packages arrived at Troy on the 26th or 27th of May.

The court, among other things, charged the jury that if, from the testimony, they should find that there was an agreement by the defendant, or those whose acts would bind him, to carry the property in question to Albany, then a question arose as to the rule of damages. That mere delay, although unreasonable, did not make the defendant chargeable for the value of the goods. That in this case there was no claim that the property was injured or deteriorated by the delay. That if they had been materially injured or deteriorated, this might authorize an abandonment of them by the owner, and give the plaintiffs a right to charge the defendant for their value; but as it was, the rule would be the difference between the highest market price of the goods, when or after they should have been delivered, and when they were actually tendered, and the expense the plaintiffs were put to by the delay. To this portion of the charge there was no exception.

The plaintiffs' counsel requested the judge to charge, that if there was an agreement to carry the goods to Albany, that unreasonable delay in the delivery of goods made the defendant liable to account for their full value; that the law imposed this liability upon common carriers, as a penalty for delay, although it might not be so with other bailees. The court refused to so charge, and the counsel for the plaintiffs excepted. The jury rendered a verdict in favor of the plaintiffs for $10; and a judgment was rendered in favor of defendants for the amount of their costs, less the $10. This judgment was affirmed by the supreme court at a general term in the 1st district. The plaintiffs appealed to this court.

HAND, J. The jury have found the contract of bailment in this case, and assessed the damages for its violation by the defendant. As to the time in which his contract is to be performed, a common carrier is bound to use all reasonable diligence. That was not done in this case; and on the question of damages, the jury probably took a view of the circumstances very favorable to the defendant. But their verdict cannot be disturbed solely upon that ground. Nor did the judge err in the admission of evidence as to the circumstances under which the receipt was given. The proposition was not to vary or explain the terms of the receipt; and the defendant had a right to show, if such was the fact, that it was obtained from his agent or servant under such circumstances as did not bind him.

There was no exception to the charge as given; and the only question really arising on this bill of exceptions is, whether the judge should have told the jury that, if there was a contract to carry the goods to Albany, the plaintiffs were entitled, as a matter of law, to recover the full value of the goods on account of the delay. The plaintiffs asked for an unqualified charge on this point, without reference to the motives of the defendant, or any circumstances that might be supposed to explain the transaction. I think the judge could not have charged as requested. The plaintiffs state in their complaint that the property was wholly lost to them, and that they lost the sale to Greenman. But the testimony does not sustain that allegation; not in a legal sense.

Before the Code, a good way of ascertaining legal obligations was by considering the remedies by which they were enforced. A supposed uniform and universal remedy in all cases has, in a measure, deprived us of these aids; but still some light may be obtained from analogy. This property was, from some cause, detained in Troy, some half dozen miles from Albany, about six weeks; and the defendant, during that time, made no effort to send it to its destination. This was inexcusable delay, and undoubtedly entitled the plaintiffs to all real damages sustained by them which were the natural consequence of the neglect. But it does not follow that the plaintiffs had a right to refuse and abandon the property and recover its full value. There is no evidence of a refusal to deliver, nor indeed that the plaintiffs ever demanded the property or gave the defendant notice that it had not been received. They were not bound to do either to give them a right of action. But the judge could not say to the jury, as matter of law, that there had been a conversion; nor does it appear that the property had deteriorated in condition or had seriously depreciated in value, nor was it lost. Where there has been a deterioration and loss, the carrier is liable. (Davis v. Garrett, 6 Bing., 716; Ellis v. Turner, 8 T. R., 531; Story on Bail., § 508.) In Ellis v. Turner, which was an action on the case, the carrier conveyed the goods beyond the place of destination, intending to deliver them on his return, but they were greatly damaged by the sinking of the vessel without any want of ordinary care or attention of the master or crew, and the carrier was held liable to make good the loss. Under the former system,

to maintain trover against a carrier, there must have been an unjustifiable refusal to deliver or delivery to a wrong person, or sale or destruction, or some actual wrong or injurious conversion; something more than mere omission. (Packard v. Getman, 4 Wend., 613; Hawkins v. Hoffman, 6 Hill, 586; 2 Saund. R., 49, i. k. m.) It was not necessary that the wrong should be intentional; but, as a general rule, a mere nonfeasance did not and does not work a conversion. And indeed every unauthorized intermeddling with the property of another is not a conversion. It was held by the court of exchequer in England that the act of the ferry-man in putting the horses of the plaintiff on shore out of his ferry-boat, though the jury should find it was done wrongfully, was not a conversion of the property, unless done with the intent to convert it to his own use or that of some third person, or unless the act had the effect to destroy it or change its quality. (Fouldes v. Willoughby, 8 M. & W., 540.) If it had appeared in this case that the defendant, from gross negligence, evincing a disregard of his contract and the rights of the plaintiffs, had carried the property by and on to another port, and had, with actual knowledge of all the facts, kept it several weeks, I am not prepared to say the jury might not have found that there was something more than omission, or that the evidence would not have sustained a verdict that the defendant was guilty of conversion, if rendered under a proper charge from the court. However, that point need not be decided here, for it was not raised upon the trial; the plaintiffs putting this part of their case upon the ground of mere delay, insisting that the defendant should pay for the property as a penalty for that delay, and thus, as it were, impliedly treating the case as a continuing bailment, rather than one of loss or actual conversion to the use of the defendant. If the facts of the case would not have sustained trover, the remedy would naturally have been an action of assumpsit or case; and the plaintiffs have not shown that they would have been entitled to recover for the full value of the property in either of those actions.

There were extra charges for taking the goods from Troy to Albany, but no demand therefor appears to have been made upon the consignee; and, besides, the refusal to receive them was not put upon that ground.

I think the judgment should be affirmed.

GARDINER, Ch. J. The action was against the defendant as a common carrier, for the non-delivery of a quantity of medicine shipped at New York and consigned to certain persons in Albany.

For the defendant, one Wilson was called as a witness, and was asked by the counsel for the defendant "to state the circumstances under which the receipt for the property was signed." This was allowed and the plaintiffs excepted. I can perceive no objection to this ruling of the learned judge. The plaintiffs had previously proved by the carman employed to deliver the goods, that the captain of the boat refused to receive the property on seeing that it was directed to Albany, saying that his boat did not go there; and was induced to take the medicine and sign the receipt, on his informing him that there had been an understanding to that effect with Mr. Griffith, the defendant. The defendant had a right to explain these circumstances, which formed a part of the plaintiffs' evidence by his own witness; and the question to which the objection applied went no further. The evidence was also admissible to repel the inference of a conversion, upon which the plaintiffs now insist, by showing that the carriage of the goods to Troy was not an exercise of authority over them, or an user in opposition to the rights of the owners, but in subordination to them. (8 Mees. & Welsby, 547.) If the defendant agreed to transport the goods to Albany, but informed the plaintiffs that his boat, in the usual course of her business, went to Troy in the first instance, this would not change or modify the contract but would be conclusive evidence to show that in taking the goods beyond the port of destination the carrier did not intend to convert them to his own use, or that of any other person.

The second, and most important question arises upon the charge as to the measure of damages. The judge instructed the jury, that as the property was not injured or deteriorated, the rate of damages was the difference between the highest market value, when, or after the goods should have been delivered, and when they were actually tendered. In this part of the charge the plaintiffs acquiesced; they however requested the judge to charge, "that if there was an agreement to carry the goods to Albany, that unreasonable delay in their delivery made the defendant liable for their full failure." This was refused, and I think justly. The mere omission of the carrier to deliver property in a reasonable time, is not a conversion or equivalent to a conversion; this has been repeatedly adjudged. (6 Hill, 588 and cases; Angel on Carriers, § 431-433.) The owner is entitled to a full indemnity, but not necessarily to the full value of the goods where, as in this case, they have been offered to him and refused. If special circumstances exist, such as have been supposed by the counsel for the plaintiffs in his argument, they might be shown and damages given accordingly; but in a case where the market value of the property remains the same between the time of delivery demanded by the contract and the one actually made or tendered, and where the facility for the disposition of the goods, if for sale, is unchanged, it seems to me a most unreasonable rule that a carrier should be compelled to pay the full value of the property without regard to any other circumstance than an omission to perform his contract within a reasonable time.

The whole argument in support of this rule is based upon the hypothesis, that the omission was itself a conversion. This I think is not supported either by principle or authority.

The judgment should be affirmed.

Judgment accordingly.

MEYER GEISMER, RESPONDENT, v. THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, APPELLANT.

(102 N. Y. 563; 7 N. E. 828.)

Appeal from judgment of the General Term of the Supreme Court, in the fifth judicial department, entered upon an order made at the October term, 1884, which overruled defendant's exceptions and directed judgment for plaintiff on a verdict. (Reported below, 34 Hun, 50.)

This action was brought to recover damages for alleged negligence on the part of defendant in the performance of a contract for transportation of live stock.

Upon the trial of this action there was evidence proving or tending to prove these facts: On the 21st day of July, 1877, the plaintiff delivered to the defendant, at Toledo, in the State of Ohio, a large number of cattle and hogs to be transported within a reasonable time over its railroad to Buffalo, in this State, there to be delivered to him. The usual and ordinary time for the transportation of such freight between the two places named was about twenty-five hours. The plaintiff's cattle and hogs were started on a train of defendant's cars for their destination, and were carried with reasonable dispatch and without delay as far as Collingwood, in the State of Ohio, where they arrived on the twenty-second day of July. Collingwood was a place where it was usual and customary for the defendant to stop all its stock trains for the purpose of changing engines, engineers, firemen and crews employed on such trains, and the train on which plaintiff's stock was shipped stopped there for the purpose of making such usual changes. When plaintiff's stock arrived there the defendant was willing and desirous to proceed and continue the carrying of the stock to Buffalo, and had all the necessary cars, locomotives and employes to make up and manage the train; but it was prevented from proceeding immediately and accomplishing in the usual time the carriage of the stock to its destination in consequence of a portion of its employes striking and refusing to run the train or to permit others to do so. A few weeks prior to the arrival of the plaintiff's stock at Collingwood, the defendant made an order reducing the pay of its employes engaged on its trains and at their stations and shops ten per cent, and by reason of such reduction many of the employes refused to work on defendant's trains, or to permit others to work who were willing to; and many of the firemen and brakemen who had been in the defendant's employ took forcible possession of some of the defendant's engines and some of the fixtures of the engines, and detached engine hose, let the water out of the engine boilers, uncoupled cars, carried away and hid some coupling pins and links, placed the engines in the round-house, and barricaded the same. The persons who took such forcible possession of the property of the defendant were a great number—over two hundred persons—the greater portion of whom were firemen and brakemen who had been in the employ of the defendant up to the time of the strike, on the twenty-second day of July, and were the controlling element of the force which prevented the moving of the defendant's trains at Collingwood. Such persons boldly and defiantly refused to obey any of the orders of the defendant's officers, and refused to permit any of the defendant's trains to be moved, and threatened persons who should attempt to move any of the trains or cars until the demands of the strikers should first be complied with. The officers of the defendant made various attempts to move trains from Collingwood, and placed on the trains employes who were willing to work and operate the same; but they were prevented from moving the trains by threats, and were compelled to desist from all attempts to move them from Collingwood. During all the time, from the day the stock arrived at Collingwood until it was finally reshipped, the officers of the defendant exerted themselves with great diligence to move the trains and to induce and persuade those who up to that time had been in the employ of the defendant to return to their places on the trains and to permit the defendant to have the use and control of its property, the railroad and its fixtures; but they openly declared and announced that would do so only upon the condition that the order of the defendant reducing the wages of the employes should be annulled and the wages restored as they were before such reduction; they also demanded the annulling of the rule requiring certain qualifications of engineers, and the removal of the general master mechanic, and that no one should be discharged for having taken part in the riot and the strikers would have disbanded and the late employes of the defendant would have promptly resumed their employment with the defendant, and would have ceased all force and violence to the defendant, its officers and employes, and would have allowed and restored to the defendant the full and complete control of all its property and its railroad had their demands been acceded to; but the defendant refused to accede to the demands. There was a sufficient number of other competent workmen willing and ready to take the places of the strikers at such reduced wages who could at any time have been so employed, and who would have moved defendant's train except for the violent opposition of the strikers. After the strike had continued for a period of eleven days it ceased, and all the

late employes of the defendant who were engaged in the strike resumed work on the defendant's cars, and the defendant was restored to the possession of all its property and railroad and fixtures so taken possession of by the strikers; but the wages were not restored nor other concessions made by defendant. If it had not been for those who had been in the employ of the defendant up to the time of the commencement of the strike, the defendant could have overcome the resistance and transported plaintiff's stock in due and ordinary time. As soon as the strike ceased the defendant transported the plaintiff's stock to Buffalo and there delivered it to the plaintiff, who took possession of it. The plaintiff suffered great damage from the delay, to recover which this action was commenced.

The trial judge, among other things, charged the jury, "that if the strike had its origin in the minds of the defendant's employes, that it began with them and terminated when they were ready to end it, and that strangers, outside parties, joined them through sympathy or other cause, the defendant is not exempt and the plaintiff may recover damages"; "that whether the delay in bringing forward this train arose because the defendant's engineers, brakemen and firemen were on a strike, declining to work, and the company had not men to carry on its business, or that they would not do it, or suffer others to do it, even though they were active in their resistance, although they committed violence, if they were the servants or employes of the defendant, nevertheless it is imputable to the defendant in this case"; "that if the defendant's employes were willing to carry on the business, and other men which have been mentioned sought to prevent those who were willing to work from carrying on its business, and continuing their labor, and that it was effective and sufficient to prevent those who were willing from going into the employ of the company, and that this combination was strong and powerful, strong in its moral position, strong in its physical power to overmaster and control the situation and prevent the company from bringing out its engines and starting out the train, and so extended from Cleveland to Buffalo, embracing Erie, it is no excuse for the delay, because if the strikers were the defendant's employes, they represented the defendant; they were its servants and agents, and their acts were the acts of the corporation." To all these portions of the charge defendant's counsel excepted; and he requested the judge to charge "that if the jury believe from the evidence that the cattle were delivered in Buffalo at as early a day as was possible under all the circumstances in the case, they will find for the defendant"; "that if the jury believe, from the evidence, that on and after the 21st day of July, 1877, the railroad tracks, depots and rolling stock of the defendant were taken forcible possession of by a body or bodies of armed men, among whom were some of its employes, and that they continued to hold possession thereof, by force of arms, for several days, by reason of which the delivery of the plaintiff's stock at Buffalo was delayed until August 4, 1877, the plaintiff cannot recover"; "that if the jury believe from the evidence that under the circumstances the defendant could not have moved the plaintiff's stock from Collingwood to Buffalo previous to the time it did without endangering life and property, then that the defendant was justified in delaying the delivery of the stock until it was actually delivered"; "that if the cause of the detention of the plaintiff's stock arose from forcible resistance of the late employes of the defendant, the defendant having at all times a sufficient force of faithful employes to have operated and run the defendant's road had it not been for such forcible resistance, then the plaintiff cannot recover"; "that if any of the employes of the defendant joined the strikers, they ceased from that time to be employes of the company, and the defendant is not in any way responsible for their acts." The judge declined to charge each of these requests, and the defendant's counsel duly excepted. The jury rendered a verdict for the plaintiff.

EARL, J. We are of opinion that the learned trial judge fell into error as to rules of law of vital and controlling importance in the disposition of this case.

A railroad carrier stands upon the same footing as other carriers, and may excuse delay in the delivery of goods by accident or misfortune not inevitable or produced by the act of God. All that can be required of it in any emergency is that it shall exercise due care and diligence to guard against delay and to forward the goods to their destination; and so it has been uniformly decided. (Wibert v. N. Y. & Erie Railroad Co., 12 N. Y. 245; Blackstock v. N. Y. & Erie Railroad Co., 20 id. 48.)

In the absence of special contract there is no absolute duty resting upon a railroad carrier to deliver the goods intrusted to it within what, under ordinary circumstances, would be a reasonable time. Not only storms and floods and other natural causes may excuse delay, but the conduct of men may also do so. An incendiary may burn down a bridge, a mob may tear up the tracks or disable the rolling stock or interpose irresistible force or overpowering intimidation, and the only duty resting upon the carrier, not otherwise in fault, is to use reasonable efforts and due diligence to overcome the obstacles thus interposed, and to forward the goods to their destination.

While the court below conceded this to be the general rule, it did not give the defendant the benefit of it because it held that the men engaged in the violent and riotous resistance to the defendant were its employes for whose conduct it was responsible, and in that holding was the fundamental error committed by it. It is true

that these men had been in the employment of the defendant. But they left and abandoned that employment. They ceased to be in its service or in any sense its agents, for whose conduct it was responsible. They not only refused to obey its orders or to render it any service, but they willfully arrayed themselves in positive hostility against it, and intimidated and defeated the efforts of employes who were willing to serve it. They became a mob of vicious law-breakers to be dealt with by the government, whose duty it was, by the use of adequate force, to restore order, enforce proper respect for private property and private rights and obedience to law. If they had burned down bridges, torn up tracks, or gone into passenger cars and assaulted passengers, upon what principle could it be held that as to such acts they were the employes of the defendant for whom it was responsible? If they has sued the defendant for wages for the eleven days when they were thus engaged in blocking its business, no one will claim that they could have recovered.

It matters not, if it be true, that the strike was conceived and organized while the strikers were in the employment of the defendant. In doing that they were not in its service or seeking to promote its interests or to discharge any duty they owed it; but they were engaged in a matter entirely outside of their employment and seeking their own ends and not the interests of the defendant. The mischief did not come from the strike—from the refusal of the employes to work, but from their violent and unlawful conduct after they had abandoned the service of the defendant.

Here upon the facts, which we must assume to be true, there was no default on the part of the defendant. It had employes who were ready and willing to manage its train and carry forward the stock, and thus perform its contract and discharge its duty; but they were prevented by mob violence which the defendant could not by reasonable efforts overcome. That under such circumstances the delay was excused has been held in several cases quite analogous to this which are entitled to much respect as authorities. (Pittsburg & C. R. R. Co. v. Hogen, 84 Ill. 36; Pittsburgh, C. W. L. R. Co. v. Hallowell, 65 Ind. 188; Bennett v. L. S. & M. S. R. R. Co., 6 Am. & Eng. R. Cas. 391; I. & W. L. R. R. Co. v. Juntzen, 10 Bardwell, 295.)

The cases of Weed v. Panama R. R. Co. (17 N. Y. 362), and Blackstock v. N. Y. & Erie R. R. Co. (1 Bosw. 77; affirmed, 20 N. Y. 48), do not sustain the plaintiff's contention here. If in this case the employes of the defendant had simply refused to discharge their duties, or to work, or had suddenly abandoned its service, offering no violence, and causing no forcible obstruction to its business, those authorities could have been cited for the maintenance of an action upon principles stated in the opinions in those cases.

We are, therefore, of opinion that this judgment should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

HENRY S. SHELTON, RESPONDENT, v. THE MERCHANTS' DISPATCH TRANSPORTATION COMPANY, APPELLANT.

(59 N. Y. 258.)

Appeal from judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of plaintiff, entered upon the report of a referee.

This action was against defendant as a common carrier, for failure to deliver goods intrusted to it for transportation.

The referee found the following facts:

That on the second day of October, 1871, the plaintiff purchased at the city of New York, of the firm of H. B. Claflin & Co., a quantity of goods, and directed them to ship the same to him at Janesville, Wisconsin, by the defendant's line. The goods so purchased were packed by Claflin & Co., were by them marked "H. S. Shelton, Janesville, Wis.," and were, on the same day, by them delivered to the defendant, at its depot in the city. At the time of such delivery, H. B. Claflin & Co. received from the defendant three receipts. (A copy of one is contained in opinion.) On the third and fourth days of October, Claflin & Co. presented the receipts at the general office of the defendant, and on the same or following day received bills of lading in the usual and customary form, given by defendant. They contained this clause:

"To be forwarded in like good order (dangers of navigation, collisions and fire, and loss occasioned by mob, riot, insurrection or rebellion, and all dangers incident to railroad transportation, excepted, to Chicago depot only, he or they paying freight and charges for the same as below."

It was the usual custom of said H. B. Claflin & Co. to mail receipts or bills of lading to their consignees.

The packages aforesaid were safely and with all due care and diligence transported to Chicago, and arrived there, a part in the evening of Saturday, the seventh day of October, and the remainder thereof on the morning of Sunday, the eighth day of October, and were, upon their arrival, unloaded into a freight house used by the defendants. In the evening of the eighth, a great fire occurred in Chicago, without fault or negligence on the part of the defendant; that said packages and their contents were consumed and entirely destroyed, without negligence of any kind on the part of the defendant.

The referee was requested to find the following additional facts, which appeared by the evidence:

"That the said H. B. Claflin & Co. were, on the said 2d day of October, 1871, and for a long time previous thereto had been, large shippers of goods by the defendant's line, and that it had always been their cus-

tom to obtain receipts or bills of lading therefor."

"That the defendants were, at the time mentioned in the complaint, carriers of goods, wares and merchandise for him between different parts of the United States, but that, in October, 1871, the terminus of the route of defendant from the city of New York in the direction of Janesville, Wisconsin, was, and had been since the 10th day of March, 1871, Chicago, Illinois, and that transportation beyond Chicago, in the direction of and to Janesville aforesaid, had to be performed by separate and independent carriers, and the charges of transportation beyond Chicago were paid to such carriers by the owners of the property transported, in addition to the amount paid to defendant for transportation to Chicago aforesaid."

The referee refused so to find, as immaterial, and defendant's counsel excepted.

JOHNSON, J. The referee refused to find that, previous to the shipment in question, H. B. Claflin & Co. had been large shippers by the defendant's line, and had always been accustomed to obtain bills of lading for the goods shipped; and also that the defendants were carriers upon a route terminating at Chicago, and not extending to Janesville, Wisconsin; and that between the latter points transportation had to be performed by separate and independent carriers. These matters the referee refused to find, on the ground that they were immaterial to the rights of the parties. In this we think he erred, and for the following reasons: Claflin & Co. were the agents of the plaintiff in respect to the transportation of the goods in question. His directions to them were to ship the goods to him at Janesville, Wisconsin, by the defendant's line. The extent of the authority thus conferred, was considered in Nelson v. Hudson River Railroad Company (48 N. Y., 498). It necessarily extends to the making of such contracts as the agents, in the honest exercise of their discretion, see fit to make.

The fact that the carriers and the agents employed have a habitual course of dealing in respect to contracts for transportation, is a material and important element in determining the construction to be put on their acts in any particular case. (Mills v. Mich. Cent. Railroad, 45 N. Y., 622.) The delivery by the agents of the plaintiff, to the carriers, was made upon no particular agreement made at the time. The packages were marked with the address of the plaintiff, and receipts were signed by the agents of the defendants, at their receiving depot at New York. These receipts were in a bound receipt book belonging to Claflin & Co., filled up by them, and signed by the agents of the defendants. They purport to be receipts, and not contracts for carriage. They were in the following form: "New York, Oct. 2, 1871. Received from H. B. Claflin & Co., in good order on board the M. D. for —— the following packages, one case D. G. marked H. S. Shelton Janesville, Wis." and were signed "Gleason." In a day or two, but after the packages had been started on their way, the agents of the plaintiff, acting in accordance with the habitual mode of doing this business, sent the receipts to the defendant's office, and procured bills of lading for the goods, the giving of which was entered on the several receipts. These bills of lading expressed the actual contract of carriage between the parties who in fact made the contract, the defendants on the one hand, and H. B. Claflin on the other. When the goods were delivered and the primary receipts given, each of the parties was acting in a habitual method, and with a habitual understanding of what they were engaged in doing. The receipts were presented and signed with the view and expectation on both sides, that bills of lading were in the usual course to be subsequently issued, expressing the intentions and engagements of the parties. This was their method of dealing, distinctly in their contemplation from the beginning, reasonable in itself and completely within the authority committed by the plaintiff to his agents, H. B. Claflin & Co. Any attempt on their part to claim a different agreement, would have been an act of bad faith; because it would have been a departure from the understanding based upon the previous course of dealing with these parties. In the view we take of the relations and acts of these parties, the matters of fact which the referee held to be immaterial, were plainly material, because they were essential to the disclosure of the actual contract of the parties. The bills of lading were obtained by the plaintiff's agents, in the exercise of their original authority to contract with the defendants for transportation, and these controlled the rights of the parties and displaced the common-law relation which otherwise might have existed between them.

The order of time in which the business was actually transacted, cannot be allowed to affect the rights of the parties. If H. B. Claflin & Co. were originally authorized to ship on bills of lading limiting the common-law liability of the defendants, the fact that receipts were taken in one stage of the business, intended by neither party as completing their dealing or contract, did not exhaust the authority. It was never so intended and cannot have that effect. The acts of the parties must have operation as they were intended by the parties when they were done. The bills of lading excepted the risk of fire, and as it was by that danger that the property in question was destroyed, the defendants are free from liability, at least unless the loss was due to their negligence or fault. The only suggestion of fault is that the cars containing these packages, were unloaded on Sunday in Chicago. The case does not inform us that by the law of Illinois, where the loss happened, unloading cars on Sunday was unlawful, and we have no means of knowing such to be the

fact, in respect to the laws of that State. The common law, at least, teaches no such doctrine.

The judgment should be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed.

SETH B. GROSVENOR, RESPONDENT, v. THE NEW YORK CENTRAL RAILROAD COMPANY, APPELLANT.

(39 N. Y. 34.)

The complaint in this action alleges, that, in April, 1861, the plaintiff delivered to the defendant, at Clifton Springs, a cutter, to be carried by it to Buffalo, and paid the defendant therefor, which the defendant agreed to do, and that by the negligence of the defendant, it became wholly lost to the plaintiff. The answer denies these allegations. The issue was tried in the Superior Court of Buffalo, before Justice Clinton and a jury, when the following facts were proved: That the plaintiff called upon the defendant's depot agent at Clifton, and paid him the freight on the cutter, and the fare of his servant to Buffalo, and told him that he would send them down in the morning, to go by the afternoon train. The servant brought the cutter, by plaintiff's direction, to have it shipped to Buffalo, and arrived at the depot about six o'clock in the morning, and placed it on the platform of the freight house, next the railroad track, with one end next the freight house, and the other toward the track, and went back after the thills; that he returned in about an hour with them, and stopped in front of the passenger depot, about six rods from the freight house, and saw the defendant's baggageman, Hall, who, at the time, was sweeping out the depot, and said to him, there is some stuff to go to Buffalo. He asked on what train, to which he replied, the one o'clock, and then took the thills and laid them with the cutter. He had not then seen the baggageman do any thing with the freight, and did not ask for or take any receipt for the property; that one Sutherland was the defendant's agent there, and had been such agent for three years, and was alone authorized to receive and deliver freight, and resided in the depot. The defendant proved Hall was baggageman, and had never received freight or given receipts therefor, except for his especial directions, and had no general orders on that subject. That freight is always received and delivered at the east end of the freight house. That there is a platform alongside of the freight house, next the track, and comes within a few inches of a freight car on the track, which is used for receiving and delivering freight from and to the cars, when it is taken into or from the freight house and weighed; and that it is received from and delivered at the east end of the depot. That the cutter when on the platform, where it was left by the plaintiff's servant, could not be seen from the passenger depot. That the cutter placed on the platform, as stated, would project over it nine inches. That two or three hours after it was left, a car in a passing train caught the cutter and broke it, and the first knowledge the agent had of its being there, was seeing it pass his office at the passenger depot on this car, broken. That it was the invariable custom for the shipper to mark property and its destination, before the defendant received it, when he weighed it and ascertained the freight; and that the plaintiff's servant did mark a box, which he brought with the cutter in the afternoon, before shipment, and said he wanted it to go to Buffalo.

At the close of the plaintiff's testimony, and at the close of the evidence, the defendant made a motion for a nonsuit, upon the ground, that, upon the undisputed facts, the plaintiff was not entitled to recover, which motion was denied by the court, and an exception taken to the decision by the defendant.

The jury found a verdict for the plaintiff for $78.16, for which judgment with costs was entered. The defendant appealed to the General Term of that court, where the judgment was affirmed. The defendant thereupon appealed to this court.

MILLER, J. I am of the opinion that the court erred in refusing to nonsuit the plaintiff upon the trial. To render a party liable as a common carrier, it must be established that the property was actually delivered to the common carrier or to some person duly authorized to act on his behalf. The responsibility of the carrier does not commence until the delivery is completed. (Angell on Carriers, § 129; Story on Bailments, § 532.) It is not enough that the property is delivered upon the premises, unless the delivery is accompanied by notice to the proper person. (Packard v. Getman, 6 Cow. 757; Trevor v. U. & S. R. R. Co., 7 Hill, 47; Blancard v. Isaacs, 3 Barb. 388; 2 Kent Com. 604; 1 Pars. on Con. 654.) The liability of the carrier attaches only from the time of the acceptance of the goods by him. (Story on Bailments, § 533; 6 Cow. supra.) To complete the delivery of the property within the rules laid down in the authorities, I think it is also essential that the property should be placed in such a position that it may be taken care of by the agent or person having charge of the business, and under his immediate control. It must be accepted and received by the agent. It appears in the case at bar that the cutter of the plaintiff was placed upon the platform of the defendant's freight house, by a servant of the plaintiff, the freight having been previously paid, to be transported to Buffalo. At the time when it was thus left, a baggageman in the defendant's employment, who was then engaged in sweeping out the depot, was notified that there was some freight to go to Buffalo in the noon train. The servant of the plaintiff testifies that he had seen this person receive and put freight on

the cars, and at this time he apparently had charge of the depot, although the proof on the part of the defendant shows that another employee was the real freight agent, and the person with whom the contract was made for the carriage of the property, and that the baggageman had no authority to receive it. Upon this state of facts, I am inclined to think that the plaintiff had established sufficient prima facie to submit to the jury the question whether the baggageman was authorized to receive the property, and whether the notice to him was of itself sufficient. Persons dealing with railroad corporations, and parties engaged in the transportation of freight, have a right to consider that those usually employed in the business of receiving and forwarding it, have ample authority to deal with them. It is enough to establish a delivery, in the first instance, to prove that a person thus acting received and accepted the property for the purpose of transportation, and even although it subsequently appears that another employee was actually the agent having charge of this department of business, yet the company who sanction the performance of this duty by other persons in their employment, and thus hold out to the world that they are authorized agents, are not at liberty to relieve themselves from responsibility, by repudiating their acts. So far then as this branch of the case is concerned, it was at least a question of fact, to be submitted to the jury under proper instructions, whether the baggageman of the defendant, to whom it is claimed by the plaintiff the cutter was delivered, was the agent of the defendant, duly authorized to receive the same, and whether notice of its delivery was given to him as such agent. But, whether he was such agent, or the duty of receiving freight devolved upon another person, the defendant could not be held liable under any circumstances, without an actual and complete delivery of the property into the possession of the corporation, and under its control. This, I think, was not done. The undisputed testimony shows, that the cutter was placed upon the platform, and that within two or three hours afterward, it was carried away and broken to pieces by a passing train of cars. The fact that it was thus carried away, evinces, that it was carelessly exposed by the plaintiff's servant; that the destruction of the cutter was occasioned by his negligence, and that the delivery was not as perfect and complete as it should have been.

The accident would not have happened had the cutter been placed beyond the reach of passing trains. It was not enough that the agent was notified, to make out a valid acceptance and delivery. The place of delivery was important, and it was equally essential that due care should be exercised. Suppose the servant had left the cutter on the track of the railroad, and notified the agent, would the defendant have been responsible? Clearly not, for the apparent reason that there was no delivery upon the premises, no surrender of the property into the possession of the agent. Until it was actually delivered, the agent was under no obligation to take charge of the property, even if notified. It is apparent that the plaintiff was in fault in not delivering the property to the defendant, and in leaving it in an exposed condition, which caused its destruction; and, having failed to establish this material part of his case, should have been nonsuited. As a new trial must be granted for the error stated, it is not important to examine the other questions raised and discussed.

Judgment reversed, and new trial granted, with costs to abide the event.

HERMAN BALDWIN
v.
THE AMERICAN EXPRESS COMPANY.
(23 Ill. 197.)

Writ of Error to the Circuit Court of Cook county; the Hon. George Manniere, Judge, presiding.

This was an action of assumpsit, brought by Herman Baldwin against the American Express Company, to recover the value of a package of money sent by the plaintiff to D. J. Baldwin, at Madison, Wisconsin.

The cause was tried by the court without a jury, by consent of parties.

It was stipulated on the trial that the defendant received from the plaintiff a package containing $1,000 in money, to be forwarded and delivered to David J. Baldwin, at Madison, Wisconsin, and that the same had never been received by Baldwin or his agents.

The defendant then read in evidence the following order:

"H. A. Douglas, ag't Am'n Ex. Co., please deliver to C. T. Flowers, or Dane County Bank, any pkges. that may come to your office for me.

Baraboo, Wis., Aug. 8th, 1857.
"D. J. Baldwin."

The proof further showed that the package in question arrived at Madison, Wisconsin, on September 8, 1857, directed to D. J. Baldwin, Baraboo, "marked" $1,000. The package was not delivered, or any entry thereof made in the delivery book, but the clerk of the bank was informed of the arrival of the package, and so was the clerk of Mr. Flowers, to whom the bank directed the express company to deliver it. The other material facts of the case are stated in the opinion of the court. The court below found for the defendant.

MR. JUSTICE BREESE delivered the opinion of the Court:

The question in this case is, was there sufficient evidence of a delivery of this package, or of an offer to deliver, as will discharge the liability of the express company as a common carrier, or change it into the liability of a depositary simply.

There is no count in the declaration against the defendant, charging any other contract with it than that as a common

carrier, and consequently, all evidence in relation to the security of the safe, or the absence of a night watch, is out of the question. The defendant can only be liable as a common carrier, and in no other character on this declaration. We do not consider there is any offer to deliver this package either to the officers of the Dane County Bank or to Flowers, or to any one in his employment authorized to receive it, proved.

The testimony of Douglas, the agent of the express company, taken in connection with that of Memhard, the messenger, of Treadway, one of the employees of the bank, and of Brown, the cashier of the bank, and of Willis, the clerk of Flowers, all go to show that the package was not ever tendered by Douglas, to either of them, and he shows most clearly that the package was at no time ready for delivery, either to the bank or to Flowers, for he says it was the custom at the express office to enter the packages received in a delivery book, which is also the receipt book, and by which book they deliver to consignees, who sign a receipt in this delivery book. Now this package was never entered on this book, and of course was not ready for delivery.

The bank had no opportunity to refuse to receive the package, for it was not offered to any officer of the bank. One or more of them was informed there was such a package there for Baldwin, but though the bank office was not five steps distant, and in the same building with the express office, the express agent did not take it to the bank, and there offer to deliver it. It was not offered to Flowers, or his clerk, at his place of business. The clerk was merely told by the messenger, when making his rounds, there was a package for Baldwin at the office, and the clerk said he would "go round and see about it." When at the office, the package was not offered to him, and if it had been, he would not have been authorized to receive it at the office, it not having been entered on the delivery book, and the custom of the express company being shown to be, at Madison, to deliver by that book to the consignees in person, or to their authorized agent, at their place of business. An offer to deliver at the express office, if that was proved, under such circumstances, amounted to nothing.

Mr. Fargo, the general agent of this company, says, "we deliver goods actually to the person, or by notice," by which we would understand, that at important towns on their routes, and at the termination of their routes at important towns, they deliver personally; at way-stations by notice, and by depositing the goods or packages in a safe receptacle, if that be the known custom of the company. Such a custom may be reasonable, and therefore legal, and if well established, parties will be presumed as having contracted with reference to it; but at small stations, where the business will not justify them in keeping a special delivery agent, prompt notice should be given to the consignee, in order to discharge them from the strict liability of common carriers. Mr. Van Vleet, the check clerk in the United States express office, says that "the general method of conducting an express business is to take receipts in a receipt book, which is called the delivery book." This was the custom, as proved by Douglas, of the defendants, at Madison.

The cases cited by defendants' counsel, of vessels and railroad companies delivering goods at their landings or depots with or without notice, cannot meet such a case as this, where the undertaking is to deliver in person.

It is the settled doctrine of England and of this country, that there must be an actual delivery to the proper person, at his residence or place of business, and in no other way can he discharge himself of his responsibility as a common carrier, except by proving that he has performed such engagement, or has been excused from the performance of it, or been prevented by the act of God or a public enemy. Stephenson v. Hart, 4 Bing. 476; Garnett v. Willan, 5 Barn. & Ald. 53; Duff v. Budd, 3 Brod. & Bing. 177; Hyde v. The Navigation Co., from the Trent to the Mersey, 5 T. R. 389; 2 Kent's Com. 604; Gibson v. Culver, 17 Wend. 305; Eagle v. White, 6 Wharton, 505; Moore v. Sheindine, 2 Har. & McHen. 453; Chickering v. Forolm, 4 Mass. 453; Young v. Smith, 3 Dana, 92.

It is necessary, in order to give one security to property, this rigid rule should obtain, and it has for years been enforced against common carriers. They are considered as insurers, and are under that responsibility; and to prevent litigation, and avoid the necessity of going into the examination of matters difficult to be unraveled, the law, very justly, in case of loss, presumes against them. The rule being so rigorous, they are entitled to demand, and do demand, a compensation for their services in full proportion, at least, to the risks incurred. The company in this case, have shown no excuse for the non-delivery of the package. The facts and the law are against them. We have not the opportunity to examine the case of Marshal et al. v. Henry Wells et al., in 6 Wisconsin, referred to by defendants' counsel, in which this company prevailed, as is said, upon the same state of facts upon which we have adjudicated. We are inclined to think there must have been some circumstance in that case not found in this, which determined the recovery. It may be the proof in that case showed the entry of the package on the delivery book, and an offer at the bank perhaps, after bank hours, and a refusal to receive it on that account, or some other controlling fact not appearing in this record.

If not so, then we can only say we differ from the Supreme Court of Wisconsin, in

our view of the law upon the facts presented.

The judgment of the circuit court is reversed, and the cause remanded.

Judgment reversed.

MORTIMER E. McENTEE, RESPONDENT, vs. THE NEW JERSEY STEAMBOAT COMPANY, APPELLANT.

(45 N. Y. 34.)

Appeal from the General Term of the Supreme Court in the second district.

The action was brought against the defendants for the conversion of chattels claimed by the plaintiff. The defendants, as common carriers between Albany and New York, received from Mr. Guyer, at Albany, and carried to New York, in 1868, several bundles of sash and blinds addressed to "McEntee," New York. After these arrived at New York, the plaintiff claimed them, and gave evidence tending to prove that he demanded the goods and tendered the charges, and that the agents of the defendants refused to deliver them.

The defendants gave evidence somewhat in conflict with the plaintiff's statement, and also gave evidence tending to show that other property of a like character had on former occasions being received by Mr. Guyer in New York, and that the goods were first inquired for as the goods of Guyer, and that the defendant supposed they might belong to him, and that they offered to deliver them to the cartman of the plaintiff and to the plaintiff upon the production of any paper showing ownership or authority to receive them, and that the defendants were at all times ready to deliver the goods to the plaintiff upon the production of any reasonable evidence identifying him as the consignee and owner. The judge ruled and decided that the only question for the jury was whether the freight money was tendered, and restricted the counsel in summing up to that question only, and charged the jury, 1st, That when the defendants receive goods, the consignor putting them on a steamboat to be carried to New York without consigning them to any particular individual, the steamboat company was authorized to deliver them to any person who calls for them; and, 2d. That common carriers have no right to insist on any person proving ownership, for they are not restricted as to the delivery, and incur no liability whatever in that respect.

To these several rulings the defendants excepted. The counsel for the defendants also made several requests to the judge to charge, which were refused, and exceptions taken to the refusal.

A verdict was rendered at the Kings Circuit in favor of the plaintiff for the value of the property, upon which judgment was entered and affirmed on appeal by the Supreme Court, and from the latter judgment the defendants have appealed to this court.

ALLEN, J. The defendants were charged for the conversion of the goods upon evidence of a demand and a refusal to deliver them. If the demand was by the person entitled to receive them, and the refusal to deliver was absolute and unqualified, the conversion was sufficiently proved, for such refusal is ordinarily conclusive evidence of a conversion; but if the refusal was qualified, the question was whether the qualification was reasonable; and if reasonable and made in good faith, it was no evidence of a conversion. (Alexander v. Southey, 5 B. and Ald., 247; Holbrook v. Wight, 24 W. R., 169; Rogers v. Weir, 34 N. Y., 463; Mount v. Derick, 5 Hill, 455.) If, at the time of the demand, a reasonable excuse be made in good faith for the non-delivery, the goods being evidently kept with a view to deliver them to the true owner, there is no conversion.

This action is not upon the contract of the carriers, but for a tortious conversion of the property; but the rights and duties of the defendants as carriers are, nevertheless, involved.

The defendants were bailees of the property, under an obligation to deliver it to the rightful owner. They would have been liable had they delivered the goods to a wrong person. Common carriers deliver property at their peril, and must take care that it is delivered to the right person, for if the delivery be to the wrong person, either by an innocent mistake or through fraud of third persons, as upon a forged order, they will be responsible, and the wrongful delivery will be treated as a conversion. (Hawkins v. Hoffman, 6 Hill, 586; Powell v. Myers, 26 Wend. R., 290; Devereux v. Barclay, 2 B. and Ald., 702; Guillaume v. Hamburgh and Am. Packet Co., 3 Hand; 42 N. Y., 212; Duff v. Budd, 3 Brod. and Bing., 177.) The duties of carriers may be varied by the differing circumstances of cases as they arise; but it is their duty in all cases to be diligent in their efforts to secure a delivery of the property to the person entitled, and they will be protected in refusing delivery until reasonable evidence is furnished them that the party claiming is the party entitled, so long as they act in good faith and solely with a view to a proper delivery. The circumstances of this case, the very defective address of the parcels, and the omission of the plaintiff to produce any evidence of title to the property or identifying him as the consignee, justified the defendants in exercising caution in the delivery, and it should have been submitted to the jury whether the refusal was qualified, as alleged by the defendants; and if so, whether the qualification was reasonable, and was the true reason for not delivering the goods. The judge also erred in his instructions to the jury as to the duty of the defendants, as common carriers, in the delivery of goods. They may not properly or without incurring liability to the true owner, deliver goods to any per-

son who calls for them, other than the rightful owner. The judgment must be reversed and a new trial granted, costs to abide event.

All the judges concurring, judgment reversed and new trial ordered.

ABRAM WITBECK, RESPONDENT, v. ALEXANDER HOLLAND, Treasurer of the American Express Company, APPELLANT.

(45 N. Y. 13.)

Appeal from the judgment of the General Term of the Supreme Court in the fourth judicial district, affirming the judgment for the plaintiff, entered upon the report of the referee.

This action was tried before a referee, who found that the American Express Company was a joint stock association engaged in the general express business. That the plaintiff was a soldier on Hart's Island, N. Y., who, having received his bounty money on the 3d December, 1864, took $320 of it to the office of Adams Express Company, on that island, where it was counted, put in an envelope, sealed and addressed to "Martin Witbeck, Schenectady, N. Y.," delivered to the agent of the company, who gave the plaintiff a receipt acknowledging the receipt of the package, "upon the special acceptance and agreement, that this company is to forward the same to its agent, nearest or most convenient to destination only, and there to deliver the same to other parties to complete the transportation, such delivery to terminate all liability of this company for such package," etc.

The package was delivered by the Adams Express Company on the 5th December, 1864, to the American Express Company at its office in New York, and a receipt was given to the Adams Express Company as follows:

Received, New York, December 5, 1864, of Adams Express Company (per bills), in good order, the following articles set opposite our respective names.

ARTICLES	Dollars	Cents	Consignee	Where from	Destination.	Amount Charged	By whom received
Pck.	$320		Martin Witbeck.	H. I.	Schenectady, N. Y.	$1.75	Myers.

Myers was the agent of the American Express Company at New York. The plaintiff, December 8, 1864, enclosed the receipt in a letter to his brother Daniel Witbeck, who resided at Schenectady, which letter and receipt were received by Daniel Witbeck as an advertised letter about the middle of February, 1865.

There was at the time no contract or business connection between the Adams Express Company and the American Express Company, except that they took parcels, goods, etc., for each other for transportation and delivery along their respective routes of business. The American Express Company delivered the package at Schenectady, December 6th, 1864. Martin Witbeck, a consignee of said package, resided with his wife at Schenectady, at the time of the arrival of the package at Schenectady, and until after January 14, following.

The agent of the American Express Company did not know Martin Witbeck, and, when the package arrived, looked at the directory and did not find his name in it. The next day the agent filled up a notice and addressed it to Martin Whitbeck, Schenectady, and deposited it in the post-office. Between one and three days thereafter, the agent inquired of two men, conductors upon the N. Y. Central Railroad, running from Schenectady to Troy, and also inquired of John Bradt, the city treasurer of Schenectady, whether they knew Martin Whitbeck, and they replied they did not.

The agent made no further effort to find the consignee, and the package was deposited in the company's iron safe in its office till January 17, 1865, when the office was burglariously opened in the night, the safe blown open, the package abstracted and stolen and has never been recovered.

The notice put in the post-office, was not received by Martin Witbeck, though inquiries were made several times at the post-office while it was there, by his wife and father, for letters for themselves and for him.

The referee decided, among other things, that the American Express Company was bound to deliver the package to Martin Witbeck, personally, or at his residence or place of business; that the American Express Company did not make due effort to find Martin Witbeck, or his residence or place of business; that the plaintiff was entitled to judgment for $320, with interest from December 7, 1864.

From the judgment entered upon the report the defendant appealed to the General Term, where it was affirmed, and from such judgment of affirmance this appeal was taken.

GROVER, J. The facts found by the referee showed beyond question that the defendant was a common carrier, and responsible, as such, for property delivered to it for transportation. This finding was warranted by the evidence. It was engaged in transacting a general express business. It is insisted by the counsel for the defendant that its liability was restricted by the contract, proved by the receipt given by the Adams Express Company to the plaintiff, upon the receipt of the money from him by it at Hart's Island. From this receipt, it appears that the latter company undertook to forward the package to its agent nearest

to its destination, there to deliver it to other parties to complete the transportation, such delivery to terminate all liability of that company for its passage. There is nothing in this or any other restriction at all affecting the liability of the defendant as a common carrier; all the restrictions found in the receipt are by the language limited to the liability of the Adams company. Indeed, were they applicable to the defendant, they would not affect the liability of the defendant in the action, as they do not include the cause of the loss, unless they relieve the carrier from the duty of delivery to the consignee. The first inquiry is, whether it was the duty of the carrier so to deliver the package in the absence of any restriction. Carriers by land are bound to deliver or tender the goods to the consignee at his residence or place of business, and until this is done they are not relieved from responsibility as carriers. (2 Kent's Com., 605; Angell on Carriers § 295; Gibson v. Culver, 17 Wend., 305; Fisk v. Newton, 1 Den., 45.) But when goods are safely conveyed to the place of destination, and the consignee cannot, after reasonable effort, be found, the carrier may discharge himself from further responsibility by depositing the property in a suitable place for the owner. (Fisk v. Newton, supra.) Carriers by vessels, boats and railways are exempt from the duty of personal delivery. (Redfield on Railways, § 127; Thomas v. Boston R. R. Co., 10 Metcalf, 472.) Such carriers discharge themselves from responsibility, as such, by transporting the goods to their nearest business station to the residence or place of business of the consignee, and notifying the consignee of their readiness to deliver the goods at such station, after the lapse of a reasonable time for him to receive them. But this exemption does not extend to express companies, although availing themselves of carriage by rail. (Redfield on Railways, § 127.) These were established for the purpose of extending to the public the advantages of personal delivery enjoyed in all cases of land carriage prior to the introduction of transportation by rail.

It appeared in the present case that the defendant had its vehicles by which they carried articles to the consignees in the city of Schenectady, which had arrived there by rail under contracts with the company for the transportation. This is the usual course of transacting business by such companies; were it otherwise, the business done by these companies would be greatly diminished, as it would be equally advantageous in many cases to have the property transported by the railroad company. When the defendant received the package from the Adams Company at New York, consigned to Martin Witbeck, Schenectady, it became liable as carrier for its carriage to Schenectady and its delivery to Witbeck there, if with reasonable diligence he could be found. The performance of this entire service was contracted for by its receipt so addressed, and had the defendant received it from the plaintiff at New York and given him a receipt for its transportation, the obligation to make personal delivery at Schenectady, would have been incurred. The only remaining question arises upon the exception taken to the finding by the referee, as a fact, that the defendant did not make due effort, nor use due diligence to find said Martin Witbeck, the consignee of said package. It is insisted by the counsel for the appellant, that the question, what is reasonable diligence, is one of law. That may be so, when there is no conflict in the evidence, or controversy as to the facts to be inferred therefrom. But that is not this case, nor will most cases of this class be of that description. In most, if not all, the questions will be mixed, both of fact and law. In the present case the finding of the referee was clearly correct. The diligence, which the law required of the defendant, was such as a prudent man would have used in an important business affair of his own. The evidence shows that the defendant was so unattentive as to mistake the surname of the consignee. Although the package was addressed to Witbeck, all its inquiries were made for Whitbeck. This may have prevented their finding him. It further appeared that its inquiries were confined to a few persons in the vicinity of its place of business, and that by these it obtained information of other persons of a like surname, one of whom was the father of the consignee. Surely inquiry should have been made of these persons, and had it been so made delivery would have been made and the loss would never have occurred. There is nothing in the point that the negligence of the plaintiff in not giving further information as to the residence of the consignee contributed to the loss. The defendent accepted the package, addressed as it was, and failed in the performance of the duty imposed thereby. For such failure it is responsible, irrespective of the right of the plaintiff to give additional information. I have examined the various exceptions taken by the appellant to the rulings of the referee as to the competency of evidence. The question whether the consignee was well known in Schenectady was proper. The plaintiff had the right to prove this fact if he could. But the testimony given in answer was not material. None of the testimony excepted to could have prejudiced the defendant. The judgment appealed from must be affirmed.

All the judges concurring, judgment affirmed.

NORWAY PLAINS COMPANY vs. BOSTON AND MAINE RAILROAD.

(67 Mass. [1 Gray] 263.)

Action of contract upon the agreement of the defendants to transport certain goods from Rochester (N. H.) to Boston.

The parties submitted the case to the decision of the court upon the following statement of facts: "The defendants received of

the plaintiffs, at Rochester, packages and bales of merchandise, to be transported to Boston. Receipts specifying the date of the delivery of the goods to the defendants, and containing a description of them, were signed by the agent of the corporation, copies of which were annexed." These receipts, the form of which is printed, are respectively dated October 31st, and November 2d, 1850, and the defendants thereby acknowledge that they have received the goods "numbered and marked as above, which the company promises to forward by its railroad, and deliver to or order at its depot in Boston; freight therefor to be paid."

"The train in which the goods mentioned in the receipt dated November 2d, 1850, were sent, usually arrives in Boston at about half past twelve o'clock; but on the day of its arrival, November 4th, 1850, did not reach the depot until a later time. Ames, the truckman employed by the plaintiffs to take their freight from the defendants' depot in Boston, and whose principal business it is to cart goods from said depot for the plaintiffs and others, went for the goods, and waited from about two o'clock until about three and a half o'clock in the afternoon, and was then told by the agents of the defendants, that they were in the hindmost car, which was then out on the wharf and inaccessible to trucks or carts, and could not then be delivered; and no time was stated when they might be expected to be delivered; and he, being satisfied that they could not be reached until it would be too late to transport and deposit them where they were to go that day, and no notice being given when they would be delivered, departed, intending to call for them early on the next morning. In order that the goods should be transported to the place where the truckman was to carry them, it was necessary to receive them by three and a half or four o'clock, the days being short and the stores being closed about sunset. During the ensuing night, or the morning of November 5th, 1850, before daylight, the depot, with the packages and bales of merchandise belonging to the plaintiffs, was consumed by fire.

"When a freight train arrives it is usual to run it into the depot as far as possible, and unlade the cars which are inside, and relade them with the outward freight, and then run them off on to another track; so that those outside are detained there until those inside are unladen, reladen and passed forward; and caused corresponding delay in the delivery of the goods in the hindmost cars. And this was a reasonable course.

"Said Ames had authority from the plaintiffs to take from said depot any goods arriving there, without special directions or notice, and was in the frequent habit of so doing, and therefore was allowed by the railroad corporation, on the arrival of the train, to inspect the way bill, to inform himself what goods were on board the train; and no notice was usually given him, other than this.

"The gates of the depot were closed at half past four o'clock. The goods described in the receipt dated November 2d, were discharged from the cars, and put on the platform in a fit state for delivery, before five o'clock, but at what precise hour is not known; and this was the usual course, when goods, from any cause, were not delivered before the gates were closed. But after Ames left, the cars were put in such a position outside of the depot, that the said goods could have been taken directly from them before half past four o'clock, had Ames remained; though that would not have been in the general course of delivery, and could only have been done by an arrangement with Ames for that purpose; and no offer or suggestion was made to him that they could be so taken. Ames frequently took goods from the cars themselves, without waiting for their being discharged on to the platform, when it was for the mutual convenience of both parties that he should do so.

"The goods described in the receipt dated October 31st, 1850, arrived on Saturday, the 2d of November, and were discharged from the cars sometime during that day, and were ready for delivery at least as early as Monday morning. No notice had been given to the plaintiffs of their arrival, otherwise than that Ames knew that they were so ready, and could have taken them, so far as the railroad corporation was concerned, if it had seen fit. The agent of the plaintiffs when these goods were put on the cars, knew that, according to the usual course of the trains, they would arrive in Boston on Saturday, about noon."

SHAW, C. J. The liability of carriers of goods by railroads, the grounds and precise extent and limit of their responsibility, are coming to be subjects of great interest and importance to the community. It is a new mode of transportation, in some respects like the transportation by ships, lighters, and canal boats on water, and in others like that by wagons on land; but in some respects it differs from both. Though the practice is new, the law, by which the rights and obligations of owners, consignees, and of the carriers themselves, are to be governed, is old and well established. It is one of the great merits and advantages of the common law, that instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it. These general principles of equity and policy are rendered precise, specific, and adapted to practical use, by usage which is the proof of their general fitness and common convenience, but still more by judicial exposition; so that, when in a course of judicial proceeding, by tribunals of the highest authority, the general rule has been modified, limited and applied, according to particular cases, such judicial exposition, when well settled and acquiesced in, becomes itself a precedent and forms a rule of law for future

cases, under like circumstances. The effect of this expansive and comprehensive character of the common law is, that whilst it has its foundations in the principles of equity, natural justice and that general convenience which is public policy; although these general considerations would be too vague and uncertain for practical purposes, in the various and complicated cases of daily occurrence, in the business of an active community; yet the rules of the common law, so far as cases have arisen, and practices actually grown up, are rendered, in a good degree precise and certain, for practical purposes, by usage and judicial precedent. Another consequence of this expansive character of the common law is, that when new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decision, they must be governed by the general principle, applicable to cases most nearly analogous, but modified and adapted to new circumstances, by considerations of fitness and propriety, of reason and justice, which grow out of those circumstances. The consequence of this state of the law is, that when a new practice or a new course of business arises, the rights and duties of parties are not without a law to govern them; the general considerations of reason, justice and policy, which underlie the particular rules of the common law, will still apply, modified and adapted, by the same considerations, to the new circumstance. If these are such as give rise to controversy and litigation, they soon, like previous cases, come to be settled by judicial exposition, and the principles thus settled soon come to have the effect of precise and practical rules. Therefore, although steamboats and railroads are but of yesterday yet the principles which govern the rights and duties of carriers of passengers, and also those which regulate the rights and duties of carriers of goods, and of the owners of goods carried, have a deep and established foundation in the common law, subject only to such modifications as new circumstances may render necessary and mutually beneficial.

The present is an action brought to recover the value of two parcels of merchandise, forwarded by the plaintiffs to Boston, in the cars of the defendants. These goods were described in two receipts of the defendants, dated at Rochester, (N. H.,) the one October 31st, 1850, and the other November 2nd, 1850.

By the facts agreed it appears, that the goods specified in the first receipt were delivered at Rochester, and received into the cars, and arrived in Boston seasonably on Saturday the 2d of November, and were then taken from the cars, and placed in the depot or warehouse of the defendants; that no special notice of their arrival was given to the plaintiffs or their agent; but that the fact was known to Ames, a truckman, who was their authorized agent, employed to receive and remove the goods, that they were ready for delivery, at least as early as Monday morning, the 4th of November, and that he might then have received them.

The goods specified in the other receipt were forwarded to Boston on Monday, the 4th of November; the cars arrived late; Ames the truckman, knew from inspection of the way-bill that the goods were on the train, and waited for them some time, but could not conveniently receive them that afternoon, in season to deliver them at the places to which they were directed, and for that reason did not take them; in the course of the afternoon they were taken from the cars and placed on the platform within the depot; at the usual time at that season of the year, the doors were closed. In the course of the night the depot accidentally took fire, and was burnt down, and the goods were destroyed. The fire was not caused by lightning; nor was it attributable to any default, negligence, or want of due care, on the part of the railroad corporation, or their agents or servants.

We understand the merchandise depot to be a warehouse suitably inclosed and secured against the weather, thieves, and other like ordinary dangers, with suitable persons to attend it, with doors to be closed and locked during the night, like other warehouses, used for the storing of merchandise; that it is furnished with tracks, on which the loaded cars run directly into the depot to be unloaded; that there are platforms on the sides of the track, on which the goods are first placed; that if not immediately called for and taken by the consignees, they are separated according to their marks and directions, and placed by themselves in suitable situations within the depot there to remain a reasonable and convenient time, without additional charge until called for by parties entitled to receive them.

The question is whether, under these circumstances, the defendants are liable.

That railroad companies are authorized by law to make roads as public highways, to lay down tracks, place cars upon them, and carry goods for hire, are circumstances which bring them within all the rules of the common law, and make them eminently common carriers. Their iron roads, though built, in the first instance, by individual capital, are yet regarded as public roads, required by common convenience and necessity, and their allowance by public authority can only be justified on that ground. The general principle has been uniformly so decided in England and in this country; and the point is, to ascertain the precise limits of their liability. This was done to a certain extent in this court, in a recent case, with which, as far as it goes, we are entirely satisfied. Thomas v. Boston & Providence Railroad, 10 Met. 472.

Being liable as common carriers, the rule of the common law attaches to them, that they are liable for losses occurring from any accident which may befall the goods, during the transit, except those arising from the act of God or a public enemy. It is not necessary now to enquire into the weight of those considerations of reason and policy, on which the rule is founded; nor to consider what casualty may be held to result from an act of God, or a public enemy; because the present case does not turn on any such distinction. It is sufficient, therefore, to state and affirm

the general rule. In the present case the loss resulted from a fire, of which there is no ground to suggest that it was an act of God; and it is equally clear that it did not result from any default or negligence on the part of the company, though the goods remained in their custody. If, at the time of the loss, they were liable as common carriers, they must abide by the loss; because as common carriers they were bound as insurers to take the risk of fire, not caused by the act of God, and in such case, no question of default or negligence can arise. Proof that it was from a cause for which they, neither by themselves nor their servants, were in any degree chargeable, could amount to no defence, and would therefore be inadmissible in evidence. If, on the contrary, the transit was at an end, if the defendants had ceased to have possession of the goods as common carriers, and held them in another capacity, as warehousemen, then they were responsible only for the care and diligence which the law attaches to that relation; and this does not extend to a loss by an accidental fire, not caused by the default or negligence of themselves, or of servants, agents, or others, for whom they are responsible.

The question then is, when and by what act the transit of the goods terminated. It was contended, in the present case, that, in the absence of express proof of contract or usage to the contrary, the carrier of goods by land is bound to deliver them to the consignee, and that his obligation as carrier does not cease till such delivery.

This rule applies, and may very properly apply, to the case of goods transported by wagons and other vehicles, traversing the common highways and streets, and which therefore can deliver the goods at the houses of the respective consignees. But it cannot apply to railroads, whose line of movement and point of termination are locally fixed. The nature of the transportation, though on land, is much more like that by sea, in this respect, that from the very nature of the case, the merchandise can only be transported along one line, and delivered at its termination, or at some fixed place at its side, at some intermediate point. The rule in regard to ships is very exactly stated in the opinion of Buller, J. in Hyde v. Trent & Mersey Navigation, 5 T. R. 387. "A ship trading from one port to another has not the means of carrying the goods on land; and, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier."

Another peculiarity of transportation by railroad is, that the car cannot leave the track or line of rails, on which it moves; a freight train moves with rapidity, and makes very frequent journeys, and a loaded car, whilst it stands on the track, necessarily prevents other trains from passing or coming to the same place; of course, it is essential to the accommodation and convenience of all persons interested, that a loaded car, on its arrival at its destination, should be unloaded, and that all goods carried on it, to whomsoever they may belong or whatever may be their destination, should be discharged as soon and as rapidly as it can be done with safety. The car may then pass on to give place to others, to be discharged in like manner. From this necessary condition of the business, and from the practice of these transportation companies to have platforms on which to place goods from the cars, in the first instance, and warehouse accommodations by which they may be securely stored, the goods of each consignment by themselves, in accessible places, ready to be delivered, the court are of opinion, that the duty assumed by the railroad corporation is—and this, being known to owners of goods forwarded, must, in the absence of proof to the contrary, be presumed to be assented to by them, so as to constitute the implied contract between them—that they will carry the goods safely to the place of destination, and there discharge them on the platform, and then and there deliver them to the consignee or party entitled to receive them, if he is there ready to take them forthwith; or, if the consignee is not there ready to take them, then to place them securely and keep them safely a reasonable time, ready to be delivered when called for. This, it appears to us, is the spirit and legal effect of the public duty of the carriers, and of the contract between the parties, when not modified or altered by special agreement, the effect and operation of which may not here be considered.

This we consider to be one entire contract for hire; and although there is no separate charge for storage, yet the freight to be paid, fixed by the company, as a compensation for the whole service, is paid as well for the temporary storage, as for the carriage. This renders both the services, as well the absolute undertaking for the carriage, as the contingent undertaking for the storage, to be services undertaken to be done for hire and reward. From this view of the duty and implied contract of the carriers by railroad, we think there result two distinct liabilities; first, that of common carriers, and afterwards that of keepers for hire, or warehouse keepers; the obligations of each of which are regulated by law.

We may then say, in the case of goods transported by railroad, either that it is not the duty of the company as common carriers, to deliver the goods to the consignee, which is more strictly conformable to the truth of the facts; is necessary, it may be said that delivery or, in analogy to the old rule, that delivery by themselves as common carriers to themselves as keepers for hire, conformably to the agreement of both parties, is a delivery which discharges their responsibility as common carriers. If they are chargeable after the goods have been landed and stored, the liability is one of a very different character, one which binds them only to stand to losses occasioned by their fault or negligence. Indeed the same doctrine is distinctly laid down in Thomas v. Boston & Providence Railroad. 10 Met. 472, with the same limitation. The point that the same company, under one and the same contract, may be subject to distinct duties, for a failure in which they may be

liable to different degrees of responsibility, will result from a comparison of the two cases of Garside v. Trent & Mersey Navigation, 4 T. R. 581, and Hyde v. Trent & Mersey Navigation, 5 T. R. 389. See also Van Santvoord v. St. John, 6 Hill, 157, and McHenry v. Philadelphia, Wilmington & Baltimore Railroad, 4 Harring, 448.

The company, having received an adequate compensation for the entire service, if they store the goods, are paid for that service; they are depositaries for hire, and of course responsible for the security and fitness of the place, and all precautions necessary to the safety of the goods, and for ordinary care and attention of their servants and agents, in keeping and delivering them when called for. This enforces the liability of common carriers, to the extent to which it has been uniformly carried by the common law, so far as the reason and principle of the rule render it fit and applicable, that is, during the transit; and affords a reasonable security to the owner of goods for their safety, until actually taken into his own custody.

The principle, thus adopted, is not new; many cases might be cited; one or two will be sufficient. Where a consignee of goods sent by a common carrier to London, had no warehouse of his own, but was accustomed to leave the goods in the wagon office, or warehouse of the common carrier, it was held, that the transit was at an end, when the goods were received and placed in the warehouse. Rowe v. Pickford, 8 Taunt. 83. Though this was a case of stoppage in transitu, it decides the principle. But another case in the same volume is more in point. In re Webb, 8 Taunt, 443. Common carriers agreed to carry wool from London to Frome, under a stipulation, that when the consignees had not room in their own store to receive it, the carriers, without additional charge, would retain it in their own warehouse, until the consignor was ready to receive it. Wool thus carried, and placed in the carrier's warehouse, was destroyed by an accidental fire; it was held, that the carriers were not liable. The court say, that this was a loss which would fall on them, as carriers, if they were acting in that character, but would not fall on them as warehousemen.

This view of the law, applicable to railroad companies, as common carriers of merchandise, affords a plain, precise and practical rule of duty, of easy application, well adapted to the security of all persons interested; it determines that they are responsible as common carriers until the goods are removed from the cars and placed on the platform; that if, on account of their arrival in the night, or at any other time, when, by the usage and course of business, the doors of the merchandise depot or warehouse are closed, or for any other cause, they cannot then be delivered; or if, for any reason, the consignee is not there ready to receive them; it is the duty of the company to store them and preserve them safely, under the charge of competent and careful servants, ready to be delivered, and actually deliver them when duly called for by parties authorized and entitled to receive them; and for the performance of these duties, after the goods are delivered from the cars, the company are liable as warehousemen, or keepers of goods for hire.

It was argued in the present case, that the railroad company are responsible as common carriers of goods, until they have given notice to consignees, of the arrival of goods. The court are strongly inclined to the opinion, that in regard to the transportation of goods by railroad, as the business is generally conducted in this country, this rule does not apply. The immediate and safe storage of goods on arrival, in warehouses provided by the railroad company, and without additional expense, seems to be a substitute better adapted to the convenience of both parties. The arrival of goods, at the larger places to which goods are thus sent, are so numerous, frequent, and various in kind, that it would be nearly impossible to send special notice to each consignee, of each parcel of goods, or single article, forwarded by the trains. We doubt whether this is conformable to usage; but perhaps we have not facts enough disclosed in this case, to warrant an opinion on that question. As far as the facts on this point do appear, it would seem probable, that persons, frequently forwarding goods, have a general agent, who is permitted to inspect the waybills, ascertain what goods are received for his employers, and take them as soon as convenient after their arrival. It also seems to be the practice, for persons forwarding goods, to give notice by letter, and enclose the railroad receipt, in the nature of a bill of lading, to a consignee or agent, to warn him to be ready to receive them. From the two specimens of the form of receipt given by these companies, produced in the present case, we should doubt whether the name of any consignee or agent is usually specified in the receipt and on the way-bill. The course seems to be, to specify the marks and numbers, so that the goods may be identified by inspection and comparison with the way-bill. If it is not usual to specify the name of a consignee in the way-bill, as well as on the receipt, it would be impossible for the corporation to give notice of the arrival of each article and parcel of goods. In the two receipts produced in this case, which are printed forms, a blank is left for the name of a consignee, but it is not filled, and no consignee in either case is named. The legal effect of such a receipt and promise to deliver no doubt is, to deliver to the consignor or his order. If this is the usual or frequent course, it is manifest that it would be impossible to give notice to any consignee; the consignor is prima facie the party to receive, and he has all the notice he can have. But we have thought it unnecessary to give a more decisive opinion on this point, for the reason, already apparent, that in these receipts no consignee was named; and for another, equally conclusive, that Ames, the plaintiffs' authorized agent, had actual notice of the arrival of both parcels of goods.

In applying these rules to the present case, it is manifest that the defendants are not lia-

ble for the loss of the goods. Those which were forwarded on Saturday arrived in the course of that day, lay there on Sunday and Monday, and were destroyed in the night between Monday and Tuesday. But the length of time makes no difference. The goods forwarded on Monday were unladen from the cars, and placed in the depot, before the fire. Several circumstances are stated in the case, as to the agent's calling for them, waiting, and at least leaving the depot before they were ready. But we consider them all immaterial. The argument strongly urged was, that the responsibility of common carriers remained until the agent of the consignee had an opportunity to take them and remove them. But we think the rule is otherwise. It is stated, as a circumstance, that the train arrived that day at a later hour than usual. This we think immaterial; the corporation do not stipulate that the goods shall arrive at any particular time. Further, from the very necessity of the case, and the exigencies of the railroad, the corporation must often avail themselves of the night, when the road is less occupied for passenger cars; so that goods may arrive and be unladen, at an unsuitable hour in the night, to have the depot open for the delivery of the goods. We think, therefore, that it would be alike contrary to the contract of the parties, and the nature of the carriers' duty, to hold that they shall be responsible as common carriers, until the owner has practically an opportunity to come with his wagon and take the goods; and it would greatly mar the simplicity and efficacy of the rule, that delivery from the cars into the depot terminates the transit. If therefore, for any cause, the consignee is not at the place to receive his goods from the car as unladen, and in consequence of this they are placed in the depot, the transit ceases. In point of fact, the agent might have received the second parcel of goods, in the course of the afternoon on Monday, but not early enough to be carried to the warehouses, at which he was to deliver them; that is, not early enough to suit his convenience. But, for the reasons stated, we have thought this circumstance immaterial, and do not place our decision for the defendant, in regard to this second parcel, on that ground.

Judgment for the defendants.

MOSES vs. BOSTON & MAINE RAILROAD.

(32 N. H. 523.)

Case, to recover the value of ten bags of wool lost.

The declaration originally contained but one count, in which it is alleged that the defendants, on the 2d of November, 1850, being common carriers of goods for hire, in consideration that the plaintiff, at the request of the defendants, delivered to them the wool in question, promised to take care of, safely convey from Exeter to Boston, and deliver to the plaintiff said wool for a reasonable reward, within a reasonable time; yet the defendants, having accepted the wool for that purpose, did not carry the same to Boston, and did not deliver the same to the plaintiff, though a reasonable time therefor hath elapsed; and though afterwards, to wit, on the 9th of Nov., 1850, requested thereto; but so negligently conducted themselves with regard to the wool, that, through the carelessness and negligence of the defendants, it was lost.

The plaintiff had leave to amend the declaration, and filed four additional counts, which were allowed, saving to the defendants all exceptions on account of the amendment.

The first amended count does not allege that the defendants were common carriers, but sets out the undertaking of the defendants to carry the wool safely to Boston, and there keep it securely for a reasonable time after its arrival, and then to deliver it to the plaintiff on request; and a failure to fulfill the undertaking, alleging the negligence of the defendants, and the consequent loss as in the original count.

The second amended count is in all respects similar to the original, except that it sets forth the undertaking of the defendants, and their failure to fulfil, as in the first amended count.

The third amended count is in all respects like the first, except that it sets out that the wool was to be delivered to T. B. Townsend and Son, instead of the plaintiff; and the fourth is in all respects like the third, except that it alleges that the defendants were common carriers, and kept a warehouse in Boston for storing goods conveyed upon their railroad, and that the wool after its arrival in Boston was to be kept therein for a reasonable time, and then delivered to Townsend & Son, on request.

It was proved on the trial that the wool was delivered to the defendants at Exeter, on the 2d of November, 1850, in bags, directed to Townsend & Son, Boston; that on the 4th it was carried over the defendants' railroad in their freight cars, arriving at the freight depot of the defendants in Boston at some time from about one to three o'clock in the afternoon; that, in the usual course of business, from two to three hours was required to unload the freight from the cars into the depot or warehouse, and that the gates were shut at five o'clock, so that no goods could be removed therefrom after that hour until the next morning. It was also proved that on the night of the 4th the warehouse and most of its contents were consumed by fire, and that evidence introduced by the defendants tended to show that the wool was destroyed by the fire.

It was contended by the defendants that the wool had been removed from the cars and placed upon the platform of the warehouse, separate from other goods, and ready to be taken away by Townsend & Son, or the plaintiff, previous to the fire, and that these facts in connection with a printed notice, offered in evidence by the defendants in order to restrict their carrier liability, which they had made public, and which they claimed had been brought home to the knowledge of the plaintiff exonerated them from their liability as common carriers. The notice was as follows:

"Articles of freight must be taken away within twenty-four hours after being unladen from the cars, on arriving at their place of destination—the company reserving the right, if they see fit of charging storage after that lapse of time. The company will not hold themselves responsible as common carriers for goods, after their arrival at their place of destination and unloading in the company's warehouse or depot."

The plaintiff contended that the wool had not been thus unladen and placed upon the platform previous to the fire, and that he had no knowledge of the printed notice previous to the wool being sent over the road. He also contended that if these facts were not so, nevertheless, the responsibility of the defendants as common carriers did not terminate until such a time had elapsed after the wool was taken from the cars and placed in the warehouse, as would enable Townsend & Son, with exercise of reasonable diligence, to take it away.

The plaintiff also claimed that if the defendants' liability as common carriers had terminated previous to the fire, the wool was in their custody as warehouse men, and was lost through their want of ordinary care and prudence, and that they were liable for it on that ground.

It was also made a question by the plaintiff, whether the defendants had not sold a portion of the wool and received a certain sum therefor.

By consent of the parties the jury were directed to return answers to five questions submitted to them in writing; it being understood that, upon the determination of such of these questions as might be material, a general verdict was to be entered in accordance with the finding of the jury upon those questions, subject to the opinion of this court. The questions were as follows:

1. Was the wool carried over the road and then removed from the cars to the platform of the freight depot in Boston, and separated from other goods before the fire?

2. Was it so carried and removed from the cars a sufficient time before the fire to enable Townsend & Son to obtain possession of it by the exercise of reasonable diligence on the part of the plaintiff and of Townsend & Son?

3. Did the wool fail of being delivered to Townsend & Son by the want of ordinary care and prudence on the part of the defendants?

4. Was any portion of the wool sold by the defendants?

5. Did the plaintiff have any knowledge of the printed notice before the wool was sent over the road?

The plaintiff's counsel in his argument to the jury called their attention to the first paragraph in the printed notice, as an admission by the defendants that twenty-four hours was not an unreasonable time for the removal of the wool; and the court instructed the jury that it was competent evidence upon the second question, even if the plaintiff had no knowledge of the existence of this paper when the wool was sent. After the verdict was returned, and not before, the defendants excepted that these instructions were given without instructing the jury further, that if they treated the first paragraph in the notice as an admission, they were also to consider with it the succeeding paragraph.

The jury disagreed upon the first question, returned an answer in the negative to the second, in the affirmative to the third, and in the negative to the fourth and fifth, and a general verdict was thereupon entered for the plaintiff, which the defendants moved to set aside.

Various questions are raised by the case upon exceptions taken to the rulings of the court upon evidence, and their instructions to the jury upon the third question; which, however, are unnecessary to be stated, as the case is decided upon other grounds.

SAWYER, J. The first of the five questions submitted to the jury was thus submitted as involving the point on which the question turned as to the liability of the defendants, as common carriers, if it should be settled by this court to be the law that their liability as carriers terminated when the wool was taken from the cars and placed upon the platform of the warehouse at its place of destination, separate from other goods, and ready for delivery. This question was immaterial, if that liability in point of law rests upon other grounds; and the general verdict would, in that view, be unaffected by an agreement of the jury, one way or the other, or by their failing to agree either way upon it. By the finding upon the second question the fact is established, under the instructions which were given upon that question, that Townsend & Son, the consignees, had not reasonable opportunity, after the wool was unloaded and before the fire, to remove it from the warehouse, with the exercise of reasonable diligence on their part and on the part of the plaintiff. The finding upon the fifth question is material only upon the view that the defendants may limit their carrier liability as to such goods, by a public notice to that effect, brought home to the knowledge of the plaintiff. That upon the third question is material only in case it should become necessary to consider whether the defendants are to be held liable as warehouse-men on the ground of negligence, they not being liable as common carriers; and that upon the fourth question being in favor of the defendants, is immaterial upon either of the points to be considered in the case.

If the verdict is to be sustained, it is clear that it must be upon one or the other of the grounds,—1st, that the jury, having found the fact in answer to the second question, that the wool was not removed from the cars a sufficient time before the fire to enable the consignees to remove it with reasonable diligence on their part and on the part of the plaintiff, it continued down to the time of its loss in the hands of the defendants as common carriers; their liability, as such carriers, being held in law not to have terminated until the consignees had that reasonable opportunity after it was taken from the cars; or, second, that the jury, having found in an-

swer to the third question the other fact, that the wool was lost through the negligence of the defendants, they are liable for the consequences of that negligence in the loss of the wool, in whatever capacity they held it, whether as carriers, depositaries, or as warehouse-men. There are two aspects, then, in which the case is to be viewed; one presenting the case of a suit against the defendants as common carriers, liable for all losses which may happen except such as arise from the act of God or the public enemy, and in which the question of negligence is not involved; the other against them as warehouse-men, depositaries, or bailees for hire, and in which they are to be held liable only for negligence.

Considering the suit, then, as one proceeding against the defendants as common carriers, it stands upon the original count in the declaration and the second and fourth amended counts. In these different counts the delivery and the receipt of the wool, the undertaking to carry to Boston and there deliver, and the nondelivery and loss, are alleged in substantially the same manner, except that in the amended counts the allegation is inserted, not contained in the original, that the defendants also undertook to keep the wool safely in Boston a reasonable time after its arrival, and then deliver on request; and in the fourth the allegation is inserted, not contained in either of the others, that the defendants kept a warehouse in Boston for storing goods conveyed upon their railroad, in which they undertook to keep the wool for that reasonable time after its arrival, and then to deliver to Townsend & Co. instead of the plaintiff, as stated in the others.

That the amendments to this extent are admissible admits of no doubt. They all proceed against the defendants in the same character—as common carriers—to recover the value of the same ten bags of wool lost, with such modifications of the contract alleged, under which they were received by the defendants, as would seem to be necessary to adapt the declaration to the proof. The amended counts are clearly for the same cause of action as the original, and in no way inconsistent with it. The objection taken by the defendants to the amended counts, that they are for a different cause of action from that set out in the original, or are inconsistent with it, cannot be sustained, so far as it applies to the second and fourth amended counts. The views entertained by the court upon other points in the case render it necessary to determine only upon this point that the second and fourth amended counts are admissible, while the others may be considered as inadmissible.

The defendants also excepted, after the verdict was returned, to the omission by the court in their instructions to the jury to charge that they were to consider the last paragraph in the printed notice in connection with the first. The exception stated in the case is, that in giving the instructions in relation to the first paragraph the court did not also instruct the jury that if they considered the first as an admission by the defendants, they were also to take into consideration with it the other paragraph. We do not understand the exception to be to the character of the instructions given, but to the fact that those being given in relation to the first clause in the notice, they were not followed by others in relation to the second. That the court did not give instructions upon a particular point, is no ground of exception to the verdict, unless the party excepting requested the judge so to instruct. It is to be understood that no such request was submitted, unless the case states otherwise. The exception must, therefore, be overruled.

The position taken at the trial that the defendants had limited their liability as common carriers to the time when the wool was taken into the depot, by a public notice to that effect, would not have availed the defendants if the finding of the jury upon the fifth question had established the fact that the notice was brought to the knowledge of the plaintiff before the wool was sent. In the case of Moses v. Railroad, 4 Foster 71, it was expressly decided that a public notice to the effect that the railroad company would not be responsible for loss or injury to goods in their hands as carriers, except such as might arise from negligence, would not have the effect thus to limit their common law liability, even when brought home to the knowledge of the owner. This renders it unnecessary to consider any question arising upon the character of the instructions given upon the fifth question; and the only remaining point in the case, considered as an action against the defendants as carriers, upon the original count and the second and fourth amended counts, is that involved in the second question, raising the principal inquiry in the case, when does the liability of a railroad company, as carriers of goods, terminate?

The wool in this case was received and conveyed by the defendants in their ordinary employment as common carriers. It was not of a value disproportionate to its bulk, and was such that no deception could have been practiced upon them as to the extent of the risk they incurred. In the transportation of such commodities, their responsibility as carriers commences with the receipt of the goods, though not put by them immediately on the transit, and it ceases only when they have reached their destination and their control over them as carriers has terminated. That control must continue until delivery, or a tender or offer to deliver, or some other act which the law can regard as equivalent to a delivery. The delivery of goods conveyed by railroad is necessarily confined to certain points on the line of the railroad track. Railroad companies cannot, like wagoners, pass from warehouse to warehouse, and there discharge their freight to the various consignees upon their own premises. They consequently establish certain points as places of delivery, and there unlade their cars of such of the freight as may most conveniently find its ultimate destination from those respective points. But while it is in the process of unloading, and afterwards, while awaiting removal, it must be protected from the weather

and from depredation. Freight is brought over the road at all hours by night as well as by day, and the trains must necessarily be more or less irregular in the hours of their arrival. It cannot be required of the consignee to attend at the precise moment when his goods arrive, to receive and take care of them, and the company cannot discharge themselves from responsibility by leaving them in an exposed condition in the open air. Until the goods have passed out of their custody and control into the hands of the proper person to receive them they have a duty to perform in the preservation and protection of the property, even after their responsibility as common carriers is at an end. Smith v. Railroad, 7 Foster 86. It thus becomes a matter of necessity for them to provide depots, or warehouses, for the reception of freight at the stations established for its delivery. If the owner or consignee, or other person authorized to receive the goods, is present at the time of the arrival, and has opportunity to see that they have arrived, and to take them away, this may be regarded as equivalent to a delivery. They must be understood, after this, to remain in the charge of the company, for his convenience, as depositaries or bailees for hire. In such case the grounds upon which the common law liability of the carrier is made to rest have so far ceased to exist that there is no longer any just occasion for holding the company to that stringent responsibility in reference to those goods. They are no longer in the course of transportation, beyond the reach of the owner, and under the exclusive control and observation of the carrier. The owner has again got sight of his property, and is in a situation to some extent to oversee and protect it. Nor is he any longer under the difficulties and embarrassments in attempting to make proof of subsequent fraud or negligence as when it was on its passage beyond the reach of his observation, and under the private control of the carrier. The facilities and temptations to fraud and collusion in the embezzlement or larceny of the goods are also removed, or at least greatly diminished.

It is upon these considerations that the strict liability of the carrier is founded. "It is a politic establishment," says Lord Holt, in Coggs v. Bernard, 2 Ld. Raym. 918, "contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing for else the carrier might have opportunity of undoing all persons who had any dealings with him, by combining with thieves, &c., and yet doing it in such a clandestine way as would not be possible to be discovered."

In 2 Kent's Com. 602, it is said that the rule subjecting the carrier to this strict responsibility is founded on broad principles of public policy and convenience, and was introduced to prevent the necessity of going into circumstances impossible to be unravelled. If it were not for the rule, the carrier might contrive, by means not to be detected, to be robbed of his goods, in order to share the spoil.

That the danger of loss by such collusion is not now so prominent a consideration as in the semi-barbarous times when the rule was first adopted, is quite probable. But upon this point it is well said by the court in Moses v. Railroad, before cited, that the immense increase of this business, the great value of the commodities now necessarily entrusted to the charge of common carriers, and the vast distances to which they are to be transported have multiplied the difficulties of the owner who seeks to recover for the loss of his goods, and have added greatly to the opportunities and temptations of the carrier, who might be disposed to neglect or violate his trust. The reasons upon which the rule is founded apply in all their force to railroad companies as carriers, and the same considerations of public policy which lead to its adoption, continue to require that it be maintained in all its rigor, as to them. Any relaxation of the rule must be attended only with mischief. Many of the most eminent English judges prior to the acts of II. Geo. IV. and 1 Wm. IV. expressed regret that their courts had sanctioned the doctrine that the carrier had the right to limit his liability by a public notice, and predicted the necessity for the legislative interference which resulted in those acts restoring the strict responsibility of the ancient rule, in order to remedy the mischiefs which that relaxation had introduced. Moses v. Railroad, qua sup.

The inquiry then is, at what moment after the goods conveyed by a railroad company in their cars have reached the point on the line of the railroad where they are to be delivered, may the reasons upon which the common law liability of the carrier is founded be said to cease when there is no person present at their arrival authorized to receive them, and ready to take them away.

That it is the duty of the consignee to come for them is clear, but it would be quite as impracticable for him to be at the place of delivery at the precise moment of their arrival, or of their being unladen from the cars, without actual notice to him of their arrival, as it would be for the company to diverge from their line of road in order to deliver them at his place of business, or to send notice to him of their arrival, before proceeding to unload them. The arrival may be in the night, or after the expiration of business hours at the station, or at so late a period before it as to render it impossible for him to get them away within the hours of business. If under such circumstances they have been removed from the cars and placed in the warehouse, it cannot be said that they are so placed and kept there until the gates are opened, and business resumed upon the following day, for any purpose having reference to the convenience and accommodation of the owner or consignee, nor can the proceeding upon any sound view be considered as equivalent to a delivery. The same persons—the servants of the company—continue in the exclusive possession and control of the goods as when they were in their transit, and they are

equally shut up from the observation and oversight of all others. The consignee has had no opportunity to know that they have arrived and in what condition, and is on no better situation to disprove the fact, or to question any account the servants of the company having them in charge may choose to give of what may happen to them after they are so removed from the cars, or what has happened prior thereto, than before. If purloined, destroyed, or damaged by their fraud or neglect, subsequent to their removal and before he can have had the opportunity to come for them, he is left to precisely the same proof as if the larceny or injury had occurred while they were actually in transitu—the declarations of the servants of the company—they having, it may well be supposed, feelings and interests adverse to him, and knowing that he has no evidence at command from other sources to impeach their statement. It is obvious, too, that the opportunities and facilities for embezzling the goods and for other fraudulent or collusive practices, must continue to be equally tempting after their removal under such circumstances, as before. The risk of detection in some respects may be made even less than before, by the greater facilities which the servant of the company in charge of the warehouse has of manufacturing evidence of a burglary or creating proof of the destruction of the goods by fire set by himself for the purpose of concealing his agency in their larceny. For all purposes which have reference to the difficulties and embarrassments in the way of the owner in attempting to prove loss or damage by the fault or neglect of the company, to his inability to give to them any oversight or protection, and to his security against fraud and collusion until he can have reasonable opportunity to see, by his own observation, or that of others than the servants of the company, that they have arrived, and to send for and take them away, he stands in the same relation to them as when they were actually in the course of transportation. The same broad principles of public policy and convenience upon which the common law liability of the carrier is made to rest, have equal application after the goods are removed into the warehouse as before, until the owner or consignee can have that opportunity; and the same necessity exists for encouraging the fidelity and stimulating the care and diligence of those who thus continue to retain them in charge, by holding that they shall continue subject to the risk.

It is no satisfactory answer to this view to say that the company, having provided a warehouse in which to store the goods for the accommodation of the owner, after the transit has terminated, may be regarded, by their act of depositing them in the warehouse, as having delivered them from themselves as carriers, to themselves as warehousemen. The question still is, when, having a proper regard to the principles which lie at the basis of their carrier liability, and to the protection and security of the owner, can this transmutation of the character in which they hold the goods be said to take place, and this constructive delivery to be made. If this is held to be at any point of time before there can be opportunity to take them from the hands of the company, then may the owner be compelled to leave them in their possession under the limited liability of depositaries, or bailees for hire, contrary to his intention, and without any act or neglect on his part which may be considered as indicative of his consent thereto. It may have been his intention to take them from their possession at the earliest practicable moment, for the reason that he may not be disposed to entrust them to their fidelity and care without the stimulus to the utmost diligence and good faith afforded by the strict liability of carriers. If he neglects to take them away upon the first opportunity that he has to do it, he may be said thereby to have consented that they shall remain under the more limited responsibility. But upon no just ground can this consent be presumed when his only alternative is to be at the station where they are to be delivered at the arrival of the train, at whatever hour that may happen to be, whether in the day or the night, in or out of business hours, and regardless of all the contingencies upon which the regularity of its arrival may depend. It is to be supposed that the consignee has been advised by the consignor of the fact that the goods have been forwarded, and that he has taken or is prepared to take proper measures to look for them upon their arrival, and to remove them as soon as he can have reasonable opportunity to do so. It must be supposed, too, that he is informed of the usual course of business on the part of the company, and of their agents, in the hours established for the arrival of the trains, and in unlading the cars and delivering out goods of that description, and that he will exercise reasonable diligence in reference to all these particulars, to be at the place of delivery as soon as may be practicable after their arrival, and take them into his possession. The extent of the reasonable opportunity to be afforded him for that purpose is not, however, to be measured by any peculiar circumstances in his own condition and situation, rendering it necessary for his own convenience and accommodation that he should have longer time or better opportunity than if he resided in the vicinity of the warehouse, and was prepared with the means and facilities for taking the goods away. If his particular circumstances require a more extended opportunity, the goods must be considered after such reasonable time as, but for those peculiar circumstances would be deemed sufficient to be kept by the company for his convenience, and under the responsibility of depositaries or bailees for hire only.

In the case now under consideration, there was conflicting evidence as to the time when the train by which the wool was carried, arrived at the depot in Boston. The evidence on the part of the defence tended to show that it arrived at the usual time—between one and two o'clock in the afternoon; while that of the plaintiff tended to show that it did not arrive until three o'clock. The gates of the depot were closed at five, and from two to three

hours were usually required for unloading the cars. Upon the view of the evidence most favorable to the defendants, there was but a period of from three to four hours, at the longest for the consignee to have come and taken away the wool, before the gates were closed; and it was destroyed before they were reopened for the purpose of delivering out the goods. This view proceeds upon the supposition that the work of unlading the cars was commenced immediately upon their arrival; and in the process of unloading, ordinarily occupying from two to three hours, the wool happened to be the first article taken from the cars and was at once ready for delivery. Upon a view less favorable to the defendants, the jury might have found, upon the evidence in the case, that the train arrived at three, and that the wool was unloaded at six—one hour after the closing of the gates. That the verdict in answer to the second question submitted to the jury was therefore warranted by the evidence, is quite clear; and as there are no legal exceptions to the proceedings upon the trial, so far as they relate to this point, the answer of the jury to that question establishes the fact that the consignees had no reasonable opportunity, after the wool was taken from the cars, to come and inspect it, so far as to see whether from its outward appearance it corresponded with the letter of advice from their consignor, and to remove it before it was destroyed. This fact being established, upon the views of the law entertained by the court, the transit had not terminated, and the defendants continued liable for the wool as carriers, down to and at the time of the loss; and the general verdict entered for the plaintiff may well be sustained upon the original and the second and fourth amended counts.

We are aware that this view of the liability of railroad companies as carriers conflicts with the opinion of the Supreme Court of Massachusetts, as pronounced by the learned chief justice of that court in the recent case of Norway Plains Co. v. these defendants, 1 Gray 263. In that case it was held that the liability as carriers ceases when the goods are removed from the cars and placed upon the platform of the depot, ready for delivery, whether it be done in the day time or in the night—in or out of the usual business hours—and consequently irrespective of the question whether the consignee has or not an opportunity to remove them. The ground upon which the decision is based would seem to be the propriety of establishing a rule of duty for this class of carriers of a plain, precise and practical character, and of easy application, rather than of adhering to the rigorous principles of the common law. That the rule adopted in that case is of such character is not to be doubted; but with all our respect for the eminent judge by whom the opinion was delivered, and for the learned court whose judgment he pronounced, we cannot but think that by it the salutary and approved principles of the common law are sacrificed to considerations of convenience and expediency, in the simplicity and precise and practical character of the rule which establishes.

It is unnecessary, then, to consider the exceptions taken upon the other view of the case, as an action against the defendants for negligence in their case of the wool after their liability as carriers had ceased.

Judgment upon the verdict.

GEORGE McMILLAN ET AL. v. MICH. S. & N. I. R. R. Co. JOHN HEFFRON ET AL. v. SAME. ROBERT W. KING v. SAME.

(16 Mich. 79.)

Case brought up for review from Wayne circuit.

These were three actions on the case brought against defendants as common carriers, to recover the value of certain goods burned while in their depot at Detroit, in April, 1866.

The defendants pleaded the general issue. The cases were heard together without a jury, on stipulations.

COOLEY, J.: The first question to be considered in this case is, whether the defendants, in respect to the business transacted by them on the line of the Detroit, Monroe & Toledo railroad, are subject to the liabilities imposed by the general railroad law of the state, under which the road named was constructed, or may claim the benefit of such exemptions as are contained in their original charter. As the charter expressly provides that for goods in deposit awaiting delivery, the company shall be liable as warehousemen only (Laws 1846, p. 185), and contains no prohibitory clauses which would prevent their making any contract which it is lawful for a common carrier to make, while the general law prohibits any company formed under it from lessening, or directly or indirectly abridging their common law liability as carriers (Comp. L., § 1992), it is possible that important consequences may depend upon the determination of this question.

The doubt, if any, springs from that provision in the general railroad law which authorizes any railroad company in the state to "make any arrangements with other railroad companies, within or without this state, for the running of its cars over the road of such other company, or for the working and operating of such other railroads as said companies shall mutually agree upon: Comp. L., § 1993. The defendants are lessees of the Detroit, Monroe & Toledo road, and while they admit that all those provisions of the general railroad law which measure the extent of property rights, prescribe the width of the road, the mode of use, speed, ringing of bells, or the manner of enjoyment, must be applicable to them as lessees, as defining and constituting a part of the right itself, yet they claim that obligations springing from the use depend upon their own charter, under which alone the contracts are to be made or the acts done from which the obligations spring.

I have been unable to discover anything in the general railroad law which supports

this distinction, or which indicates an intention on the part of the legislature that the lessee of a road, constructed under that law, should take the road discharged of any of the conditions or burdens imposed for the benefit of the public upon the lessor. The authority to "work and operate" the road of a corporation does not necessarily imply that the operating is to be otherwise than under the obligations imposed upon the corporation by its charter; and as grants of corporate franchises are to be construed with strictness (2 Kent, 298: Charles River Bridge v. Warren Bridge, 11 Pet., 544; Perrine v. Chesapeake & Delaware Canal Co., 9 How., 172; Bradley v. N. Y. & N. H. R. R. Co., 21 Conn., 294; Chenango Bridge Co. v. Binghampton Bridge Co., 24 N. Y., 87, and 3 Wallace, 51), we are not at liberty to infer an intent in the legislature to relieve the road in the hands of the lessee from obligations resting upon the lessor, unless such intent is clearly expressed, or, at least, is necessarily to be inferred. There is no such clear expression in the present case, and the inference, I think, is against any such intent. The legislature, by the general law, established the rules under which they would allow new roads to be constructed and operated; and when they gave permission to the proprietors to lease them to others, it is to be presumed, in the absence of any declaration to the contrary, that the intention was not to dispense with those regulations which they have judged important for the public interest and protection.

The power to lease does not imply the power to transfer greater rights than the lessor himself possesses; and where the obligations assumed by the lessor, pertaining to the management of his business, and the liabilities which should spring therefrom, were the consideration upon which the franchises was granted, it would be a violent inference that the legislature designed to waive them when they are no less important to the public protection after the lease than before.

I think, therefore, that the liability which rests upon these defendants is that of the Detroit, Monroe & Toledo railroad company, which by law is not permitted to lessen or abridge its common law liability as common carriers. What that liability is when they have transported property over their road and deposited it in their warehouse to await delivery to the consignee is the next question demanding consideration.

On this point three distinct views have been taken by different jurists, neither of which can be said to have been so far generally accepted as to have become the prevailing rule of the courts.

First. That when the transit is ended, and the carrier has placed the goods in his warehouse to await delivery to the consignee, his liability as carrier is ended also, and he is responsible as warehouseman only. This is the rule of the Massachusetts cases —Thomas v. Boston & Providence R. R. Co., 10 Met., 472, and Norway Plains Co. v. Boston & Maine R. R. Co., 1 Gray, 263— and those which follow them.

Second. That merely placing the goods in the warehouse does not discharge the carrier, but that he remains liable as such until the consignee has had reasonable time after their arival to inspect and take them away, in the common course of business: Morris & Essex R. R. Co. v. Ayres, 5 Dutch., 393; Blumenthal v. Brainerd, 38 Vt., 413; Moses v. Bost. & Me. R. R., 32 N. H., 523; Wood v. Crocker, 18 Wis., 345; Redf. on Railw., 3d ed., § 157.

Third. That the liability of the carrier continues until the consignee has been notified of the receipt of the goods, and has had reasonable time, in the common course of business, to take them away after such notification: McDonald v. W. R. R. Corp., 34 N. Y., 497, and cases cited; 2 Pars. on Cont., 5th ed., 189; Ang. on Carriers, § 313; Chitty on Carriers, 90.

The rule as secondly above stated proceeds upon the idea that the consignee will be informed by the consignor of any shipment of freight, and that it then becomes the duty of the former to take notice of the general course of business of the carrier, the time of departure and arrival of trains, and when, therefore, the receipt of the freight may be expected, and to be on hand ready to take it away when received. It is assumed to be simply a question of reasonable diligence with the consignee whether he ascertains the receipt of his consignment or not; the regularity of the trains being such as to leave him without reasonable excuse if he fails to inform himself.

There may be railroad lines in the country where the application of this rule would do injustice to no one. If the business is not so great but that freight trains can be run with the same regularity as those for passengers, and the freight can always be sent forward immediately on being received for the purpose, a notice from the consignor will usually apprise the consignee with sufficient certainty when the goods may be expected. But on the long through lines such regularity is quite impracticable. Freight must be sent forward from the carrier's warehouse with a promptness depending upon the pressure of business; or, in other words, as it may suit his convenience and his interest to forward it. This may be many days, or even weeks, after its receipt, or it may be immediately. It is not always in the power of the carrier to give reliable information upon the subject, and unavoidable delays frequently intervene after the transit has commenced. To require the consignee to watch from day to day the arrival of trains, and to renew his inquiries respecting the consignment, seems to me to be imposing a burden upon him without in the least relieving the carrier. For it can hardly be doubted that it would be less burdensome to the carrier to be required to give notice than to be subjected to the numberless inquiries and examinations of his books which would otherwise be necessary, especially at important points.

The rule that the liability of the carrier shall continue until the consignee has had reasonable time after notification to take away his goods, is traceable to certain English decisions having reference to carriers by water, whose mode of doing business resembles that of railroad companies in the inability to proceed with their vehicles to every man's door, and there deliver his goods. It is a modification in favor of the carrier by land of the obligation formerly resting upon him, and which required, in the absence of special contract, an actual delivery to the consignee of the goods carried. The modern modes of transportation render this impracticable, unless the carrier shall add to his business that of drayman also, which is generally a distinct employment. In lieu of delivery, therefore, the carrier is allowed to discharge himself of his extraordinary liability by notifying the consignee of the receipt of the goods, who is then expected, in accordance with what is almost an universal custom, to remove them himself. It is insisted, however, that this rule, so far as it can be considered established by authority, is applicable only to carriers who have no warehouses of their own, but make the wharf or platform their place of delivery, and who therefore never become warehousemen, and are held to a continued liability as carriers, as the only mode of insuring watch and protection over the goods until the owner can have opportunity to receive them. This distinction would not be entirely without force, and would seem to be acted upon in one state at least. Compare Scholes v. Ackerland, 13 Ill., 574, and Crawford v. Clark, 15 Id., 561, with Richards v. M. S. & N. I. R. R. Co., 20 Id., 404, and Porter v. Same, 20 Id., 407, See, also, Chicago & R. I. R. R. Co. v. Warren, 16 Id., 502, where a railroad company was held to the same measure of responsibility as a carrier by water, where the property carried, instead of being placed in their warehouse, was left outside.

But it may well be doubted whether the distinction rests upon sufficient reasons. The man who sends his goods by railroad, and who desires to receive them as soon as they reach their destination, has commonly no design to employ the railroad company in any other capacity than that of carrier. If any other relation than that is formed between them, it is one that the law forms, upon considerations springing from the usages of business, and having reference to the due protection of the interests of both. The owner wants storage only until he can have time to remove the goods; and the warehousing is only incidental to the carrying. Payment for the transportation is payment also for the incidental storage. The owner has been willing to trust the company as carriers because the law makes them insurers; but he might not be willing to trust them as warehousemen under a liability so greatly qualified, and in a trust which implies generally a considerable degree of personal confidence. As what he desires is, not to have the goods remain in store, but to receive them personally as soon as they can be carried, and as the railroad company, if they had no warehouse, would continue to be liable as carriers until the lapse of a reasonable time after notification, it would seem that if the company can claim any exemption from their liability as insurers, it must be upon the ground that the erection of warehouses is for the benefit, not of the company, but of the public doing business with them, and facilitate delivery. But this, as appears to me, would be taking a very partial and one-sided view of the purpose of these structures.

If the road has no warehouse, the cars must remain standing on the track until the owner can come and receive his goods, or, if they are unloaded, the company must not only establish a watch to prevent thefts, but at their peril must protect against injuries by the elements. Landing the goods on the platform, it is agreed on all hands, does not alone discharge the carrier. And it seems to me that a consideration of the immense carrying trade of the country will force one to the conclusion that it can not possibly be either properly, expeditiously or profitably done except with the conveniences afforded by the railroad warehouses, which afford the easiest, cheapest and most effective means by which carriers are enabled to protect themselves against losses in that capacity.

At the great centers of commerce, it would be impossible to transact the amount of business now done, if the cars must stand upon the track until the goods carried can be delivered from thence to the consignees. Unloading them in immense quantities upon open platforms would expose them to destruction. At the less important points the same thing is true, but in less degree. It would seem, therefore, looking only to the interest of the carriers, that the reasons which require the construction of warehouses are imperative. Only by means of them can they keep their tracks clear for trains, or protect against the destruction of goods of which they are insurers. And wherever the business is large, warehouses are required also, to enable the companies to carry out a system of separation and classification of goods received, without which it would be quite impossible to conduct the business with facility or profit. The warehouses are also absolutely essential in connection with the receipt and dispatch of goods to be sent from each point, and in respect to which the railroad company are unquesionably liable as carriers from the time of their receipt. In every view, therefore, they seem indispensable to the business of the carrier; and being constructed with reference to it, they are properly nothing more than an extension of the platforms upon which the companies receive and deliver goods, with walls and roofs added to facilitate, guard, and to protect against injuries by the elements.

The interest, on the other hand, which the consignee has in the warehouse, is much

less direct and important. It may facilitate the delivery of goods, but the carrier is liable if he fail to deliver in reasonable time. The risk of loss and injury will be less, but against these the carrier insures. In no proper sense can the warehouse be said to be for his accommodation; and if the obligations of the carrier to him are to be diminished by its erection, he might well prefer that it should not be built. The rule which changes the carrier into a warehouseman against the will of the owner of the property, on the ground solely that he has erected convenient structures for the storage, but which structures are absolutely essential to his business as carrier, seems to me to be a departure from the rule of the common law upon reasons which do not warrant it. It is a rule which allows the insurer, to absolve himself from obligations to the insured, by supplying himself with conveniences for the transaction of his business, and with the means of protection against loss or damage.

A critical examination of the cases on this subject would scarcely be useful. As they cannot be reconciled, the court must follow its own reasons. I am unable to discover any ground which to me is satisfactory, on which a common carrier of goods can excuse himself from personal delivery to the consignee, except by that which usage has made a substitute. To require him to give notice when the goods are received, so that the consignee may know when to call for them, imposes upon him no unreasonable burden. If, by understanding with the consignee, the goods were to remain in store for a definite period, or until he should give directions concerning them, the rule would be different, because the relation of warehouseman would then be established by consent. In the absence of such understanding, sound policy, I think, requires the carrier to be held liable as such until he has notified the consignee that the goods are received. If the nature of the bailment then becomes changed through the neglect of the consignee to remove the goods, it will be by his implied assent. Such a rule is just to both parties and burdensome to neither, and it will tend to promptness on the part of carriers in giving the notices, which, whether compulsory or not, are generally expected from them.

Whether the clause in the general railroad law forbidding companies formed under it from lessening or abridging their common law liability as carriers, prevents their entering into contracts by which their employers release them from any of their liability, is not clear upon the terms of the clause itself. Such contracts are not expressly forbidden, and the general tendency of legislation in modern times has been to relax, rather than to render more severe, the strict rules of the common law in regard to carriers, of which our own state presents an example in the legislative exemption of the principal companies from liability as carriers for goods in their warehouses awaiting delivery. And a clause which should forbid parties from entering into any such agreements with carriers as they might conceive to be for their interest, would hardly be looked for in the general law, unless strong reasons were known to have existed for its adoption.

When that law was passed, a controversy had been going on between common carriers and the public in respect to the notices given by the former, by public advertisement and otherwise by which they sought to relieve themselves from some portion of their common law liability, whether those employing them assented or not. The courts in this country had generally held these notices ineffectual; but they still continued to be given, and to be insisted upon as possessing legal force. I do not perceive in the clause in question any intention to go further than to put an end, by the fundamental law of these organizations, to any further controversy upon that ground. In view of the extent to which the courts had gone in England, in giving force to such notices, no one can say that the precaution was needless. The companies are forbidden to lessen or in any way abridge their liabilities as common carriers, but the person sending goods by them is not forbidden to release them from such liabilities, or from any portion thereof, for any consideration which to him is satisfactory. In other words, the law compels these companies at all times, at the option of those sending goods by them, to carry the goods as insurers. If, on the other hand, the carriers can make it for the interest of the party to relieve them from this liability wholly or in part, a contract to that effect, if fairly made, and embracing no unreasonable conditions, is not opposed to public policy, and to forbid it would seem an unnecessary restraint upon freedom of action. See Bissell v. N. Y. C. R. R. Co., 25 N. Y., 448. The distinction between a restriction by the carrier himself and a contract by which another party releases him from obligations, was pointed out by this court in Michigan Central R. R. Co. v. Hale, 6 Mich., 243, and is the same which is applicable here. Many things are transported by railroad in respect to which it may be for the mutual interest of both parties that special contracts be made. Live stock are usually accompanied and cared for by the owner or his agent, under special agreements, and in some other cases the owner prefers to assume such general oversight and control as is inconsistent with the full common law liability of the carrier. It has not been generally supposed that the clause under consideration forbade special contracts in such cases, and the legislature of 1867 must have considered them lawful when they provided that all contracts modifying the common law liability of railroad companies as carriers should be wholly in writing: Laws 1867, p. 165. This enactment was evidently designed not to enlarge the powers of railroad companies, but to impose restraints upon an existing authority to make contracts.

A much more difficult question is, what shall constitute the proof of a contract, in the absence of distinct evidence that the parties have consulted and agreed upon terms. The practical difficulty, amounting almost to an impossibility of bringing the carrier and his employer together on every occasion for the discussion of terms, has led to the adoption by carriers of a printed form of contract, which is put into the hands of the consignor, and by its terms purports to bind him to its conditions but it is strongly insisted that there ought to be more satisfactory evidence of assent on the part of the consignor to modify any of his common law rights, than is derived from the mere receipt of a paper from the carrier, framed to suit the interest of the latter, and which the consignor may never read.

There are some matters in respect to which the carrier may qualify his liability by mere notice. Mr. Greenleaf says: "It is now well settled that a common carrier may qualify his liability by a general notice to all who may employ him, of any reasonable requisition to be observed on their part, in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight, and the like as, for example, that he will not be responsible for goods above the value of a certain sum, unless they are entered as such, and paid for accordingly:" 2 Greenl. Ev., § 235; see Western Transportation Co. v. Newhall, 24 Ill., 466. These are but the reasonable regulations which every man should be allowed to establish for his business, to insure regularity and promptness, and to properly inform him of the responsibility he assumes. And it has been held that notice derived from the usage of the carrier may determine the manner in which he is authorized to make delivery: Farmers & Mechanics' Bank v. Champlain Trans. Co., 16 Vt., 52; same case, 18 Id., 131, and 23 Id., 186. But beyond the establishment of such rules, the force of a mere notice can not extend. Subject to reasonable regulations, every man has a right to insist that his property, if of such description as the carrier assumes to convey, shall be transported subject to the common law liability. "A common carrier has no right to refuse goods offered for carriage at the proper time and place, on tender of the usual and reasonable compensation, unless the owner will consent to his receiving them under a reduced liability; and the owner can insist on his receiving the goods under all the risks and responsibilities which the law annexes to his employment:" Pierce on Railroads, 416. See Hollister v. Nowlen, 19 Wend., 234; Cole v. Goodwin, 19 Id., 251; Jones v. Voorhees, 10 Ohio, 145; Bennett v. Dutton, 10 N. H., 487; N. J. Steam Navigation Co. v. Merchants' Bank, 6 How., 382; Moses v. Boston & Maine R. R. Co., 24 N. H., 71; Kimball v. Rutland & Burlington R. R. Co., 26 Vt., 256; Slocum v. Fairchild, 7 Hill, 292; Dorr v. N. J. Steam Navigation Co., 4 Sandf., 136, and 11 N. Y., 485; Michigan Central R. R. Co. v. Hale, 6 Mich., 243. The fact that a restrictive notice is shown to have been actually received or seen by the owner of the goods will not raise a presumption that he assents to its terms, since it is as reasonable to infer that he intends to insist on his rights as that he assents to their qualification, and the burden of proof is upon the carrier to establish the contract qualifying his liability, if he claims that one exists: N. J. Steam Navigation Co. v. Merchants' Bank, 6 How., 382, per Nelson, J.

The evidence of such a contract in the present case consists, first, of the defendant's mode of doing business, and, second, of what are called in the case bills of lading, and which contain the supposed limitations. It is admitted by the plaintiffs that all the bills of lading in use by these defendants, and all the contracts of affreightment, the instructions to agents, and the printed rules posted in all the depots and station houses of defendants for the past ten years, have contained clauses exempting them from liability for loss by fire, and providing that when goods are in the depot awaiting delivery to consignees, the company will be liable as warehousemen only, and not as carriers; and that plaintiffs have been accustomed to do business with defendants, and to receive and send goods over their road under bills of lading of this description.

There are several reasons why knowledge in plaintiffs of defendant's usage to make restrictive contracts cannot control the present case. In the first place, knowledge of such usage can in no case of the kind be allowed force beyond that which could be given to notice of an intention on the part of the carrier to restrict his liability, brought home to the party in any other mode; and we have already seen that the force of such notices is exceedingly circumscribed. And it can hardly be seriously claimed that the plaintiffs, by accepting restrictive contracts in some cases, have thereby debarred themselves from insisting upon their common law rights thereafter. In the second place, the defendants have no power under the law to establish a usage restricting their liability; as that would come directly in conflict with the clause in the general railroad law heretofore quoted. And in the third place, if this were otherwise, the usage would be irrelevant to the present case, since the proof relates to dealings between the parties to this suit at Detroit, and to usages understood by the plaintiffs there, while the contracts here in question were in each instance made with consignors at a distance, and in most cases by other railroad companies, whose usages do not seem to be uniform.

It remains to be seen whether the conditions embodied in the bills of lading are to be treated as a part of the contract for transportation and to be regarded as assented to by the consignors, notwithstanding they may not have read them.

A bill of lading proper is the written acknowledgment of the master of a vessel

that he has received specified goods from the shipper, to be conveyed on the terms therein expressed to their destination, and there delivered to the parties therein designated: Abbott on Shipping, 322. It constitutes the contract between the parties in respect to the transportation; and is the measure of their rights and liabilities, unless where fraud or mistake can be shown: Redf. on Railw., 307-390, and notes; Ang. on Carriers, § 223. It has acquired from usage a negotiable character, and the carrier may be estopped, as against the indorsee for value, from showing mistakes in giving it: Redf. on Railw., 307. Whether the contracts which railroad companies are accustomed to give on the receipt of goods for transportation, and which are usually called by the same name, are subject to all the same incidents as the bills of lading proper, we need not now consider; but it will not be disputed that they fix the rights and liabilities of the parties when their terms have been agreed upon, and it is, I think, the weight of authority, and certainly the rule in this state, that the carrier may stipulate in them for a limitation of his common law liability: Michigan Central R. R. Co. v. Hale, 6 Mich., 243.

Bills of lading are signed by the carrier only; and where a contract is to be signed only by one party, the evidence of assent to its terms by the other party consists usually in his receiving and acting upon it. This is the case with deeds-poll, and with various classes of familiar contracts, and the evidence of assent derived from the acceptance of the contract, without objection, is commonly conclusive. I do not preceive that bills of lading stand upon any different footing. If the carrier should cause limitations upon his liability to be inserted in the contract in such a manner as not to attract the consignor's attention, the question of assent might fairly be considered an open one (Brown v. Eastern R. R. Co., 11 Cush., 97); and if delivery of the bill of lading was made to the consignor under such circumstances as to lead him to suppose it to be something else—as, for instance, a mere receipt for money—it could not be held binding upon him as a contract, inasmuch as it had never been delivered to and accepted by him as such: King v. Woodbridge, 34 Vt., 565. But, except in these and similar cases, it cannot become a material question whether the consignor read the bill of lading or not. The ground upon which it is claimed that this becomes important seems to be that parties generally receive these contracts without reading them or inquiring into their terms—taking whatever the railroad companies see fit to give them, and that they are thus liable to be imposed upon and defrauded, unless the courts interfere to protect them. Or, if we may be allowed to state the same thing in different words, as everybody is negligent in these matters, and will not give the necessary attention to their contracts that is essential to the protection of their interests, the courts must interfere to set them aside wherever extraneous evidence of actual assent is not produced. If the courts possess any such power, and it is expedient to exercise it, it may be important to consider, at the outset, whither it will lead us. Bills of lading are not the only contracts that are received in this careless way. Deeds, mortgages, and bills of sale are every day given and received without being read by the parties, though they may contain provisions which have not been the subject of special negotiation. Policies of insurance, which more nearly resemble the instruments now in question, are still more often received without examination. In the absence of fraud, accident or mistake, no one ever supposed it was competent for the courts to reform such instruments in behalf of a party who would not inform himself of their purport. Nothing would be certain or reliable in business transactions if contracts were liable to be set aside on grounds like these. The law does not assume to be the guardian of parties compotes mentes in respect to the lawful contracts which they may make, but it proceeds upon the idea that where fraud has not been practised, and mistake has not intervened, the general interests of the community are best subserved by leaving every man to the protection of his own observation and diligence.

It is argued that the consignor had no occasion to examine the bill of lading, because he had a right to suppose it recognized the common law liability. But the common law does not establish the rates of freight, or the place of delivery; and for stipulations respecting these, at least, every man must examine his bill of lading. Moreover, we cannot overlook the facts that a large proportion of these instruments are issued with restrictive clauses, and that carriers arrange their tariffs of freight in the expectation that they will be accepted. These facts are so well understood that a person exercising ordinary diligence in his own. affairs, would not be likely to accept one of these instruments without examination, if he expected to hold the carrier to the liability which would rest upon him in the absence of special contract.

I do not find any case in which a court has assumed to set aside such a contract on the ground that the party had failed to read it. An exemption from liability from losses arising from specified causes, when embodied in the bill of lading has frequently been recognized as a part of the contract, though it did not distinctly appear to have been brought to the consignor's notice (Davidson v. Graham, 2 Ohio N. S., 131; Parsons v. Monteath, 13 Barb., 353; York Co. v. Central R. R. Co., 3 Wall., 107; Dorr v. N. J. Steam Nav. Co., 11 N. Y., 491; and, in the case last referred to, it is said that the exemption, when embodied in the bill of lading, must be deemed to have been assented to by the parties. The same presumption would seem to have been acted upon in

More v. Evans, 14 Barb., 524); Kallman v. Ex. Co., 3 Kans., 205, and Whitsides v. Thurlkill, 20 Miss., 599; and it is in accordance with the general rule applicable to written contracts.

It is said, however, that these special contracts must be held void for want of consideration, unless it is shown that, in return for the release of the carrier from his extraordinary liability, he, on his part, has made a deduction in the rates of freight. What does appear in the present case is, that the carrier, in consideration of the promise by the consignor to release him from certain liabilities, and to pay him certain moneys, agrees on his part to carry the goods for the sum named. I do not see how we can assume that the charges are the same that they would have been had the release been omitted. If, by the charter of a railroad corporation, maximum rates had been established, and the corporation had attempted to charge these rates for a restricted liability, a case would be presented coming within the principle of this objection (Bis. v. N. Y. C. R. R. Co., 25 N. Y., 449, per Selden, J.); but no such case is before us here, and a consideration appears which, for aught that is shown by the record, is sufficient.

It was also said on the argument, that a rule such as we have now laid down, would place the public at the mercy of the railroad companies, who would refuse to give any other than restricted bills of lading. It is enough for us to say, in this case, that railroad companies chartered as common carriers have no such power, and the consignor can assent to the restriction in each instance, or refuse to assent at his option. If the corporations decline to transport goods as common carriers, when that is the condition upon which they hold their franchises, there would be no difficulty, I apprehend, in applying the proper remedy.

It will now be necessary to examine the various bills of lading, in reference to the particular limitations which they contain. Two of those given by the Cincinnati, Hamilton & Dayton R. R. Co. contain no restrictions: the other excepts against liability for "unavoidable accidents and fire in depot." Those issued by the defendants contain, among others, a similar exception. It is claimed by the plaintiffs that these and similar exceptions will not shield the defendants, because the loss in the present case was the result of the negligence of their officers or servants, against liability for which it was not lawful for them to contract.

Whether the rule that a carrier, on grounds of public policy, is not to be permitted to contract for exemption from liability for his own negligence (Fairchild v. Slocum, 19 Wend., 329; York Company v. Central R. R. Co., 3 Wall., 113; 3 Pars. on Cont., 5th ed., 249), can properly be so extended as to prevent corporations contracting against liability for the negligence of their officers or servants, or any classes of them, and, if not, then whether the general words of exemption here employed ought to be construed to embrace the negligence of such officers and servants (Wells v. N. J. Steam Nav. Co., 8 N. Y., 379; Schieffelin v. Harvey, 6 Johns., 179; Alexander v. Greene, 7 Hill, 533), are questions I do not care to discuss in this case, inasmuch as I think that no such negligence is shown. What was relied upon was the fact that barrels of benzine were carried over the road of defendants, landed in their depot at Detroit, and then passed over to the Detroit & Milwaukee railroad company, which occupied the other end of the same warehouse; that some of these barrels were in a leaky condition; and that while being handled by the employees of the latter company the escaping gas took fire from a lantern, and resulted in the destruction of the warehouse and its contents. From this it appears that the fire took place after the inflamable fluid had passed out of the hands of the defendants. The fact that they had carried it over their road had nothing to do with its ignition. If it should be conceded to be negligence in the company to receive so dangerous an article among their freights, yet if no loss resulted while it remained in their custody, it would be difficult to hold them responsible for accidents happening from its subsequent handling. When the Detroit & Milwaukee company received it upon their premises, it was of no consequence from whence it came, and any accident which might result would have no relation to the source from which it was received. It would be as legitimate to hold a merchant responsible from whom it might have been bought, as the carrier from whom it had been accepted. If we are to trace causes back, we need not stop at the preceding carrier, but, with similar reason, might hold the man liable who made the leaky barrels, or the person from whom the first carrier received them filled. The law can only look at the proximate causes of an injury, and not at those remote circumstances that may have contributed to those causes: Olmstead v. Brown, 12 Barb., 657; Butler v. Kent, 19 Johns., 223; Whately v. Murrell, 1 Strob., 389; Matthews v. Pass, 19 Ga., 141; Platt v. Potts, 13 Ired., 455.

Some question was made on the argument whether the consignors can be held, in the absence of explicit evidence on the subject, to have authority to enter into special contracts with the carrier which shall be binding on the consignee. His authority, I think, is to be presumed; and the carrier, is under no obligation to inquire into it: Moriarity v. Harnden's Exp., 1 Daly, 227. It is a question of more difficulty whether the Ohio bills of lading would govern the transportation for the whole route. By their terms, the Cincinnati, Hamilton & Dayton railroad company acknowledge the receipt of the goods in good order, to be delivered in like good order "at Toledo for Detroit," unto the plaintiffs or their assigns, they paying freight. No evidence is given of any custom that these

contracts shall govern the whole distance; nor does the case show whether the rates of freight specified are for the delivery at Toledo or at Detroit. The words employed only import that the goods are to be carried to Toledo, and from thence forwarded; and in the absence of any special custom on the subject, it would seem that the company giving these bills fully discharged their duty when they had delivered the goods to the defendants at Toledo.

There is a number of English cases in which it has been held, where carriers received goods and gave receipt therefor which specified that they were received to be sent to a point beyond their line, and there delivered to the consignee, that the contract was one for transportation the whole distance, upon which the first carrier might be sued for a loss occurring after the goods had passed out of his hands: Muschamp v. Lancaster R. R. Co., 8 M. and W., 421; Collins v. Bristol & Exeter R. R. Co., 11 Exch., 790; same case in House of Lords, 5 H. & N., 969. The same ruling has been made in this country, where the carrier had expressly agreed to carry to a point beyond his line, for a compensation specified: Wilcox v. Parmelee, 3 Sandf., 610; Mallory v. Burrett, 1 E. D. Smith, 234; Noyes v R. & B. R. R. Co., 27 Vt., 110. But the doctrine generally accepted by the American courts is, that where a carrier receives goods marked for a particular designation beyond his line, and does not expressly undertake to deliver them at the point designated, the implied contract is only to transport over his own line and forward from its terminus: Ackley v. Kellogg, 8 Cow., 223; Van Santvoord v. St. John, 6 Hill, 157; Hood v. N. Y. & N. H. R. R. Co., 22 Conn., 1; Elmore v. Naugatuck R. R. Co., 23 Conn., 457; F. &. M. Bank v. Champlain Trans. Co., 23 Vt., 209; Brintnall v. Saratoga R. R. Co., 32 Id., 665; Nutting v. Connecticut River R. R. Co., 1 Gray, 502; Briggs v. Boston & Lowell R. R. Co., 6 Allen, 246; Perkins v. Portland & Saco R. R. Co., 47, Me. 573; American note to 11 Exch., 797. And see Angle v. Miss. & Mo. R. R. Co., 9 Iowa 487. In the case in 1 Gray, the defendants receipted the goods at a station on their line "for transportation to New York"—a point beyond their line. No connection in business was shown between them and any other railroad company. The defendants were accustomed to receive pay only over their own road. The goods in question were delivered to a connecting line, but only a portion of them reached New York. The defendants were held not liable, on the ground that their undertaking was to carry over their own road only. Whether the receipt of freight by them for the whole distance would have affected their liability may perhaps be an open question on the authorities. That circumstance has evidently been regarded as important in some cases. See Weed v. S. &. S. R. R. Co., 19 Wend., 537, and Redf. on Railw., 286 and note; but in Hood v. N. Y. & N. H. R. R. Co., 22 Conn., 1, the first carriers, who received payment for transportation over the connecting line, were regarded as having received it as agent only, and not as compensation for an undertaking by themselves to transport over such line.

In the present case it is not shown that any connection in business exists between the defendants and the Cincinnati, Hamilton & Dayton railroad company. It is admitted that the latter company "is one of those forming a transportation route from Cincinnati, to the city of Detroit"—but this would be true whether the companies had business connections or not. It does not appear that the freight was paid and the contrary is inferable. It does not even appear that the charges agreed upon were for the whole route; and if they were, the case, I think, would not be affected by that circumstance. The only consequence would be to make the whole freight payable to the defendants who would deduct their own charges and pay over to the Ohio company what remained. Fixing upon the price would only amount to an agreement by the Ohio company that the whole charges should not exceed that sum. In the absence of agreement between the two companies on the subject, the defendants would not be compelled to conform their own rates to those agreed upon at Cincinnati.

On this record, as it stands, I think we must hold that the bills of lading given at Cincinnati were fully complied with when the Cincinnati, Hamilton & Dayton company had carried the goods to Toledo and there delivered them to the defendants. If there is any exception to this statement, it must relate to the rates of freight; but even as to those, the undertaking of the Ohio company would not bind the defendants unless authority to bind them was shown. As there is no evidence on that point, I think the defendants received the goods at Toledo to be carried to Detroit under their liability as carriers at the common law, and with the right to make such reasonable charges as their regulations may have prescribed. If reasonable charges over their own line would exceed the amount specified—and which would appear by the way-bill—they might refuse to receive the goods except upon prepayment; but if they received and carried them with a notification that certain rates only were to be charged for the whole transportation, they would doubtless be limited in their collection to that sum. But one company cannot possess power, arbitrarily and in the absence of consent, to fix the rates for transportation by another, on the ground solely that the two form a continuous line between two points. It must be equally without power to make contracts diminishing the common law liability of the other; inasmuch as all such contracts must be based upon a consideration, which only the party himself or his agent duly authorized is competent to agree upon. If the bills of lading in terms applied to the carriage for the whole distance, we should be re-

quired to hold, I think, that the defendants adopted their terms and consented to be bound by them when they received and carried the goods under them; but I have already said that such is not the case in respect to the particular bills now under consideration.

I think, therefore, that the defendants should be held liable for the wine, candles and tobacco shipped from Cincinnati, unless the plaintiffs had been duly notified of their receipt at Detroit, and had had reasonable time after notice to remove them before the fire had occurred. It is admitted that no notice was given of the receipt of the wine and candles, but of the arrival of the tobacco the plaintiffs were notified about half-past 3 o'clock in the afternoon of the 26th of April. The defendants were in the habit of closing their depot at 6 P. M. The fire occurred on the same evening. I am of opinion that a reasonable time was not afforded for the removal after the notice. It might not be proper to attempt to lay down any general rule as to what shall constitute reasonable notice in these cases, where the record discloses so little which bears upon the point; but it seems quite clear to my mind that two hours and a half are not sufficient, especially in view of the notice which defendants give to consignees—that they will charge for storage after twenty-four hours—which may possibly have led to a general impression that the relation of warehousemen was not to be considered as established until the expiration of that time. I think, therefore, the plaintiffs should have judgment for the value of the tobacco also. For the eggs delivered to the defendants at Adrian and Hudson, under an exemption from liability for losses in consequence of fire in the depot, the defendants cannot be held liable under the principles hereinbefore stated.

CHRISTIANCY, J. concurred.

CAMPBELL, J.: The first question to be considered is whether the liability of the defendants is to be measured by their own charter, or by the general railroad law. The charter of the defendants does not provide for their extending their business to Detroit. And, although the general law contemplates that different roads may make consolidating arrangements which will reserve to them their chartered powers (§ 1994), yet that is not to be done by a mere lease. And where a road is held under lease, I think that the lessee must find his powers and responsibilities in the law which governs the leasehold property, and not in his personal or corporate capacity, independent of that law. Had the charter of defendants contemplated such a lease the case might be different; but, as matters now stand, the only power to run this road at all is derived from the general law under which it was organized, and the franchises can not be measured by any other standard. Those who exercise the privilege must bear the burden: Gardner v. Smith, 7 Mich., 410.

The question then arises, whether the liability of the defendants for goods in warehouse awaiting delivery is that of warehousemen or carriers. If they are carriers only, then nothing but a contract can change their liability, as the statute is very plain in its prohibition against any limitation depending entirely on their own will: Comp. Laws, § 1992. We must, therefore, endeavor to determine whether the office of these corporations changes, at any time, from that of carriers to that of warehousemen, and, if so, when the character shifts.

The authorities, upon this subject, are not in harmony. In those cases where the precise point has arisen we find that in Indiana, Illinois, Iowa, Massachusetts and Pennsylvania, the decisions are direct that the liability of carrier ends and that of warehouseman begins, as soon as the property is placed in the warehouse. In New Hampshire and Wisconsin it is decided that the special liability of a carrier continues until notice, and until time has been given for removal. Beyond this the doctrine either way rests upon dicta, or upon analogies which are drawn from other kinds of carriage. Having no direct adjudications of our own, we are compelled either to rest upon the weight of these authorities, or to investigate their respective merits. The text writers cannot very safely be cited as authority upon such a dispute, where the law is so recent; and if they could be, it cannot be denied that they are very far from speaking decisively. I think the preponderance of direct authority is very clearly in favor of the defendants. I am not inclined to regard this ruling as so absolutely settled as to preclude further inquiry. But I think the predominating rule is most in harmony with the course of business, and with the reasons which underlie the whole law of bailments.

It is now too late to discuss the propriety of the severe liabilities imposed upon carriers. They rest, in my judgment, much more strongly upon law than upon reason. But this would not justify us in refusing to apply them to all cases coming within the fair scope of such employment. Yet, when the question arises whether these liabilities should be extended to cases not analogous in all their features, the nature of the differences must have a material bearing upon the decision; and the reasons of the old law may be fairly regarded, so that their applicability or inapplicability may have some weight in determining the result.

The original rule applicable to carriers is generally said to have risen from the facilities offered to such persons, when away from their employers, of combining with thieves to steal the goods intrusted to them. This rule originated when the business was carried on upon a small scale, and was altogether in private hands. It is manifestly inapplicable to any of the extensive systems of land and water carriage, which have now superseded most of the smaller enterprises on our great thoroughfares. As

soon as business requires the employment of more extensive agencies, it becomes of the utmost importance to the proprietors of freight lines to pay great heed to their servants, for they always have interests of their own, which need care and guardianship quite as much as those of their customers, and which furnish quite as many inducements and chances for dishonesty. The common law, however, took no heed of these things, and applied the same indiscriminate rules to all common carriers; and we are compelled to hold that, so far as risks are concerned, such carriers are under the same rigid rules, except so far as they have been changed by statute. The tendency of modern legislation has been to remove some of these oppressive burdens, but there has not been, in this state at least, any change in favor of railroads. But, while this is so, the law relative to warehousemen also remains as it was, and those who perform their functions can not be held to any greater diligence than is demanded in the exercise of ordinary care. There is no principle of law which, on account of this difference of liabilities, favors the existence or continuance of one relation in a given case rather than the other. Each is as lawful as the other and there can be no propriety in continuing either of the responsibilities longer, or beginning it earlier, than if there was no difference in the measure of care required from both. The character of the business done should determine its appellation.

One of the chief sources of confusion in the law, upon such questions as those now before us, arises from a failure to perceive that uniformity in the degree of diligence required of carriers does not draw after it uniformity in the mode of doing business. The mode of receiving goods for carriage, and of disposing of them when the carriage has been completed, differs in the different kinds of carriage. It is very true that delivery has been sometimes loosely said to be one of the incidents necessary to complete the contract of carriage at common law. But it is one of those sayings which have very little reason to sustain it. It was never true except in regard to that species of carriage conducted by means of wagons and other wheeled vehicles on land, or by yet more humble means, which, in modern times, at least, is of very trifling importance compared with the immense business conducted by water, and upon vehicles which cannot be brought to every man's door. No court has assumed to hold that in those cases where delivery was impossible or unreasonable there is any uniform usage, and any attempt to create one, except by statute, must be somewhat arbitrary. It is, therefore, generally agreed that each business will naturally have its own usages, and that all persons dealing with carriers must deal with them upon that understanding.

It is a matter which must be considered as universally known, that railroads cannot deliver freight unless by making arrangements distinct from the regular conveniences of their cars and track. Our statutes require us to take notice that these corporations are expected to have warehouses and depots, and they are authorized to use the right of eminent domain to secure them. We are bound to know that goods must be placed in these warehouses, in order to enable the roads to do business at all with security to their customers.

If they have no such depositories of their own, they must place their goods in the warehouses of some one else, as is very generally done on state railroads. Upon the facts found in the cases before us, it appears that defendants have warehouses of their own, and that all parties are expected to call at these places for their goods, and that plaintiffs have been in the habit of doing so. The simple question is, whether these parties who are lawfully expected to have warehouses as well as cars, and who, it is admitted on all hands, may be warehousemen as well as carriers, become such as to all warehoused goods awaiting delivery, or only as to a part.

The ground on which it is claimed that their liability as carriers continues after warehousing, is that until notice has been given of the arrival of the goods, and until sufficient time has elapsed for removing them, the carrier's duty is not performed. It is somewhat difficult to determine the source of this proposition, although it has often been laid down. It is usually said to be a substitute for delivery. But I think the authorities to which allusion has already been made are correct in holding that this idea is fallacious. Delivery is something to be done to the property itself, and concerns it as much as any other part of the carriage. It is, in other words, the deposit of the property at its place of destination, and is, therefore, attended, until complete, with the same risks attached to its transit. Where delivery at one place —as at the premises of the owner—is impossible, then the natural substitute would be its deposit in some other safe place which is accessible, and this would, upon all principles of analogy, complete the functions of the carrier as such. And if notice is required it would, therefore, become consistent to treat it, not as a part of the unfinished duty of the carrier, but as informing the parties concerned that he had done his part, and they must look after their own property. And if this is so, then all the carrier can be expected to do will be to deposit his load in a proper, safe and commodious place, such as persons generally are willing to leave their property in for safe keeping.

That notice, although proper, and customary, can not be regarded as essentially incident to the continuing and extraordinary risks of the carrier, is, I think, a fair deduction from many considerations to be drawn from authority. In the first place, I think this is a necessary conclusion from

our own decision in Michigan Central R. R. v. Hale, 6 Mich., 243. It was held in that case that goods in warehouse must be regarded as waiting delivery before as fully as after notice, and that notice was not necessary to change the carrier into a warehouseman, although it was necessary, under the charter of the company, to justify any charges for storage. In the next place, there are numberless cases where notice is impossible or inconvenient, and where no authority requires it. And it need hardly be remarked that the law which holds carriers to so strict an account in other things, would never discharge them on mere grounds of convenience from the performance of any legal duty. I have met with no case which requires a carrier to give notice to any person not residing at the place of destination, or to any one not already known there, or to use any special diligence in hunting up consignees who are not found on ordinary inquiry. Where goods are deposited by carriers in their own warehouses, to be called for by consignees residing elsewhere, or to be forwarded, the prevailing doctrine requires no notice. Neither is it customary or required that carriers, either by land or water, who pass through different points on regular journeys, delay their business to give notice of the deposit of their way freight. And it is universally admitted that a custom to give or to abstain from giving notice is valid, and needs no such assent as is required from those whom it is sought to affect by departures from the strict liabilities of common carriers. This of itself is enough to show that it is no necessary incident of the contract of carriage, with or without delivery, for no usage of a company can, by its own force, limit these liabilities.

Some of the authorities dwell considerably upon the point that persons may be very willing to employ these carriers as such, and yet not be willing to accept their modified liability in another capacity. But this is assuming the whole matter; for if the railroad occupies both grounds in performing its duties, then it can not be said that it is not employed in contemplation of the change at the termination of the transit. The one duty must be presumed to be as much contemplated as the other.

And it is certainly more in harmony with reason to measure their responsibility in all cases by the functions performed for the time being, than to import into one business the obligations of another. If by law and usage they deal with goods when unloaded just as warehousemen deal, and are placed under the same circumstances, there is no sound reason why they should stand on any different footing. If warehousemen are less strictly bound than carriers, it is because the law has determined that when property is in their custody is does not require any further measure of protection than that which has been settled upon by legal usage from the beginning; and there is no good reason for drawing lines between persons performing identical functions. It must not be imagined that, by ceasing to remain liable as carriers, they cease to perform valuable services or to care for the property. The warehouse business is one which deals with very nearly, if not quite, as much property as is handled by carriers. It requires the employment of honest agents and vigilant watchmen. The amount of care exercised, in fact, is fully as great as men exercise over their own possessions, and much of our most valuable commodities will be always found stored in these repositories, because they are deemed especially safe. Carriers are allowed by contract to obtain the same immunities, and no one has ever regarded such contracts as unreasonable. And I can conceive of no rule more simple or more just than one which, in conformity with the general law of bailments, will hold railroads to be carriers when acting in the conveyance of goods, and warehousemen when holding them in store. If the warehouses were in other hands, and the custom of business was such as appears in this case, it could not be denied that the warehouse owners became liable as soon as the property reached their possession. This is the only practical test for determining when the duties shift, where the same company performs both, and it is the rule which we applied in the M. C. R. R. v. Hale.

It was suggested on the argument that the provisions in the charters of the Central and Southern roads were intended to be peculiar privileges, purchased of the state under special circumstances. This is a mistake. A large part of the charters passed at the same session, and at subsequent sessions, contain the same clauses, and where this is not the case the warehouse privileges are in some respects even more liberal in regard to restrictions on charges. I do not understand, that these clauses were designed to introduce new privileges, or to do more than settle what may be regarded as a disputed principle of law. And a rule which will produce uniformity, and cannot, under these circumstances, be regarded as against public policy, ought to prevail. It is at once simple, certain and intelligible; while the other rule is not uniform in its application, and is open to endless difficulties concerning reasonableness of time as well as ability to give notice, and does not, in my judgment, conform to the analogies of business.

Upon the other questions raised in the case, I do not deem it necessary to make any extended remark. I agree with my brother Cooley, that the liability of a common carrier can only be varied by contract, and that no notice, unless it has been so given as to authorize the implication of a contract, can avail. I am of opinion, however, as was intimated in American Transportation Co. v. Moore, 5 Mich., 368, that there is nothing in the nature of carriers which puts their contracts on any different

footing from the contracts of other persons, or which prevents them from making any agreement which would be lawful if made by others. And, inasmuch as the law of the land has expressly exempted them from liability for the misconduct of their subordinate agents on shipboard, I think it entirely competent to stipulate for the same exemption on land. There may be cases where it will be difficult to draw the line between responsible officers and subordinates, but in most cases it can easily be ascertained from the facts.

I concur entirely in the views of my brother Cooley upon the validity and effect of the several bills of lading, and also upon the question of freedom from responsibility for the fire.

But regarding the company as warehousemen in all the cases before us, I think all the judgments should be affirmed.

MARTIN, Ch. J. concurred.

THE MICHIGAN SOUTHERN & NORTHERN INDIANA RAILROAD COMPANY v. FREDERICK SHURTZ.

(7 Mich. 515.)

Error to St. Joseph circuit, where action was brought by Shurtz against the railroad company, for the value of certain wheat.

The declaration was in substance as follows:

First count. That defendants, being common carriers, received at White Pigeon 83 55-60 bushels wheat of plaintiff, to be taken care of, and safely and securely carried and conveyed to Toledo, and there delivered to plaintiff, for a consideration to be paid, but that, not regarding their duty as such carriers, they so carelessly and negligently behaved and conducted themselves with respect to such wheat, that the same was wholly lost to plaintiff.

Second count. Similar to the first, except that it alleged the undertaking to carry to such point on defendant's road as plaintiff should designate when defendants should be ready to carry the same, they not then being prepared so to do.

Fourth count. That defendants, as common carriers, received said wheat, and gave therefor the following receipt:

"Mich. South. Railroad,
White Pigeon, Nov. 9, 1854.

"Received of S. Cotterman, for account of Fred. Shurtz, 83 55-60 bushels of wheat to be forwarded to ———, without further liability after lake shipment or loss by fire.

"A. A. Bean, Agent,
"Per C. Dunwell."

That according to the custom of defendants the place of destination of property was usually left blank in such receipts when the property was to be carried to Toledo, whereby they undertook to carry to Toledo. Breach as in the first count.

Fifth count. The defendants as carriers received the wheat, to be safely and securely kept in their warehouse, and thence conveyed to such place on their road as plaintiff should designate when defendants should be prepared to carry the same, that they did not and would not furnish the requisite cars for carrying the same, though required so to do, but so negligently conducted themselves that the wheat became lost to plaintiff.

Seventh count. That defendants, as carriers, received the wheat, and agreed safely and securely to keep the same in their warehouse, and safely carry to such place as plaintiff should afterwards designate. Breach, that they did not safely and securely keep the wheat, whereby it became lost to plaintiff.

Ninth count. That defendants received the wheat to be taken care of, but took so little care thereof that it was destroyed and lost to the plaintiff.

Tenth count. That defendants, as carriers, received the wheat and agreed to securely keep the same, and carry to Toledo within a reasonable time. Breach, that they did not securely keep, and did not carry within a reasonable time, and through their carelessness, negligence, and delays, the wheat became lost to plaintiff.

Eleventh count. That the customary place to which wheat was carried by defendants for lake shipment was Toledo, and that by the receipt (above set forth) and the custom, they undertook to securely keep and carry said wheat to Toledo. Breach as in tenth count.

Twelfth count. Like the eleventh, except that it alleged Monroe, instead of Toledo, to be the place to which the wheat was to be carried.

The third, sixth and eighth counts were abandoned on the trial.

Plaintiff (below) gave in evidence the receipt above copied, and proved that a portion of the wheat therein mentioned remained in the warehouse of defendants on December 24th, 1854, when said warehouse was destroyed by fire. He was also permitted by the circuit judge, under objection that no such fact was alleged in his declaration, to give evidence tending to prove that before the fire he had directed the wheat to be sent forward to Toledo—the judge holding the evidence proper under the first count.

Plaintiff also, under exception, introduced evidence tending to prove the following facts: That defendants, at the date of the receipt, had insufficient facilities for forwarding grain received by them; and that it was customary to give receipts for grain without specifying the place of destination, even when it was known to both parties. They also gave some evidence which they claimed tended to show negligence on the part of the company's servants, in the burning of the warehouse.

The circuit judge charged the jury among other things excepted to:

That if the wheat was received to be carried, and if that was the principal thing to be done, then defendants are liable for its loss, otherwise not.

That if defendants received the wheat to carry to Toledo, then they are liable, notwithstanding the agent may have given a receipt not authorized by the charter of defendants.

That if plaintiff, either at the time of the delivery of the wheat or afterwards, gave orders to the defendant to forward it to Toledo, then their liability as common carriers attached from the time of such orders, and they are liable for the loss.

That if defendants did not use ordinary care (such care as men of ordinary prudence take of their own property), in regard to the stove and fire in the office in the warehouse, and through the want of such care the warehouse and wheat were consumed by fire, then the plaintiff is entitled to recover, even though the defendants received the wheat as warehousemen.

The jury under the charge of the court returned a verdict for plaintiff.

MARTIN, Ch. J.: The principal question presented by this case, is whether the railroad company are liable as common carriers for the wheat deposited in their warehouse, to await orders for transportation, and a determination of what shall be its destination. We think they are not, nor should they be. By their charter the company have no right to charge as warehousemen, for storage of goods awaiting transportation; but this disability does not of itself create any liability. When the goods are delivered to be transported to a specified point, the liability of the company as carriers commences immediately; but if they are deposited to await orders—if the company can not carry them because ignorant of the contemplated destination, or because no destination has been concluded upon by the owner, it would be gross injustice to hold them subject to the extraordinary liabilities of common carriers, while thus awaiting the determination of their owner. While the wheat was lying in their warehouse awaiting the determination of Shurtz as to its destination, the company can not be regarded as any thing more than gratuitous bailees, and are liable only as such. If the intention of Shurtz can not be clearly seen to have been that it should be transported to any particular place, how can they be seen to be carriers of it? Can the company be carriers of a thing not to be carried? But when Shurtz had determined to what point he would have his wheat transported, and had notified the company of such determination, then their liability as carriers commenced, and it became their duty to forward it without delay. This is the obligation of their charter, and a want of facilities for transportation will not relieve them from that reliability.

There is no count in the declaration which will authorize a recovery for the destruction of the wheat, held by the company to await orders for its transportation, charging them as carriers. The theory of the first count of the declaration—and it is under that, that the court below held that this proof was admissible—is that the company were common carriers for hire, and that the plaintiff caused the wheat in question to be delivered to them to be conveyed to Toledo; and that this they undertook to do; but so carelessly and negligently conducted, that the wheat was destroyed. And a like theory, viz., that the wheat was in the company's possession, subject wholly to their control, or to transportation at their convenience, and according to their ability, runs through and characterizes all the other counts, except one, in the declaration.

This fundamental error renders it unnecessary to consider the other questions raised by the bill of exceptions.

The judgment should be reversed, and a new trial ordered.

The other justices concurred.

THE L. L. & G. RAILROAD CO. vs. W. H. H. MARIS.

(16 Kan. 333.)

Error from Montgomery District Court.

The opinion contains a full statement of the facts and questions in this case. Maris, as plaintiff, recovered judgment at the April Term 1874 of the district court against the Railroad Company, for $208.25, and costs, and the Railroad Company brings the case here on error.

The opinion of the court was delivered by

BREWER, J.: This was an action brought by defendant in error to recover for goods destroyed by fire in a depot belonging to the plaintiff in error, and the question is, whether the company at the time of the fire occupied toward the goods the position of carrier, or that of warehouseman. The case was tried upon an agreed statement of facts. It is not contended that the fire was caused by the negligence of the company, or that if its liability as carrier had terminated it was responsible for the loss. The material facts are these: Maris was a merchant at Winfield, a place about ninety miles west of Independence, a point on the company's road. Goods were shipped to him over the company's road, to be delivered to him at Independence. The goods in question reached Independence on the 4th and 7th days of January, 1872, and were placed in the depot building, and there remained eight days, (until the 15th of January,) and were then consumed by fire. Immediately after the arrival of each consignment of goods at Independence, notice thereof was forwarded by mail to Maris at Winfield, but did not reach him until the 20th of January, and after the fire. A tri-weekly mail ran between the two places. Ordinarily, only two days were occupied in transmitting the mail. During that month the epizooty was prevailing among the horses in that section of the country, and owing to that or some other cause over which neither party had any control, the notice did not reach Maris until the 20th. He called every day at the post office in Winfield for

his mail. The only means of conveying goods from Independence to Winfield was by wagon, and under favorable circumstances the trip from Winfield to Independence took from three to five days, and the round trip six to ten days. By special agreement between the parties, notice was to be given Maris by mail of the arrival of the goods at Independence. The form of the notice given, (and Maris had prior to the 1st of January, 1872, received similar notices of the arrival of other goods,) was as follows:

Freight Office, L. L. & G. R. R. Line,
Independence, ———, 187—.

M ————————:

There this day arrived at our depot at ————, consigned to you, the following articles:

No. | Articles. || No. | Articles.
Exhibit A.

Weight, ——— Charges, $———
which are ready for delivery to you on payment of freight and charges.

N. B.—No goods delivered until all the charges thereon are paid. Storage will be charged in all cases where goods are not removed within the prescribed time.

The contract of this company as common carriers ends upon the arrival of goods at our depots, and the company will not be responsible for damage from ordinary leakage, breakage, or insufficient cooperage; and no claims for damages will be allowed after the goods leave the depot, unless by consent of the agent.

Goods will be delivered only to the owner, or his written order. A receipt for the goods will, in all cases, be required, and no claim will be entertained for goods lost after such receipt has been taken.

————————, Agent.

Upon these facts some questions of importance are presented. It is insisted on behalf of the company, in the first place, "that a common carrier is relieved of its extraordinary liability as an insurer whenever it has carried the goods intrusted to it safely, and deposited them in a safe warehouse." This question as to the period at which the carrier's extraordinary liability terminates, comes to us borne upon two opposing lines of decision. At the head of one line stands the case of the Norway Plains Company v. B. & M. Rld. Co., 1 Gray, 263, in which the great jurist of Massachusetts, C. J. Shaw, holds that this liability of the carrier terminates when the goods are unloaded at their place of destination, and are ready for removal by the consignee; that if the latter be not present to receive them, and they are kept by the company in its depot or warehouse, its liability is that of a warehouseman. In other words, this liability continues only during the actual transit, and that when this is ended, if the consignee does not immediately receive them the company, as carrier, delivers them to the company as warehouseman, and thereafter the company is liable only for loss resulting from actual negligence. At the head of the other line is the case of Moses v. B. & M. Rly. Co., 32 New Hamp. 523, in which the court decides that the carrier's liability continues after the termination of the actual transit, and until the consignee has a reasonable time to remove the goods; that, as the carrier's liability commences, not with the actual transit of the goods, but from the time of receipt from the consignor, so it continues until actual delivery to the consignee, or, what is equivalent to a delivery, until the consignee has had reasonable time after their arrival to inspect and take them away in the common course of business. The mere fact that either before or after the actual transit they are placed by the company in its depot or warehouse does not change the character of its liability. The following cases support the Massachusetts doctrine: McCarty v. N. Y. & Erie Rld. Co., 30 Penn. St. 253; Francis v. Dubuque & S. C. Rld. Co., 25 Iowa, 60; Bauserman v. T. W. & W. Rly. Co., 25 Ind. 434; C. & C. Air Line Rld. Co. v. McCool, 26 Ind. 140; C. & A. Rld. Co. v. Scott, 42 Ill. 133. The other doctrine is adopted in the following cases; Fenner v. B. & St. L. Rld. Co., 44 N. Y. 505; Zum v. New Jersey St. Co., 49 N. Y., 442; Wood v. Crocker, 18 Wis. 345; Derosia v. St. P. & W. Rld. Co., 18 Minn. 133; Morris & Essex Rld. Co. v. Ayres, 5 Dutch. 393; Blumenthall v. Brainard, 38 Vt. 413; McMillan v. M. S. & N. I. Rld. Co., 16 Mich. 79; Jeffersonville Rld. Co. v. Cleveland, 2 Bush. 468; Hilliard v. Wilmington & C. Rld. Co., 6 Jones, (Law) 343. The question is a new one in this state, and one of no small importance both to carriers and shippers. Notwithstanding there is a technical precision in the Massachusetts doctrine which makes it both capable of exact statement and easy of application, we think the other doctrine more just and reasonable in its application to the ordinary transactions of business, protecting both the shipper and the carrier. It extends a little the duration of the carrier's obligation, but only so far as seems necessary to protect the shipper. The goods remain in the custody of the carrier, and subject to his control. The exact moment of arrival can seldom be known to the consignee, even if he have notice of the shipment. It is unreasonable to compel him to remain at the depot of the carrier, waiting the arrival of the goods, or assume all the risks of the uncertainties in the delay of transportation and time of arrival. We therefore hold that the carrier's liability continues until the consignee has had a reasonable time to call for, examine, and remove the goods.

What is a reasonable time? This is not a time varying with the distance, convenience or necessities of the consignee, but it is such time as will enable one living in the vicinity of the place of delivery, in the ordinary course of business, and in the usual hours of business, to inspect and remove the goods. It is well said by the

court in the case from 18 Minn. 133, that, "What would be under the circumstances of the case, such reasonable time for the removal of the goods, is not to be measured by any peculiar circumstances in the condition or situation of the consignee, or plaintiff, which render it necessary for his convenience or accommodation that he should have longer time or better opportunity than if he resided in the vicinity of the depot, and was prepared with means and facilities of removing them; but what is meant by reasonable time is, such as would give a person residing in the vicinity of the place of delivery, informed of the usual course of business on the part of the company, a suitable opportunity, within the usual business hours, after the goods are ready for delivery, to come to the place of delivery, inspect the goods, and take them away." Tried by this rule, it is plain that the goods had remained in the depot at Independence more than a reasonable time for their inspection and removal. They should have been removed on the day of their arrival, or at the furtherest, during the business hours of the succeeding day.

It is insisted however, that notice was required of their arrival, and that no notice was received until after the destruction. Whether, independent of the special contract, any notice was requisite, may be doubted. The consignee did not live at or near the place of delivery, and the authorities are conflicting upon the question whether notice is requisite even when the consignee lives at the place of delivery. See upon the question of notice McDonald v. W. Rld. Co., 34 N. Y. 497; Fenner v. Buffalo & St. L. Rld. Co., 44 N. Y. 505; Price v. Powell, 3 N. Y. 322; C. & A. Rld. Co. v. Scott, 42 Ill. 133; Derosia v. St. P. & W. Rld. Co., 18 Minn. 133; McMillan v. M. S. & N. J. Rld. Co., 16 Mich. 79; Hilliard v. W. & C. Rld. Co., 6 Jones, (Law) 343. But whether notice independent of any special contract would have been requisite, need not be determined, for here the parties had stipulated for notice. And the question is, what effect did this notice have upon the company's liability? On the one hand it is claimed that the reasonable time in which to remove the goods dates from the receipt of the notice, instead of the arrival of the goods; on the other, that the notice was purely a favor to the consignee, and that specifying the time at which the carrier's liability was to cease, it cannot be construed as enlarging that time. The question is one of difficulty. In those states where notice of the arrival of the goods is required to terminate the carrier's liability, it is held that the reasonable time for removal dates from the giving of the notice. This seems necessary to make the notice of any value, for if the reasonable time commences with the arrival of the goods it might often expire before the receipt of notice. It would almost invariably so expire if the consignee lived elsewhere than at the place of delivery. Hence, the notice would be meaningless, as affecting the rights and liabilities of either party. On the other hand, the form of notice used by the company, and of which Maris had information by the receipt of such notices, attempts to limit the effect thereof, and plainly states that the company's liability as carrier is to terminate upon the arrival of the goods. Hence, Maris had knowledge that while the company had agreed to give and would give notice of the arrival, it did so only as a favor to him, and without extending the duration of its extraordinary liability. If Maris was unwilling to continue the shipment of goods under such conditions he was at liberty to stop. Continuing, he accepts the conditions. To this it is replied that, contracting for notice without any stipulations as to the forms and conditions of notice, carries with it all the rights which flow from the mere fact of notice, and that the company cannot thereafter limit those rights by attaching conditions to that notice. This would doubtless be a satisfactory reply if this were the first consignment and the first notice. But having received notices with similar conditions, and making no objection thereto, or seeking a new arrangement, it seems to us that he cannot insist upon rights other than those given by the form of notice actually used. It must be borne in mind that this is not an attempt by the company to restrict its liability, but an attempt by special contract to enlarge it; and before the company could be bound by such special contract it should be made clear that it had assented to it in full as claimed. It is not pretended that the company had ever given any notice otherwise than with the conditions attached to this; nor is it claimed the company would not be liable for any injuries resulting from its own negligence; so that its interpretation of its contract for notice, an interpretation accepted by Maris without objection, was that of an agreement to give information of the arrival of the goods without in the meantime assuming any additional liability. We are aware that the agreed statement shows that the first notice was only received Dec. 23d, 1871, and that owing to the sickness of one party employed, as well as the prevalence of the epizooty, Maris failed to get a team to Independence before the destruction of all the goods of the various consignments by fire on January 15th, 1872. But we fail to see anything which shows that Maris was unable to communicate by mail with the company, or to go himself, or send someone else to Independence to make a new arrangement, or stop the shipment, or receive and store the goods. Under these facts, though with some doubts, we are constrained to hold that the company's liability as carrier had terminated before the fire, and that therefore it was not responsible for the destruction of the goods.

The case having been tried upon an agreed statement of facts, the judgment will be reversed, and the case remanded with instructions to enter judgment in fav-

or of the plaintiff in error, defendant below.

All the Justices concurring.

RAILROAD COMPANY vs. MANUFACTURING COMPANY.

(16 Wall. 318.)

In error to the Circuit Court for the District of Connecticut; the case being thus:

In October, 1865, at Jackson, a station on the Michigan Central Railroad, about seventy-five miles west of Detroit, one Bostwick delivered to the agent of the Michigan Central Railroad Company, for transportation, a quantity of wool consigned to the Mineral Springs Manufacturing Company, at Stafford, Connecticut, and took a receipt for its carriage, on the back of which was a notice that all goods and merchandise are at the risk of the owners while in the warehouses of the company, unless the loss or injury to them should happen through the negligence of the agents of the company.

The receipt and notice were as follows:

"Michigan Central Railroad Company,

"Jackson, October 11th, 1865.

"Received from V. M. Bostwick, as consignor, the articles marked, numbered, and weighing as follows:

[Wool described.]

"To be transported over said railroad to the depot, in Detroit, and there to be delivered to ———, agent, or order, upon the payment of the charges thereon, and subject to the rules and regulations established by the company, a part of which notice is given on the back hereof. This receipt is not transferable.

"Hastings,
"Freight Agent."

The notice on the back was thus:

"The company will not be responsible for damages occasioned by delays from storms, accidents, or other causes, . . . and all goods and merchandise will be at the risk of the owners thereof while in the company's warehouses, except such loss or injury as may arise from the negligence of the agents of the company."

Verbal instructions were given by Bostwick that the wool should be sent from Detroit to Buffalo, by lake, in steamboats, which instructions were embodied in a bill of lading sent with the wool. Although there were several lines of transportation from Detroit eastward by which the wool could have been sent, there was only one transportation line propelled by steam on the lakes, and this line was, and had been for some time, unable, in their regular course of business, to receive and transport the freight which had accumulated in large quantities at the railroad depot in Detroit. This accumulation of freight there, and the limited ability of the line of propellers to receive and transport it, were well known to the officers of the road, but neither the consignor, consignee, nor the station-master at Jackson, were informed on this subject. The wool was carried over the road to the depot in Detroit, and remained there for a period of six days, when it was destroyed by an accidental fire, not the result of any negligence on the company's part. During all the time the wool was in the depot it was ready to be delivered for further transportation to the carrier upon the route indicated.

In consequence of the loss the manufacturing company sued the railroad company. The charter of the company, which was pleaded and offered in evidence, contained a section thus:

"The said company may charge and collect a reasonable sum for storage upon all property which shall have been transported by them upon delivery thereof at any of their depots, and which shall have remained at any of their depots more than four days; Provided, that elsewhere than at their Detroit depot, the consignee shall have been notified if known, either personally or by notice left at his place of business or residence, or by notice sent by mail, of the receipt of such property at least four days before, any storage shall be charged, and at the Detroit depot such notice shall be given twenty-four hours (Sundays excepted) before any storage shall be charged; but such storage may be charged after the expiration of said twenty-four hours upon goods not taken away; Provided, that in all cases the said company shall be responsible for goods on deposit in any of their depots awaiting delivery, as warehousemen, and not as common carriers."

The controversy, of course, was as to the nature of the bailment when the fire took place. If the railroad company were to be considered as warehousemen at the time the wool was burned, they were not liable in the action, as the fire which caused its destruction was not the result of any negligence on their part. If, on the contrary, their duty as carriers had not ceased at the time of the accident, and there were no circumstances connected with the transaction which lessened the rigor of the rule applicable to that employment, they were responsible; carriers being substantially insurers of the property intrusted to their care.

The court was asked by the railroad company to charge the jury that its liability was the limited one of a warehouseman, importing only ordinary care. The court refused so to charge, and, on the contrary, charged that the railroad company were liable for the wool as common carriers, during its transportation from Jackson to Detroit, and after its arrival there, for such reasonable time as, according to their usual course of business, under the actual circumstances in which they held the wool, would enable them to deliver it to the next carrier in line, but that the manufacturing company took the risk of the next carrier line not being ready and willing to take

said wool, and submitted it to the jury to say whether under all the circumstances of the case in evidence before them, such reasonable time had elapsed before the occurrence of the fire.

The jury, under the instructions of the court, found that the railroad company were chargeable as carriers, and this writ of error was prosecuted to reverse that decision.

MR. JUSTICE DAVIS delivered the opinion of the court.

It is not necessary in the state of this record to go into the general subject of the duty of carriers in respect to goods in their custody which have arrived at their final destination. Different views have been entertained by different jurists of what the carrier is required to do when the transit is ended in order to terminate his liability, but there is not this difference of opinion in relation to the rule which is applicable while the property is in process of transportation from the place of its receipt to the place of its destination.

In such cases it is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line and to deliver to the next carrier in the route beyond. This rule of liability is adopted generally by the courts in this country, although in England, at the present time, and in some of the States of the Union, the disposition is to treat the obligation of the carrier who first receives the goods as continuing throughout the entire route. It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country, but the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction. Public policy, however, requires that the rule should be enforced, and will not allow the carrier to escape responsibility on storing the goods at the end of his route, without delivery or an attempt to deliver to the connecting carrier. If there be a necessity for storage it will be considered a mere accessory to the transportation, and not as changing the nature of the bailment. It is very clear that the simple deposit of the goods by the carrier in his depot, unaccompanied by any act indicating an intention to renounce the obligation of a carrier, will not change or modify even his liability. It may be that circumstances may arise after the goods have reached the depot which would justify the carrier in warehousing them, but if he had reasonable grounds to anticipate the occurrence of these adverse circumstances when he received the goods, he cannot by storing them change his relation towards them.

Testing the case in hand by these well-settled principles, it is apparent that the plaintiffs in error are not relieved of their proper responsibility, unless through the provisions of their charter, or by the terms of the receipt which was given when they received the wool. They neither delivered nor offered to deliver the wool to the propeller company. Nor did they do any act manifesting an intention to divest themselves of the character of carrier and assume that of forwarder.

It is insisted that the offer to deliver would have been a useless act, because of the inability of the line of propellers, with their means of transportation, to receive and transport the freight which had already accumulated at the Michigan Central depot for shipment by lake. One answer to this proposition is, that the company had no right to assume, in discharge of its obligation to this defendant, that an offer to deliver this particular shipment would have been met by a refusal to receive. Apart from this, how can the company set up, by way of defence, this limited ability of the propeller line when the officers of the road knew of it at the time the contract of carriage was entered into, and the other party to the contract had no information on the subject?

It is said, in reply to this objection, that the company could not have refused to receive the wool, having ample means of carriage, although it knew the line beyond Detroit selected by the shipper was not at the time in a situation to receive and transport it. It is true the company were obliged to carry for all persons, without favor, in the regular course of business, but this obligation did not dispense with a corresponding obligation on its part to inform the shipper of any unavoidable circumstances existing at the termination of its own route in the way of a prompt delivery to the carrier next in line. This is especially so when, as in this case, there were other lines of transportation from Detroit eastward by which the wool, without delay, could have been forwarded to its place of destination. Had the shipper at Jackson been informed, at the time, of the serious hindrances at Detroit, to the speedy transit of goods by the lake, it is fair to infer, as a reasonable man, he would have given a different direction to his property. Common fairness requires that at least he should have been told of the condition of things there, and thus left free to choose, if he saw fit, another mode of conveyance. If this had been done there would be some plausibility in the position that six days was an unreasonable time to require the railroad company to hold the wool as a common carrier for delivery. But under the circumstances of this case the company had no right to expect an earlier period for delivery, and cannot, therefore, complain of the response of the jury to the inquiry on this subject submitted to them by the Circuit Court.

It is earnestly argued that the plaintiffs in error are relieved from liability under a provision contained in one section of their charter, if not by the rules of the common law.

But it is quite clear, on reading the whole section, that it refers to property which has reached its final destination, and is there awaiting delivery to its owner. If so, how can the proviso in question be made to apply to another and distinct class of property? To perform this office it must act independently of the rest of the section, and enlarge, rather than limit, the operation of it. This it cannot do, unless words are used which leave no doubt the legislature intended such an effect to be given to it.

It is argued, however, that there is no difference between goods to be delivered to the owner at their final destination and goods deliverable to the owner, or his agent, for further carriage. That in both cases, as soon as they are "ready to be delivered" over, they are "awaiting delivery." This position, although plausible, is not sound. There is a clear distinction, in our opinion, between property in a situation to be delivered over to the consignee on demand, and property on its way to a distant point to be taken thence by a connecting carrier. In the former case it may be said to be awaiting delivery; in the latter, to be awaiting transportation. And this distinction is recognized by the Supreme Court of Michigan in the case of the present plaintiffs in error against Hale. The court in speaking on this subject say, "that goods are on deposit in the depots of the company, either awaiting transportation or awaiting delivery, and that the section (now under consideration) has reference only to goods which have been transported and placed in the company's depots for delivery to the consignee." To the same effect is a recent decision of the Court of Appeals of New York, in a suit brought to recover for the loss of goods by the same fire that consumed the wool in this case, and which were marked for conveyance by the same line of propellers on Lake Erie.

It is insisted, however, by the plaintiffs in error, if they are not relieved from liability as carriers by the provisions of their charter, that the receipt taken by the consignor, without dissent, at the time the wool was received, discharges them. The position is, that the unsigned notice printed on the back of the receipt is a part of it, and that, taken together, they amount to a contract binding on the defendants in error.

This notice is general, and not confined, as in the section of the charter we have considered, to goods on deposit in the depots of the company awaiting delivery. It is a distinct announcement that all goods and merchandise are at the risk of the owners thereof while in the company's warehouses, except for such loss or injury as may arise from the negligence of the agents of the company. The notice was, doubtless, intended to secure immunity for all losses not caused by negligence or misconduct during the time the property remained in the depots of the company, whether for transportation on their own line, or beyond, or for delivery to consignees. And such will be its effect if the party taking the receipt for his property is concluded by it. The question is, therefore, presented for decision whether such a notice is effectual to accomplish the purpose for which it was issued.

Whether a carrier when charged upon his common-law responsibility can discharge himself from it by special contract, assented to by the owner, is not an open question in this court since the cases of The New Jersey Steam Navigation Company v. The Merchants' Bank, and York Company v. Central Railroad. In both these cases the right of the carrier to restrict or diminish his general liability by special contract, which does not cover losses by negligence or misconduct, received the sanction of this court. In the former case the effect of a general notice by the carrier seeking to extinguish his peculiar liability was also considered, and although the remarks of the judge on the point were not necessary to the decision of the case, they furnish a correct exposition of the law on this much-controverted subject.

In speaking of the right of the carrier to restrict his obligation by a special agreement, the judge said: "It by no means follows that this can be done by an act of his own. The carrier is in the exercise of a sort of public office, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public limiting his obligation, which may, or may not, be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. If any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights and the duties of the carrier, as it is that he assented to their qualification. The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment."

These considerations against the relaxation of the common-law responsibility by public advertisements, apply with equal force to notices having the same object, attached to receipts given by carriers on taking the property of those who employ them into their possession for transportation. Both are attempts to obtain, by indirection, exemption from burdens imposed in the interests of trade upon this particular business. It is not only against the policy of the law, but a serious injury to commerce to allow the carrier to say that the shipper of merchandise assents to the terms proposed in a notice, whether it be

general to the public or special to a particular person, merely because he does not expressly dissent from them. If the parties were on an equality in their dealings with each other there might be some show of reason for assuming acquiescence from silence, but in the nature of the case this equality does not exist, and, therefore, every intendment should be made in favor of the shipper when he takes a receipt for his property, with restrictive conditions annexed, and says nothing, that he intends to rely upon the law for the security of his rights.

It can readily be seen, if the carrier can reduce his liability in the way proposed, he can transact business on any terms he chooses to prescribe. The shipper, as a general thing, is not in a condition to contend with him as to terms, nor to wait the result of an action at law in case of refusal to carry unconditionally. Indeed such an action is seldom resorted to, on account of the inability of the shipper to delay sending his goods forward. The law, in conceding to carriers the ability to obtain any reasonable qualification of their responsibility by express contract, has gone as far in this direction as public policy will allow. To relax still further the strict rules of common law applicable to them, by presuming acquiescence in the conditions on which they propose to carry freight when they have no right to impose them, would, in our opinion, work great harm to the business community.

The weight of authority is against the validity of the kind of notices we have been considering. And many of the courts that have upheld them have done so with reluctance, but felt themselvs bound by previous decisions. Still they have been continued, and this persistence has provoked legislation in Michigan, where this contract of carriage was made, and the plaintiffs in error have their existence. By an act of the legislature passed after the loss in this case occurred, it is declared "that no railroad company shall be permitted to change or limit its common-law liability as a common carrier by any contract or in any other manner, except by a written contract, none of which shall be printed, which shall be signed by the owner or shipper of the goods to be carried."

It is fair to infer that this kind of legislation will not be confined to Michigan, if carriers continue to claim exemption from common-law liability through the medium of notices like the one presented in defence of this suit.

These views dispose of this case, and it is not necessary to notice particularly the instructions which the court below gave to the jury. If the court erred at all it was in charging more favorably for the plaintiffs in error than the facts of the case warranted.

Judgment affirmed.

SHADRACK ROBINSON vs. JOSHUA BAKER.

(5 Cush. 137.)

This was an action of replevin, for six hundred barrels of flour, tried before Dewey, J., and reported by him for the consideration of the whole court. The material facts are as follows:—

The plaintiff, in October, 1847, by his agent, Joseph B. Gardner, of Buffalo, in the state of New York, purchased six hundred barrels of flour, which the agent caused to be put on board a canal-boat at Black Rock, on the 23d of October, 1847, to be transported to Albany. The boat was owned by a company, known by the name of the Old Clinton line, engaged in the business of common-carriers between Buffalo and Albany. On receiving the flour, the agent of the company executed and delivered to the plaintiff's agent duplicate bills of lading, by which the company undertook to deliver the flour to Witt, the agent of the Western railroad, at East Albany. One of the bills of lading was sent to Witt, and the other to the plaintiff, at Boston.

On the arrival of the flour at Albany, November 5th, 1847, Monteath and company, the agents there of the Old Clinton line, called on Witt, and informed him that the six hundred barrels of flour had arrived, and asked him if he would take it off the boat that day. Witt said he would not, without mentioning any time when he would receive the flour; but only that the boat must take its turn. Boats arriving at East Albany, consigned to Witt or to the Western railroad, were discharged in their turns; and in the months of October and November, 1847, there was a detention at East Albany, in unlading, of from one to three days.

The agents of the Old Clinton line at Albany thereupon shipped the flour to the city of New York, by a company known as the Albany and Canal line, engaged as common carriers in the transportation of merchandise between the city of New York and Albany, and received from the agents of the company $433.08, as and for the freight of the flour from Black Rock to Albany, and requested the company to ship the flour from New York to Boston, for the plaintiff.

On the arrival of the flour at New York, Hoyt, the agent of the Albany and Canal line there, shipped the same for Boston on board the schooner, Lady Suffolk, of which the defendant was master, consigned to Horace Scudder and company, agents of the Albany and Canal line, at Boston; and Hoyt at the same time remitted to Scudder and company a bill of exchange, drawn by him, as agent, upon the plaintiff, payable to Scudder and company, for $493.33, which included the freight from Black Rock to Albany, and from Albany to New York, with instructions to Scudder and company to deliver the flour to the plaintiff, on his paying or agreeing to pay the amount of the said bill of exchange, and, in addition thereto, the freight upon the flour from New York to Boston.

On the arrival of the defendant's vessel at Boston with the flour, November 23d, 1847,

the plaintiff demanded the same, and the defendant refused to deliver it, on the ground that he had a lien thereon for the freight. The plaintiff refused to pay the freight, and commenced this action of replevin to recover the flour.

It was in evidence, also, that in the spring of 1847, the plaintiff made a contract with the Western railroad corporation, to transport over their road all the flour which he might have during the year at Albany, or at places west of Albany, the quantity not to be less than twenty thousand barrels; in consideration of which the railroad corporation agreed to transport the same from East Albany to Boston for thirty-two cents a barrel, being three cents a barrel less than the usual charge of transportation; but there was no proof that this contract was known to any one but the parties to it.

It was further in evidence, that the usual time for the transportation of merchandise from Albany to Boston over the Western railroad was two days; and that the price of flour at Boston, between the 10th and the 30th of November, 1847, declined from fifty to seventy-five cents a barrel.

The plaintiff also introduced a letter addressed to him, under date of the 5th, and received by him on the 8th of November, 1847, from William Monteath and company, at Albany, in which they inform him that they had shipped his flour to New York, to be shipped from thence to Boston; that they had done so in consequence of the inability of the railroad corporation to receive the flour; and that this course would be better for the plaintiff than to have stored the flour, until the railroad company was able to receive it, which would have subjected the plaintiff to considerable expense. The plaintiff, in his answer, dated November 16th, 1847, which was also in evidence, desired to know by what authority Monteath and company sent the flour to New York; and informed them that there would be a loss upon it in consequence, of from $300 to $400. He added, that he should make his claim for damages as soon as the flour had arrived and been sold.

The plaintiff, upon this evidence, requested the judge to instruct the jury as follows:—

1. That the Old Clinton company never acquired any claim against the plaintiff for freight; because the flour was not delivered at East Albany to Witt, as by the bill of lading the company contracted to do.

2. That the Old Clinton company, by diverting the course of the flour, and sending the same by the way of New York, if such diversion was without the consent of the plaintiff, lost the lien which they might otherwise have had for the freight thereof from Black Rock to East Albany.

3. That the Old Clinton company, by parting with the possession of the flour, if this was done without the consent of the plaintiff, lost the lien which they otherwise might have had for the freight of it from Black Rock to East Albany.

4. That the defendant was bound to ascertain the title of the Old Clinton company and of the Albany and Canal company; and if these companies, or either of them, diverted the course of the flour, without the consent of the plaintiff, the defendant had no lien or right to detain the flour against the plaintiff, for the freights claimed by the companies, or for his own freight.

5. That the defendant, by notice of the lien sought to be enforced in favor of the Old Clinton company, and of the Albany and Canal line, was so far put upon inquiry, that he must be considered as having knowledge of the terms and obligations, under which the Old Clinton company received the flour.

6. That usage or custom was not competent or admissible for the purpose of controlling the express provisions of a written contract.

The defendant objected, that to have carried the flour across the river from Albany to East Albany, would under the circumstances have been a vain and useless ceremony; and that the offer of it made by Monteath to Witt was sufficient; and he asked the court to instruct the jury, that the plaintiff had ratified the diversion, if any, by Monteath and company, by reason and as a consequence of his neglect to reply to the letter of November 5th until the 16th of November.

The presiding judge having stated, that assuming the rule of law to be correctly laid down by the counsel for the plaintiff, upon the first, second, third, and sixth points, presented as questions of law; yet, nevertheless, if the defendant received the flour at New York from an agent of a forwarding line from Albany, with a request to transport the same to Boston, for the lawful owner thereof, and the defendant received the flour in the ordinary course of his business and in good faith, for the purpose of transporting it to Boston, and in entire ignorance of the original contract for the transportation of the same by the Old Clinton line to East Albany, and that the plaintiff desired its transportation thence by railroad to Boston, but under the belief, that this was an ordinary case of transportation of flour put into his charge by an authorized agent; if the defendant had performed the service of transportation from New York to Boston, under such circumstances, he would be entitled to his reasonable charges for freight, and had a lien upon the flour therefor, which he might enforce, and might lawfully detain the flour until the same was paid; and that irrespective of the other questions of law raised, this would justify the defendant in refusing to deliver the goods, until the payment was made for such freight.

It was then proposed to have the jury inquire, whether or not Witt, the agent at East Albany, authorized or consented that Monteath and company should send the flour by the way of the city of New York to Boston; upon which a verdict was returned, as appears of record, that Witt did not authorize Monteath and company to forward the flour by the way of New York.

If the instruction to the jury was correct, or if the more extended claim of the defendant, namely, to recover for money paid for transportation to Albany and thence to New

York, is well sustained, then judgment is to be entered for the defendant, with a proper entry as to a return of the goods replevied.

If upon none of these grounds, or others properly open upon the case stated, the defendant has a lien upon the flour, or a right to detain the same, then judgment is to be rendered for the plaintiff, with nominal damages.

FLETCHER, J. [After stating the facts, the instructions requested, and the instructions given.] As the ruling of the judge, that the defendant, as a carrier, had a lien for his freight, was placed upon grounds wholly independent of any rightful authority in the agents of the Old Clinton line and the Albany and Canal line, to divert the goods from the course in which the plaintiff had directed them to be sent, and to forward them by the defendant's vessel, and wholly independent of the plaintiff's consent, express or implied, the simple question raised in the case is, whether if a common-carrier honestly and fairly on his part, without any knowledge or suspicion of any wrong, receives goods from a wrongdoer, without the consent of the owner, express or implied, he may detain them against the true owner, until his freight or hire for carriage is paid; or to state the question in other words, whether if goods are stolen and delivered to a common-carrier, who receives them honestly and fairly in entire ignorance of the theft, he can detain them against the true owner, until the carriage is paid.

It is certainly remarkable, that there is so little to be found in the books of the law, upon a question which would seem likely to be constantly occurring in the ancient and extensive business of the carrier. In the case of York v. Grenaugh, 2 Ld. Ray. 866, the decision was, that if a horse is put at the stable of an inn by a guest, the innkeeper has a lien on the animal for his keep, whether the animal is the property of the guest or of some third party from whom it has been fraudulently taken or stolen. In that case, lord chief justice Holt cited the case of an Exeter common-carrier, where one stole goods and delivered them to the Exeter carrier, to be carried to Exeter; the right owner, finding the goods in possession of the carrier, demanded them of him; upon which the carrier refused to deliver them unless he was first paid for the carriage. The owner brought trover, and it was held, that the carrier might justify detaining the goods against the right owner for the carriage; for when they were brought to him, he was obliged to receive them, and carry them, and therefore since the law compelled him to carry them, it will give him a remedy for the premium due for the carriage. Powell, J., denied the authority of the case of the Exeter carrier, but concurred in the decision as to the innkeeper. There is no other report of the case of the Exeter carrier to be found. Upon the authority of this statement of the case of the Exeter carrier, the law is laid down in some of the elementary treatises to be, that a carrier, who receives goods from a wrongdoer or thief, may detain them against the true owner until the carriage is paid.

In the case of King v. Richards, 6 Whart. 418, the court, in giving an opinion upon another and entirely different and distinct point, incidentally recognized the doctrine of the case of the Exeter carrier. But until within six or seven years there was no direct adjudication upon this question except that referred to in York v. Grenaugh of the Exeter carrier. In 1843, there was a direct adjudication, upon the question now under consideration, in the supreme court of Michigan, in the case of Fitch v. Newberry, 1 Doug. 1. The circumstances of that case were very similar to those in the present case. There the goods were diverted from the course authorized by the owner, and came to the hands of the carrier without the consent of the owner, express or implied; the carrier, however, was wholly ignorant of that, and supposed they were rightfully delivered to him; and he claimed the right to detain them until paid for the carriage. The owner refused to pay the freight, and brought an action of replevin for the goods. The decision was against the carrier. The general principle settled was, that if a common-carrier obtain possession of goods wrongfully or without the consent of the owner, express or implied, and on demand refuse to deliver them to the owner, such owner may bring replevin for the goods or trover for their value. The case appears to have been very fully considered and the decision is supported by strong reasoning and a very elaborate examination of authorities. A very obvious distinction was supposed to exist between the cases of carriers and innkeepers, though the distinction did not affect the determination of the case.

This decision is supported by the case of Buskirk v. Purin, 2 Hall, 561. There property was sold on a condition, which the buyer failed to comply with, and shipped the goods on board the defendant's vessel. On the defendant's refusal to deliver the goods to the owner, he brought trover and was allowed to recover the value, although the defendant insisted on his right of lien for freight.

Thus the case stands upon direct and express authorities. How does it stand upon general principles? In the case of Saltus v. Everett, 20 Wend. 267, 275, it is said: "The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his consent, and consequently that even the honest purchaser under a defective title cannot hold against the true proprietor." There is no case to be found, or any reason or analogy anywhere suggested, in the books, which would go to show that the real owner was concluded by a bill of lading not given by himself but by some third person, erroneously or fraudulently. If the owner loses his property, or is robbed of it, or it is sold or pledged without his consent, by one who has only a temporary right to its use by hiring or otherwise, or a qualified possession of it for a specific purpose, as for transportation, or

for work to be done upon it, the owner can follow and reclaim it in the possession of any person, however innocent.

Upon this settled and universal principle, that no man's property can be taken from him without his consent, express or implied, the books are full of cases, many of them hard and distressing cases, where honest and innocent persons have purchased goods of others apparently the owners, and often with strong evidence of ownership, but who yet were not the owners, and the purchasers have been obliged to surrender the goods to the true owners, though wholly without remedy for the money paid. There are other hard and distressing cases of advances made honestly and fairly by auctioneers and commission merchants, upon a pledge of goods by persons apparently having the right to pledge, but who in fact had not any such right, and the pledgees have been subjected to the loss of them by the claim of the rightful owner. These are hazards to which persons in business are continually exposed by the operation of this universal principle, that a man's property cannot be taken from him without his consent. Why should the carrier be exempt from the operation of this universal principle? Why should not the principle of caveat emptor apply to him? The reason, and the only reason, given is, that he is obliged to receive goods to carry, and should therefore have a right to detain the goods for his pay. But he is not bound to receive goods from a wrongdoer. He is bound only to receive goods from one who may rightfully deliver them to him, and he can look to the title, as well as persons in other pursuits and situations in life. Nor is a carrier bound to receive goods, unless the freight or pay for the carriage is first paid to him; and he may in all cases secure the payment of the carriage in advance. In the case of King v. Richards, 6 Whart. 418, it was decided that a carrier may defend himself from a claim for goods by the person who delivered them to him, on the ground that the bailor was not the true owner, and therefore not entitled to the goods.

The common-carrier is responsible for the wrong delivery of goods, though innocently done, upon a forged order. Why should not his obligation to receive goods exempt him from the necessity of determining the right of the person to whom he delivers the goods, as well as from the necessity of determining the right of the person from whom he receives goods? Upon the whole, the court are satisfied, that upon the adjudged cases, as well as on the general principles, the ruling in this case cannot be sustained, and that if a carrier receives goods, though innocently, from a wrongdoer, without the consent of the owner, express or implied, he cannot detain them against the true owner, until the freight or carriage is paid.

FREDERICK A. POTTS vs. NEW YORK & NEW ENGLAND RAILROAD COMPANY.

(131 Mass. 455.)

Tort for the conversion of a quantity of coal. Answer, a general denial. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, upon an agreed statement of facts in substance as follows:

The plaintiff, a coal merchant, sold to a firm in Southbridge in this Commonwealth a large quantity of coal and shipped 205 tons thereof by a schooner to Norwich, Connecticut, to be thence transported by the defendant over its railroad to the consignees at Southbridge. The defendant received the coal at Norwich, paying the water freight to discharge the schooner's lien, amounting to $205, and then carried the coal to Southbridge and delivered to the consignees all but 119 tons thereof, no part of the advances for water freight nor the defendant's freight being paid. On the arrival at Southbridge of the 119 tons, which is the coal in controversy, the consignees having failed, the plaintiff duly stopped it in transitu, and demanded it of the defendant. The defendant refused to deliver it, claiming a lien on it for the entire amount of the water freight on the whole cargo paid by the defendant, and for the whole of the defendant's freight on the cargo, amounting in all to $513. The plaintiff tendered to the defendant $297, which was enough to cover the water freight and the defendant's freight on the coal in question. The value of the coal in controversy was $696.

If the defendant had no right to hold the coal as against the plaintiff for the advances and freight on the whole cargo, judgment was to be entered for the plaintiff for $398, with interest from the date of the writ; otherwise, judgment for the defendant.

GRAY, C. J. A carrier of goods consigned to one person under one contract has a lien upon the whole for the lawful freight and charges on every part, and a delivery of part of the goods to the consignee does not discharge or waive that lien upon the rest without proof of an intention so to do. Sodergren v. Flight, cited in 6 East, 622. Abbott on Shipping (7th ed.) 377. Lane v. Old Colony Railroad, 14 Gray, 143. New Haven & Northampton Co. v. Campbell, 128 Mass. 104. And when the consignor delivers goods to one carrier to be carried over his route, and thence over the route of another carrier, he makes the first carrier his forwarding agent; and the second carrier has a lien, not only for the freight over his own part of the route, but also for any freight on the goods paid by him to the first carrier. Briggs v. Boston & Lowell Railroad, 6 Allen, 246, 250.

The right of stoppage in transitu is an equitable extension, recognized by the courts of common law, of the seller's lien for the price of goods of which the buyer

has acquired the property, but not the possession. Bloxam v. Sanders, 4 B. & C. 941, 948, 949, and 7 D. & R. 396, 405, 406. Rowley v. Bigelow, 12 Pick. 307, 313. This right is indeed paramount to any lien, created by usage or by agreement between the carrier and the consignee, for a general balance of account. Oppenheim v. Russell, 3 B. & P. 42. Jackson v. Nichol, 5 Bing. N. C. 508, 518, and 7 Scott, 577, 591. See also Butler v. Woolcott, 2 N. R. 64; Sears v. Wills, 4 Allen, 212, 216. But the common law lien of a carrier upon a particular consignment of goods arises from the act of the consignor himself in delivering the goods to be carried; and no authority has been cited, and no reason offered, to support the position that this lien of the carrier upon the whole of the same consignment is not as valid against the consignor as against the consignee.

Judgment for the defendant.

WAY, ADM'R
v.
CHICAGO, R. I. & P. R. CO.

(64 Ia. 48; 19 N. W. 828.)

Appeal from Mahaska circuit court.

The plaintiff is the administrator of the estate of John Way, deceased. The action was brought by the decedent. After his death the present plaintiff was substituted. The plaintiff claims to recover for a personal injury alleged to have been received by the decedent as a passenger on one of defendant's trains, and by being thrown against a cupola platform by defendant's negligence in making a coupling. There was a trial to a jury, and verdict and judgment rendered for the plaintiff. The defendant appeals.

ADAMS, J. In April, 1881, the decedent took passage upon a freight train at Monroe, Jasper county, for Oskaloosa. In payment of his fare he presented a mileage ticket which had been issued to one R. G. Forgrave, at commutation rates. The conductor of the train, without knowledge that Way was not Forgrave, detached the coupons for his passage. Printed upon the ticket were several conditions, and also a printed acceptance of the conditions, which was signed by Forgrave, and the whole was denominated a contract. One of the conditions is in these words: "This ticket is positively not transferable, and if presented by any other than the person whose name appears on the inside of the cover, and whose signature is attached below, it is forfeited to the company." The defendant's theory upon the trial below was that the decedent was not a passenger within the meaning of the law, and asked the court to instruct the jury accordingly. This the court refused to do, and gave an instruction in these words: "If you find from the evidence that the decedent was injured to the damage of his estate substantially as alleged, and that he was at that time riding in a caboose in the defendant's train on the mileage ticket in evidence, issued by the defendant to R. G. Forgrave, and that upon its presentation in payment for transportation the conductor of the train accepted the ticket, and recognized and treated the decedent as a passenger, the defendant's duties and obligations were, and its liabilities now are, the same as if the ticket had been issued to the decedent, whether, prior to the accident, he disclosed to or the conductor knew his identity or not." In respect to the measure of care which common carriers owe to passengers, the court gave an instruction as follows: "Common carriers of persons are required to do all that human care, vigilance, and foresight can reasonably do, in view of the character and mode of conveyance adopted, to prevent accident to passengers. Not the utmost degree of care which the human mind is capable of inventing, but the highest degree of care and diligence which is reasonably practicable under the circumstances, is what is required."

The giving of these instructions is assigned as error. The defendant insists that the contract relied upon as constituting the relation of common carrier and passenger was obtained by imposition and virtual misrepresentation, and it being now repudiated by the company, by a denial by it of its liability, the plaintiff cannot be allowed to set it up as binding upon the company; and that if the relation of common carrier and passenger did not exist, the company did not owe the decedent the measure of care set forth in the instruction. It appears to us that the defendant's position in this respect is well taken. When the decedent presented the ticket we must presume that he intended to be understood as claiming that he had a right to travel upon it. This claim involved the claim that he was Forgrave, for the ticket showed upon its face that no one had a right to travel upon it but Forgrave. By the presentation of the ticket the decedent falsely personated Forgrave with the intention of deceiving the company, and he did deceive it, and to its injury, for by reason of the deception he escaped the payment of the full rate with which he was otherwise chargeable. It is not material, then, that the decedent obtained the conductor's consent. Whether his consent would have bound the company if he had known that the decedent was not Forgrave, we need not require; it certainly did not under the circumstances shown. The only relation existing between the decedent and the company having been induced by fraud, he cannot be allowed to set up that relation against the company as a bisis of recovery. He was, then, at the time of the injury, in the car without the rights of a passenger, and without the right to be there at all. We do not say that it is necessary that a person should pay fare to be entitled to the rights of a passenger. It is sufficient, probably, if he has the consent of the company, fairly obtained. But no one would claim that a mere trespasser has such rights, and it appears to us to be

well settled that consent obtained by fraud is equally unavailing.

The plaintiff insists that the extraordinary care described in the instruction does not become due from common carriers by reason of any contract, but simply by a rule of law which enforces the duty upon broader grounds. It is not important to inquire precisely how the duty arises. However it arises, the duty is one which the common carrier owes only to passengers; and if, as we hold, the decedent did not sustain that relation within the meaning of the law, the company did not owe that duty to him, and that is the end of the inquiry. The doctrine which we announce was very clearly expressed in T., W. & W. R. Co. v. Beggs, 85 Ill. 80. In that case the court said: "Was defendant a passenger on that train in the true sense of that term? He was traveling on a free pass issued to one James Short, and not transferable, and passed himself as the person named in the pass. By his fraud he was riding on the car. Under such circumstances the company could only be held liable for gross negligence which would amount to willful injury."

In Thomp. Carr. Pass. p. 43, § 3, the author goes even further. After stating the rule that the relation of carrier and passenger does not exist where one fraudulently obtains a free ride, he says: "This doctrine extends further, and includes the case of one who knowingly induces the conductor of a train to violate the regulations of the company, and disregard his obligations of fidelity to his employer."

In U. P. Ry. Co. v. Nichols, 8 Kan. 505, the defendant in error imposed himself upon the company as an express messenger, and obtained the consent of the conductor to carry him without fare. It was held that he did not become entitled to the rights of a passenger. The court, after quoting Shearman & Redfield's definition of a passenger, which is in these words: "A passenger is one who undertakes, with the consent of the carrier, to travel in the conveyance provided by the latter, other than in the service of the carrier as such,"—proceeds to say: "The consent obtained from the conductor was the consent that an express messenger might ride without paying his fare. Such consent did not apply to the plaintiff," (the defendant in error.)

See also the following cases: T., W. & W. R. Co. v. Brooks, 81 Ill. 292; M. & C. R. Co. v. Chastine, 54 Miss. 503; Creed v. Pa. R. Co. 86 Pa. St. 139; Relf v. Rupp, 3 Watts. & S. 21; Hays v. Wells, Fargo & Co. 23 Cal. 185. The plaintiff cites and relies upon Bissell v. Railroad Cos. 22 N. Y. 308; Washburn v. Nashville, etc., R. Co. 3 Head, 638; Jacobus v. St. Paul, etc., R. Co. 20 Minn. 125, (Gil. 110); Pa. R. Co. v. Brooks, 57 Pa. St. 346; Wilton v. Middlesex R. Co. 107 Mass. 108; Flint, etc., R. Co. v. Weir, 37 Mich. 111; Dunn v. Grand Trunk Ry. Co. 58 Me. 192; Edgerton v. N. Y., etc., R. Co. 39 N. Y. 227; Gregory v. Burlington, etc., R. Co. 10 Neb. 250; S. C. 4 N. W. Rep. 1025; Great Northern R. Co. v. Harrison, 10 Exch. 376. But none of these cases hold that the extraordinary care described in the instruction given is due to a person not a passenger, and none of them hold that the relation of passenger can be insisted upon where the company shows affirmatively as a defense that the company's consent was obtained by fraud.

Certain special objections to the defense remain to be noticed.

Section 2086 of the Code provides that "when by the terms of an instrument its assignment is prohibited, an assignment of it shall nevertheless be valid." The plaintiff cites this statute and claims, as we understand, that the mere possession of the ticket by the decedent was prima facie evidence of an assignment to him, and that the assignment, under the statute was valid, and being such it is immaterial whether the conductor supposed that the decedent was Forgrave or not. Without undertaking to set forth all the answers which we think might be made to this position, we think it sufficient to say that we do not think that the word "instrument," as used in the statute, was designed to embrace railroad tickets like the one in question. The purpose of such a ticket is to serve as evidence of a contract to render the party to whom it is issued a personal service, to-wit, the transportation of himself and baggage, and no one else, over the route described. The language is, "On presentation of this ticket, with coupons and contract attached, Mr. R. G. Forgrave may travel," etc. While section 2085 treats of instruments whereby the maker acknowledges labor to be due another, and while a valid assignment may undoubtedly be made of such instruments under the statute, we cannot properly so construe the statute as to hold that the essential nature of the contract can be changed so as to require the maker to do not only what he did not agree to do, but what the other party expressly stipulated that the maker should not be required to do. The case is not different from one where an individual or corporation should agree to transport certain specific freight and no other. No assignment could be made of the contract which would impose upon the maker the obligation to transport different freight. It is said by the company that Forgrave was a commercial traveler, and that the company was interested in facilitating commercial travelers and in developing commerce along its line; but it is not important to inquire how this is. It it certain that we cannot go beyond the company's contract, so far as its essential nature is concerned.

Another statute relied upon is section 11, c. 77, Laws 1878. The section is in these words: "No railroad corporation shall charge, demand, or receive from any person, * * * for the transportation of persons, * * * or for any other service, a greater sum than it shall at the same time

charge, demand, or receive from any other person * * * for a like service from the same place, or upon like condition, and under similar circumstances." The plaintiff's position, as we understand it, is that the act of the company in commuting rates to Forgrave, though he might have belonged to a certain class, and though the company might have been interested in facilitating such class, was nevertheless a violation of law, and, being such, the acts of the decedent in gaining the advantage of the rates commuted to Forgrave, though done by imposition, were justifiable, and did not preclude him from insisting that he had the same rights that he would have had if he had paid full rates, or otherwise had obtained the consent of the company without fraud. It is a sufficient answer to say that if the company charged illegal rates, it was not done in charging Forgrave less, but some one else more; nor could the decedent properly obtain the rates made to Forgrave by personating Forgrave. Whether, if he had appeared in his own name and demanded that the rates made to Forgrave should be made to him, and the company had refused, he would have had a right to complain, we need not determine, as we have no such case.

Another position taken by the plaintiff is that the ticket provides for its own penalty for its violation, to-wit, a forfeiture, and no other penalty can be added. But the question before us is not as to the enforcement of a penalty by the company, but as to whether the decedent acquired the rights of a passenger. The right of the company to insist that he did not, if he never properly acquired the consent of the company to carry him as such, is independent of any question of penalty. We think the instruction given by the court is erroneous, and that the judgment must be reversed.

SHOEMAKER et al.,
v.
KINGSBURY.
(12 Wall. 369.)

Error to the Circuit Court for the District of Kansas.

Suit for damages for personal injuries happening on a rail car; the case being thus:

In 1867, Shoemaker and another were contractors for building the Eastern Division of the Union Pacific Railway in Kansas; and in October of that year they ran a construction train over a portion of the road, carrying material for it. To this train was attached what was called a "caboose car"—a car for the accommodation of the men connected with the train, who had their "sleeping bunks" in this car, and who stored their tools there, as also the lamps used on the cars. The road was not yet delivered over to the Pacific Railway Company, and the contractors did not wish to carry passengers. Persons, however, were sometimes carried on the caboose car, and sometimes fare had been charged for their passage, but not always.

In this state of things, one Kingsbury, a sheriff in Kansas, and a deputy marshal, wanted to make an arrest on the line of the road, and he applied for passage as far as to a place called Wilson's Creek, asking the conductor to stop the train there, in order that he might make the arrest. He was accordingly taken on the train, and the train stopped until he had made the arrest.

A part of the fare was paid by Kingsbury on the cars, and the balance afterwards. The train ran from Ellsworth to Walker's Creek in Kansas. In going towards Walker's Creek the train was made up and ran in the usual way of making up and running railway trains, the engine being in front, with the caboose and flat-cars attached in regular order. But on the return from Walker's Creek, as there was, as yet, no turntable on the road, the usual order for making up such trains was reversed, and both engine and tender were backed over the road, a distance of more than fifty miles: the tender being ahead, the engine next, the caboose and other cars attached, and following in regular order. When about three miles from Ellsworth, on this return trip, both the engine and tender were thrown from the track and upset. At the time this accident occurred, Kingsbury was riding in the caboose car with the conductor of the train, and either jumped out or was thrown out, which of the two did not exactly appear. Whichever of the two things was true he was hurt, and for the injuries which he received he brought the action below.

The accident was occasioned by the engine running against a young ox, which leaped on to the track about twenty feet in front of the advancing train, from grass or weeds five or six feet high, growing on the sides of the road. The train was running at its usual rate of speed. The accident occurred just after dark; but it was a moonlight night, and the engineer testified that he could have seen an animal two hundred yards distant on the track; that the animal was only about twenty feet from the engine when first seen. He continued his testimony thus:

"As soon as I saw the animal I shut off the steam, and seized the lever to reverse the engine, and had it about half over when the engine went off the track. Something struck me on the head and I did not know anything more. I was injured I did what I thought was best to be done to stop the train. The whistle lever was in the top of the cab. I did not whistle for brakes. I had no time to do so after I saw the animal and before the engine went off the track. The train could have been stopped in about one hundred and fifty yards. When danger appears, the first thing to be done is to reverse the engine and then sound the whistle for brakes. Both could not be done at the same time.

In order to reverse and blow the whistle two motions are necessary—first, to cut off the steam, and then take hold of a lever to throttle valve and move it over. It takes both hands to reverse. The whistle is sounded by a lever in the top of the cab. Brakemen would know, by shutting off steam and reversing, that something was the matter. It would take about ten seconds to do all this. I did it as quick as I could. I could have done nothing more than I did do."

There was no fence on the sides of the road. The plaintiff had been several times before over the road and knew its condition, and the manner in which the trains were made up and run.

The court, among other instructions, gave the following as a fifth to the jury, to which the defendants excepted:

"When it is proved that the car was thrown from the track, and the plaintiff injured, it is incumbent on the defendants to prove that the agents and servants in charge of the train were persons of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which they were engaged, and that they acted on this occasion with reasonable skill, and with the utmost prudence and caution; and if the disaster in question was occasioned by the least negligence, or want of skill or prudence on their part, then the defendants are liable in this action.

There was no evidence in the case in relation to the skill, habits, or qualifications of the agents and servants of the defendants, except what arose from the fact that the engineer had been employed on a railroad about four years, and had been engineer for more than two years, and that the fireman had been on a railroad for about eighteen months.

Verdict and judgment having gone for the plaintiff, the defendants brought the case here on error.

Mr. JUSTICE FIELD delivered the opinion of the court.

From the whole evidence in this case it is plain that the defendants were not common carriers of passengers at the time the accident occurred, which has led to the present action. They were merely contractors for building the Eastern Division of the Union Pacific Railway, and were running a construction train to transport material for the road. The entire train consisted, besides the engine and its tender, of cars for such material and what is called in the testimony a "caboose car." This latter car was intended solely for the accommodation of the men connected with the train; it contained their bunks and mattresses; they slept in it, and deposited in it the lamps of the cars, and the tools they used. It was not adapted for passengers, and, according to the testimony of the conductor, the defendants did not wish to carry passengers, although when persons got on to ride the defendants did not put them off, and sometimes, though not always, fare was charged for their carriage.

The plaintiff, who was sheriff of a county in Kansas, and deputy marshal of the district, desired to arrest a person on the line of the road, and, to enable him to accomplish this purpose, he applied to the conductor for passage on the train as far as Wilson's Creek, and requested that the train would stop there until the arrest could be made. His wishes were granted in both respects, and for the services rendered he paid at the time a portion of the fare charged, and the balance subsequently.

In the rendition of these services for the plaintiff, the defendants were simply private carriers for hire. As such carriers, having only a construction train, they were not under the same obligations and responsibilities which attach to common carriers of passengers by railway. The latter undertake, for hire, to carry all persons indifferently who apply for passage; and the law, for the protection of travellers, subjects such carriers to a very strict responsibility. It imposes upon them the duty of providing for the safe conveyance of passengers, so far as that is practicable by the exercise of human care and foresight. They are bound to see that the road is in good order; that the engines are properly constructed and furnished; that the cars are strong and fitted for the accommodation of passengers, and that the running gear is, so far as the closest scrutiny can detect, perfect in its character. If any injury results from a defect in any of these particulars they are liable.

They are also bound to provide careful and skilful servants, competent in every respect for the positions to which they are assigned in the management and running of the cars; and they are responsible for the consequences of any negligence or want of skill on the part of such servants.

They are also bound to take all necessary precautions to keep obstructions from the track of the road; and, although it may not be obligatory upon them, in the absence of legislative enactment, to fence in the road so as to exclude cattle, it is incumbent upon them to use all practical means to prevent the possibility of obstruction from the straying of cattle on to the track as well as from any other cause. As said by the Supreme Court of Pennsylvania, in speaking of the duty of railway companies in this particular: "Having undertaken to carry safely, and holding themselves out to the world as able to do so, they are not to suffer cows to endanger the life of a passenger any more than a defective rail or axle. Whether they maintain an armed police at cross-roads, as is done by similar companies in Europe, or fence, or place cattle-guards within the bed of their road, or by any other contrivance exclude this risk, is for themselves to consider and determine. We do not say they are bound to do the one or the other, but if, by some means, they do not exclude the risk, they

are bound to respond in damages when injury accrues."

It is evident that the defendants in this case were not subject to any such stringent obligations and responsibilities as are here mentioned. They did not hold themselves out as capable of carrying passengers safely; they had no arrangements for passenger service, and they were not required to make provisions for the protection of the road such as are usually adopted and exacted of railroad companies. They did not own the road, and had no interest in it beyond its construction. It was no part of their duty to fence it in or to cut away the bushes or weeds growing on its sides.

The plaintiff knew its condition and the relation of the defendants to it when he applied for passage. He had been previously over it several times, and was well aware that there were no turntables on a portion of the route; a fact, which compelled the defendants to reverse the engine on the return of the train from Walker's Creek. He, therefore, took upon himself the risks incident to the mode of conveyance used by the defendants when he entered their cars. All that he could exact from them, under these circumstances, was the exercise of such care and skill in the management and running of the train as prudent and cautious men, experienced in that business, are accustomed to use under similar circumstances. Such care implies a watchful attention to the working of the engine, the movement of the cars and their running gear, and a constant and vigilant lookout for the condition of the road in advance of the train. If such care and skill were used by the defendants, they discharged their entire duty to the plaintiff, and if an accident, notwithstanding, occurred, by which he was injured, they were not liable. They were not insurers of his safety, nor responsible for the consequences of unavoidable accident.

The question should have been put to the jury whether the defendants did in fact exercise such care and skill in the management and running of the train at the time the accident occurred. They were not responsible to the plaintiff, unless the accident was directly attributable to their negligence or unskilfulness in that particular.

The evidence in the case shows that the accident was occasioned by the tender and engine running against a steer. The train was proceeding at its usual rate of speed when the steer suddenly, from a mass of high weeds or grass growing on the sides of the road, leaped upon the track directly in front of the advancing train, at a distance from it of about twenty feet. This distance was so short, and the movement of the animal was so sudden, that it was impossible to arrest the train, and a collision followed which threw the engine and tender from the track. The plaintiff, on the happening of the collision, either leaped from the "caboose car," in which he was at the time sitting, or was thrown from it, it is immaterial which, and was injured.

The fifth instruction given by the court turned the attention of the jury from the simple question at issue for their determination, and directed it to the skill, habits, and attainments for their business of the agents and servants of the defendants, as well as to their conduct on the occasion of the accident. It held proof that the agents and servants were possessed of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which they were engaged, as essential as proof that they acted on the occasion with skill, prudence, and caution. And it made the occurrence of the accident presumptive evidence that they were destitute of such skill, habits, and qualifications.

We are of opinion that the court erred in this instruction, and that it misled the jury. On this ground the judgment of the court below must be reversed and the cause remanded for a new trial.

PATRICK GILLSHANNON vs. THE STONY BROOK RAILROAD CORPORATION.

(10 Cush. 228.)

Action on the case for injuries sustained by the plaintiff, a laborer in the employment of the defendants, by the negligence of their servants and agents. It was tried in this court before Bigelow, J., by whom the evidence was reported for the consideration of the whole court. From this evidence it appeared that the plaintiff was a common laborer, employed in repairing the defendants' road-bed, at a place several miles from his residence. Each morning and evening, he rode with other laborers, to and from the place of labor on the gravel train of the defendants. This was done with the consent of the company, and for mutual convenience; no compensation being paid, directly or indirectly by the laborers, for the passage, and the company being under no contract to convey the laborers to and from their work.

While thus on the way to their work on one occasion, a collision took place with a hand car on the track, through the negligence of those having charge of the gravel train, as the plaintiff contended, and he was thrown off and run over by the gravel train, for which injury this action was brought. The plaintiff had no charge or care over the gravel train, and there was some evidence that the gravel train was not sufficiently supplied with brakemen. If upon these facts the jury would be justified in finding a verdict for the plaintiff, the case was to stand for trial; otherwise the plaintiff to become nonsuit.

DEWEY, J. If the relation existing between these parties was that of master and servant, no action will lie against the defendants for an injury received by the plaintiff in the course of that service, occasioned by the negligence of a fellow servant. Far-

well v. Boston and Worcester Railroad, 4 Met. 49; Hayes v. Western Railroad, 3 Cush. 270.

It was attempted on the argument for the plaintiff to take the case out of the rule stated in those cases, upon the ground that the nature of the employment of these servants was different, the plaintiff being employed as a laborer in constructing the railroad bed, and not engaged in any duty connected with running the trains, and so not engaged in any common enterprise. The case of Albro v. Agawan Canal Co. 6 Cush. 75, seems to be adverse to these views, and goes strongly to sustain the defence.

It was also urged that the plaintiff was not in the employment of the defendants at the time the injury was received, or that he might properly be considered as a passenger, and the defendants, as respects him, were carriers for hire. But as it seems to us, in no view of the case can this action be maintained. If the plaintiff was by the contract of service to be carried by the defendants to the place for his labor, then the injury was received while engaged in the service for which he was employed, and so falls within the ordinary cases of servants sustaining an injury from the negligence of other servants. If it be not properly inferable from the evidence that the contract between the parties actually embraced this transportation to the place of labor, it leaves the case to stand as a permissive privilege granted to the plaintiff, of which he availed himself, to facilitate his labors and service, and is equally connected with it, and the relation of master and servant, and therefore furnishes no ground for maintaining this action.

How does the case differ from that suggested at the argument by the counsel for the defendants, who supposed a case where the business for which the party is employed, is that of cutting timber, or standing wood, and the servant receives an injury in his person on the way to the timber-lot, by the overturning of the vehicle in which he is carried, by the negligence or careless driving of another servant? There is no liability on the part of the master in such a case.

It seems to the court, that upon the evidence offered in the present case, the plaintiff was not entitled to a verdict, and the nonsuit should stand.

Plaintiff nonsuit.

STEPHEN McPADDEN, RESPONDENT, v. THE NEW YORK CENTRAL RAILWAY COMPANY, APPELLANT.

(44 N. Y. 478.)

Appeal from a decision of the General Term of the Supreme Court in the seventh district, upon exceptions there heard in the first instance, granting a new trial.

This action was brought to recover for injuries sustained by the plaintiff, while a passenger upon the defendant's road. The cause was tried at the Rochester circuit, in January, 1865; and it appeared, among other things, that, on the 5th day of January, 1864, the plaintiff took passage on a train at Rochester going westerly, intending to go to Knowlesville. The train stopped at Brockport, and there met a train coming east. About half a mile west of Brockport the two passenger cars of the train going west were thrown from the track, and the car in which the plaintiff was riding was overturned, and he was injured. The train going west was not under full headway, going at the rate of about twenty-five miles per hour. The train going east passed the place of the accident at the rate of twenty-five to thirty miles per hour.

The accident was caused by a broken rail, a piece of the rail, about four feet in length, being broken in three or four pieces. All the witnesses who testified upon the subject testified that the rail was a good, sound and perfect rail, and in all respects properly placed and fastened, and they attributed the breaking to the coldness of the weather, it being a very cold morning. A track watchman went over the track three miles west of Brockport, starting at three o'clock that morning, and a train followed him west in about an hour. He then returned over the road to Brockport, reaching there a little before six o'clock, a short time before the accident. After the train passed east, he had no time to go over the road again before this train went west. When he went over the road, he found it in good order. The plaintiff's witnesses testified that all the cars were off from the track but the locomotive. The defendant's witnesses testified that the passenger cars and the hind wheels of the baggage car were off the track. The conductor and engineer of the train going eastward testified that they did not notice any jolt, at the place of the accident, of their train, and that, if the rail had been broken and displaced by their train, they would have noticed it. The engineer of the train going west testified that he did not discover that any rail was displaced, and would have discovered it, if one had been displaced, before his engine passed over; and the conductor of this train testified that he could feel the jog when a rail was displaced. This testimony of the conductors and engineers was uncontradicted.

At the close of the evidence, the counsel for the defendant moved for a nonsuit, upon the ground that there was no proof of negligence or omission of duty on the part of the defendant, but that there was clear evidence that every precaution to insure safety to passengers had been taken. The counsel for the plaintiff then asked to go to the jury upon the question whether the rail was broken before the train going west came upon it. The court refused permission to him to do so, and nonsuited the plaintiff, and his counsel excepted, but did not request to go to the jury upon any other question.

The General Term made an order granting a new trial, and the defendant appealed from such order to this court, stipulating for judgment absolute in case the order should be affirmed.

The case below is reported, 47 Barbour, 247.

EARL, C. The General Term granted a new trial, upon the ground that the judge, at the circuit, should have submitted to the jury the question, whether the rail was broken before it was reached by the train going west carrying the plaintiff; and it held, if it was thus broken, that the defendant was liable, irrespective of any question of negligence, within the principle of the case of Alden v. The N. Y. C. R. R. Co. (26 N. Y., 102), upon the ground that it was bound to furnish a road adapted to the safe passage of trains, or in other words "a vehicle-worthy road."

I am obliged to differ with the General Term, for two reasons; 1st. If the rail was broken before it was reached by the train going west, it must have been broken by the train going east shortly before, and there is no evidence whatever that it was broken by that train. All the evidence tends to show that it was broken by the train going west. Such is the evidence of the conductors and engineers of both trains. There is no presumption that the rail was broken before this train reached it. It is unquestioned that the accident was caused by the broken rail, and if the plaintiff claimed that the defendant was liable, because the rail was broken before the train upon which he was riding reached it, it was incumbent upon him to prove it. This he failed to do; and if the jury upon the evidence had found it, it would have been the duty of the court to set the verdict aside as against the evidence.

But there is another reason. It does not appear that plaintiff's counsel, upon the trial, claimed that he had shown any negligence against the defendant, and he did not claim to go to the jury upon any such question, and the General Term did not grant a new trial upon the ground that there was any question of negligence in the case, which ought to have been submitted to the jury, but upon the ground above stated.

In the case of Alden v. The New York Central Railroad Company, the accident, by which the plaintiff was injured, was caused by the breaking of an axle of the car in which the plaintiff was riding, and it was held that a common carrier is bound absolutely, and irrespective of negligence, to provide road-worthy vehicles, and that the defendant was liable for the plaintiff's injuries caused by a crack in the axle, although the defect could not have been discovered by any practicable mode of examination. That case was a departure from every prior decision and authority to be found in the books of this country or England, and, so far as I can learn, has never been followed anywhere out of this State. It was in conflict with the previous case, in the same court, of Hegeman v. The Western Railroad Corporation (3 Kern., 9). The only authority cited to sustain the decision was the English case of Sharp v. Grey (9 Bing., 457), and yet the decision has been distinctly repudiated in England, in the well considered case of Readhead v. Midland Railway Co., first decided in the Queen's Bench (Law Reports, 2 Q. B., 412), and then on appeal in the Exchequer Chamber (Law Reports, 4 Q. B., 379), where it was unanimously affirmed in 1869; and the court held that the contract, made by a common carrier of passengers for hire, with a passenger, is bound to take due care (including in that term the use of skill and foresight) to carry the passenger safely, and that it does not contain or imply a warranty that the carriage in which he travels shall be in all respects perfect for its purpose and road-worthy. In the Exchequer Chamber, Mr. Justice Smith, writing the opinion of the court, alludes to the case of Alden v. The New York Central Railroad Company, and dissents from it, and comments upon the case of Sharp v. Grey, relied upon in that case, and he shows clearly that it was no authority for the broad doctrine laid down in that case. He says: "We have referred somewhat fully to this case (Sharp v. Grey), because it was put forward as the strongest authority in support of the plaintiff's claim, which can be found in the English courts, and because it was relied on by the judges of the Court of Appeals, in New York, in a decision which will be afterward referred to. But the case, when examined, furnishes no sufficient authority for the unlimited warranty now contended for. The facts do not raise the point for decision." Hence the case of Alden v. The New York Central Railroad Company has no foundation of authority whatever to rest on, and the only reason given for the decision is that the new rule adopted would be plainer and easier of application than the one that had been recognized and acted upon for hundreds of years. It was always supposed that there was a difference, founded upon substantial reasons, between the liability of the common carrier of goods and the common carrier of passengers. The former was held to warrant the safe carriage of the goods, except against loss or damage from the act of God or the public enemy; but the latter was held to contract only for due and proper care in the carriage of passengers.

I have thus commented upon and alluded to the case of Alden v. The New York Central Railroad Company, with no design to repudiate it as authority, but for the purpose of claiming that it is a decision which should not be extended. I am unwilling to apply it to every case that apparently comes within its principle; nor would I limit it to the car in which the passenger was riding. The whole train must be re-

garded as the vehicle; and the engine and all the cars attached together must be free from defect and roadworthy, irrespective of negligence. So far, and no farther, am I willing to regard that case as authority. Shall it be applied to steamboats and vessels, common carriers of passengers upon the ocean and our inland waters? Shall it apply to innkeepers, proprietors of theaters and other places of public resort, who invite the public into their buildings, for a compensation? And shall all such persons be held to an implied warranty that their buildings, with the appurtenances, are suitable and proper, and free from all defects which no foresight could guard against or skill detect? Shall it be applied to the roadbed of a railroad? If so applied, where shall it stop? It must also extend to the bridges, masonry, signals, and, in fact, to all the different parts of the system employed and used in the transport of passengers by railroad. And, as railroad companies are responsible for the skill and care of their human agents, such an extension of that decision would make them substantial insurers of the safety of all their passengers, and thus practically abolish the distinction between the liability of the carriers of passengers and the carriers of goods. While such a rule would "be plain and easy of application," I am not satisfied that it would be either wise or just. Railroads are great public improvements, beneficial to the owners, and highly useful to the public. There is a certain amount of risk incident to railroad travel, which the traveler knowingly assumes; and public policy is fully satisfied, when railroad companies are held to the most rigid responsibility for the utmost care and vigilance for the safety of travelers.

If, therefore, the jury had found that the rail was broken by the eastward bound train, it would still have been a case of mere accident, caused without any want of proper care and vigilance on the part of the defendant, and the defendant would not have been liable.

I am, therefore, in favor of reversing the order of the General Term, and ordering judgment upon the nonsuit, for the defendant, with costs.

LOTT, Ch. C. Assuming that it was the duty of the defendant, within the principle of Alden v. The New York Central Railroad Company (26 N. Y. Rep., 102), as stated in the opinion of the court below, "to provide a road adapted to the safe passage of the vehicle used over it, a road of continuous, unbroken rails for each and every train to enter upon, in its passage over the road," irrespective of any question of negligence (but as to which it is unnecessary to express an opinion), I am, nevertheless, of opinion, on a careful examination of the testimony in this case, that the plaintiff was properly nonsuited. It was shown by undisputed evidence, of witnesses competent to judge, that the rail in question was, previous to its being broken, a sound rail of the usual and a good size and of good, sound and solid iron, and that the breaks were new and perfectly bright, and no fracture or crack was discovered in the pieces that were broken off, that the end of the rail made a good joint, was perfect, not battered down, and in good order, that the chair was good, that the tires were good, sufficiently thick to support the rail, that there was a sufficient number of them, that they were sufficiently close together to give a good bearing for the rail, that the road was well ballasted with gravel around the ties.

This accident occurred early on the morning of the 5th day of January, 1864, about half a mile west of Brockport, and it was shown that the morning was very cold, that good and perfectly sound rails will break in cold weather when the track is in perfect order, and it was testified, by several witnesses, having experience as engineers on railroads, that they knew of no way of preventing it.

It also appeared by the evidence that a train from the west, called Wells' train, going east, came down and stopped at Brockport a few minutes before the train, on which the plaintiff was, went up, and that the two trains met at that place.

The night watchman on that section of the road testified, that he had, on the morning of the accident, left the depot at the Brockport station and went west about three o'clock, that a train followed him west about four o'clock, that he went three miles west and came back over the place of the accident a little before six o'clock; that he went over the track, carrying a lamp with him, to see if every thing was clear, and to see if any rails were broken or misplaced; that he walked in the middle of the track, looking at both tracks, examined the rails and found the track all right; that about an hour after he came down, the Wells' train, before referred to, came down, and there was no time to pass over the road again before the other train went up. The conductor on the Wells' train testified, that he had been engaged on railroads twenty-two years; that his engine and cars were in good order, and that if there had been a rail displaced he would have noticed it by the jolt.

The engineer on that train testified, that he did not notice any jolt; that if a rail had been broken and displaced, he would have noticed the jolt; that there was nothing on the track to prevent his seeing it, and if a rail had been displaced or a piece broken out he would have discovered it; that his train ran about twenty-five miles an hour, and that twenty-five or thirty miles an hour was safe running time.

The engineer of the train going west, and on which the plaintiff was a passenger, testified that he left Rochester about five o'clock in the morning; that the cars were in good order; that he did not discover any break in the rail; that he would detect a broken rail, if displaced in the track;

that he did not discover anything wrong in passing over the point where the accident occurred with his engine, and that there was no indication of a broken rail as he passed over that point; that the first notice he had of it was by the ringing of the bell; then, on looking back, he saw that two coaches had gone off the track, and one of them was overturned; that the engine did not leave the track, and that the hind wheel of the baggage car was off; that the train was at the time running twenty or twenty-five miles an hour, not to exceed twenty-five miles.

The conductor of that train stated that he was in the rear car of the train at the time of the accident; he testified that it was running at a rate not exceeding twenty-five miles an hour, and that it was not under full headway; that the engine did not leave the track; that there was no broken rail within three feet of the last car; that when a rail is displaced he can feel the jog.

No testimony was introduced to contradict or impeach the evidence to which I have referred, and after all the testimony was given, the case states that thereupon the counsel for the defendant moved for a nonsuit, "on the ground that there was no proof of negligence or omission of duty, but clear evidence that every precaution to insure safety to passengers had been taken by the defendant. The counsel for the plaintiff then asked to go to the jury upon the question whether the rail was broken before the train going west, upon which the plaintiff was, came upon it. The court refused permission so to do, and the counsel for the plaintiff excepted. The court then, on motion of the counsel for the defendant, nonsuited the plaintiff, and the counsel for plaintiff excepted." The request of the counsel to go to the jury on the single question "whether the rail was broken before the train going west, upon which the plaintiff was, came upon it," concedes all the ground on which the nonsuit was asked, except that. All the evidence bearing on the question negatived that fact. The testimony of the watchman and the engineers justified the conclusion, and none other, that the rail was not broken when the engine of the train in question entered upon and passed over it, and there was nothing shown which would have warranted the jury in finding that it was; and a verdict in favor of the plaintiff on that question would have properly been set aside, as against evidence and without any proof whatever to sustain it.

It follows from these views that the order granting a new trial was erroneous, and must be reversed, with costs, and the defendant is entitled to a judgment on the nonsuit ordered, with costs.

LEONARD, C. This case is distinguished from that of Alden v. The New York Central Railroad Company (26 N. Y., 102). In that case there was a defect in the axle, which caused the break. It could not have been discovered without removing the wheel. The Court of Appeals held that the difficulty of discovering the defect did not excuse it. The fact that the defect existed was enough, and in case of an injury caused thereby the company was held to be liable. It appeared that there was a test, which might have been applied in the construction, which would have developed the crack or flaw in the iron where it broke. (Hegeman v. The Western Railroad, 3 Kern., 9.)

Bending the axle, while in the process of construction, would have led to a discovery of the crack or flaw. This established negligence on the part of the company. There was no defect in the iron of the track in the case under consideration. There was no dispute on this point. The iron was good, and no crack or flaw appeared. The break was caused by the exceeding cold weather. This was the result of a vis major, against which no prudence could have guarded. But it is said that the break may have existed from the time the previous train going easterly passed over the track (some few minutes prior to the accident), and that if this was so, as the jury might from the evidence have found, that this case would then be brought within the principle of the case of Alden (26 N. Y. R.), before referred to. If the fact should be so found, it is contended that the track was for a few minutes in a broken condition, incapable of serving the purpose of its construction, from which the company would be liable in case of an injury.

This position is not sound, for the reason that the evidence is also uncontradicted, that the track had just been examined prior to the passing of the train going easterly, and found to be in good condition; and it was impossible for another examination to have been made before the train which carried the plaintiff reached the point where the accident occurred.

It has been said that the case of Alden (supra) holds, substantially, that the railroad company guaranty that their road and all its appointments are perfect or without defect. It may be, that liability for a defect which the company could not discover by any diligence, short of taking the machine to pieces or destroying it, amounts to a guaranty of perfection, as claimed. The principle of negligence is still the foundation of the liability.

In the present case no defect existed, or if it did exist for a few minutes, no human diligence or foresight could have discovered or prevented it. An impossibility is not demanded by the law, nor by the decision in Alden's case. The defect existed there, and it might have been discovered and prevented by attention and examination, or by the application of all the tests known to skill and science in the construction of the axle. Its omission was negligence, for which the company were held to be liable. It was no impossibility which was

there demanded. Here the demand would have that extent before the liability for damages could be held to apply. The case of Alden imposes no new rule not before known to the law. It holds that the carrier of passengers is guilty of negligence, if there is any defect in the vehicle by which they are carried and an injury occurs thereby. The existence of such a defect is so held, as matter of law, if it could have been discovered or remedied by any possible care, skill or foresight. The facts before the court in that case authorized no other deduction or conclusion.

It is the same principle applied in Sharp v. Grey (9 Bing., 457), where the court held that the carriage, used for carrying passengers, must be road-worthy; that is, if there is any defect which might, by any care or foresight, have been prevented, from which a personal injury occurs, it is negligence as matter of law. Some defect has been proven to have existed in every case where a liability has been imposed for a personal injury, and the existence of the defect was attributed to a want of such care or foresight as might have prevented it. When a passenger travels by a ship, whether navigated by sails or steam, or travels by coach or rail-car, or any other public conveyance, he expects to take, and does take, the hazard of such accidents as may occur to him without any want of care or diligence on the part of the carrier. The carrier is not liable for an injury to a passenger by the action of the elements, where no care or foresight, skill or science, could have guarded against the accident which occasioned it.

The nonsuit was properly granted, and the General Term were in error, and must be reversed.

Order of the General Term reversed, with costs, and judgment upon the nonsuit ordered, with costs. Hunt, C., dissenting.

GRAND RAPIDS AND INDIANA RAILROAD COMPANY v. HELEN S. HUNTLEY.

(38 Mich. 537.)

Error to Allegan. Submitted Feb. 1. Decided April 3.

Trespass on the case. Defendant brings error.

CAMPBELL, C. J. Suit was brought by Mrs. Huntley for personal injuries suffered on the 5th day of November, 1874, by reason of an accident caused by a passenger car being thrown from the track and upset. The testimony showed that the mischief was caused by the breaking of an axle containing a large flaw, within the wheel or near its edge. Those witnesses who made any actual examination found the flaw entirely within the axle, and covered by a small thickness of sound metal. The suit was tried in April, 1877, about two years and a half after the accident. Mrs. Huntley was injured in the shoulder, and claimed that the injury was permanent.

Testimony was introduced bearing upon the condition of the cars and track, and the speed of the train, as well as concerning the character of the injury. The principal questions arise upon the medical testimony and upon the charge; although some other points are presented.

We do not consider it necessary to dwell minutely on the testimony of speed. It was held in D. & M. Rw. Co. v. Van Steinberg, 17 Mich., 99, that questions touching the speed of trains were not properly scientific inquiries, and were not beyond the competency of ordinary witnesses who had means and habits of observation. In this case it may be doubted whether the witnesses were all near enough to observe, and some of them gave no such data as to indicate what the speed was except as to its comparison with ordinary rates. It would be going too far to hold that any increase over ordinary speed was evidence of danger or of negligence. The testimony should at least show approximately what the real rate was, and that it was faster than safety warranted, before the case should be allowed to go to the jury on such a point. The well known liability of all common observers to be deceived as to the rate of speed of heavy trains, renders it necessary to guard as far as possible against vague testimony, which cannot be directly met or corroborated by the proof of persons having actual knowledge on the subject. Testimony of actual speed is tangible, whatever may be the value of the opinions of particular observers; but opinions on relative speed, without some standard of rapidity are of no value by themselves. In regard to opinions of persons riding in the cars, and not observing from the outside, we are not prepared to say they may not be received, but we think they should be excluded unless the witnesses first show such extended experience and observation as to qualify them for forming such opinions as would be reliable. It is not presumable that ordinary railway travelers usually form such habits.

We are also of opinion that no defects in the track could be relied on to show negligence contributing to the accident except those existing where the track was injured or displaced, and that testimony as to the condition of the road away from the scene of the injury was improper to make out a cause of action, and could only tend to raise false issues. The testimony should be confined to the time as well as place of the accident.

We think there was no error in excluding testimony of the cost of Pullman cars and other stock. The law will not allow negligence to be presumed without proof of actual negligence. All speculations as to the antecedent probabilities must yield to the facts; and if such speculations can be indulged in, there would be no end to inquiry. It is easy to imagine a great variety of circumstances which might induce some persons to take more care than they would

under others; but it would be a very strained presumption that carriers of passengers must be expected to care more for the safety of cars, expensive or inexpensive, than for the lives and limbs of those who travel on their trains.

The fitness of ties for use is a matter which a conductor of several years' standing must be presumed to understand. His position is a very responsible one, and if he has not familiarized himself with such things as are customary in railway construction, he can hardly have used his eyes to much purpose.

The nature of the injury which Mrs. Huntley suffered became a leading subject of discussion. There was no apparent dispute concerning the original suffering of a slight wound on the head and the dislocation of a shoulder, which was at once set. The chief dispute was whether this dislocation involved any permanent injury, and also whether there was any injury to the spinal column which led to lasting trouble.

Dr. Turner attended her a short time after the injury, and about ten days, after which she was left in charge of Dr. Ball. He visited her again about the time suit was begun, for the purpose of making an examination, and again about three weeks before the trial or more than a year after the second visit. In each of the two latter visits he and another physician, Dr. Ball, with Dr. Andrews, examined her without removing the clothing from her back or shoulder and, as the testimony seems to show, made the examination by measuring the arm and shoulder in different positions and pressing on the spine at various points. He asked no question about the spine, but she made complaint of pain above the shoulders.

Upon this testimony of examinations Dr. Turner was allowed to state what in his opinion ailed Mrs. Huntley, and whether it was permanent. His conclusion was that she received a spinal injury at the time of the accident by a sprain—such a concussion as produced laceration and effusion of blood, resulting in a pressure on the spinal cord interfering with the functions of the nerve fluid, and preventing the assimilation of food. That she had a good appetite but could not digest her food, which results in emaciation; that she had urinary difficulties which is always the case, and that was the condition he thought the woman was in. That the difficulty was permanent.

There is probably some error in taking down some parts of the testimony, which as it reads on the record is rather blind and incoherent. But we have stated it as it was evidently designed to appear.

We think this testimony was inadmissible. No portion of it was the result of the witness' conclusions from his own examination, which, according to his statement on the stand, was purely superficial and without inquiry as to any of the injuries or maladies beyond the local injury. He was not her attending physician for purposes of treatment, nor counseling physician for any such purpose, nor did he examine her for purposes of treatment, but merely as auxiliary to a law-suit. The case shows very fully from his own statement that he had no means of knowing or suspecting from any treatment or examination whether there was any spinal, or dyspeptic, or urinary difficulty, or of what nature, or when discovered or originating, or how caused. He does not state on what he based his conclusions, but he does show that he had no knowledge to base them on. They are not scientinc opinions —which can only be founded on established facts. They do not purport to be hypothetical, and were not given in answer to any hypothesis founded on evidence. There is no testimony set forth in the record bearing on them at all. As the case stands his views are mere guesses upon no basis of facts. They are also objectionable as covering disputed facts on which it was for the jury and not for experts to decide.

Dr. Ball, who was present with Turner on both of the latter examinations testifies that he was not desired to make and did not make any examination beyond the shoulder, and knew of no further examination. He was asked and allowed to answer what expression Mrs. Huntley made at the last examination, three weeks before trial, and answered that she complained of pain, and that it hurt her. He also swore that the examination was for the purpose of giving testimony. His evidence further was not very strongly corroborative of Dr. Turner's view.

The question is raised on this whether the expressions of pain were admissible as proof of actual suffering.

It has been held several times by this court that statements of pain and of its locality were exceptions to the rule excluding hearsay evidence. Hyatt v. Adams, 16 Mich., 180; Johnson v. McKee, 27 Mich., 471; Elliott v. Van Buren, 33 Mich., 49.

These statements are admitted only upon the ground that they are the natural and ordinary accompaniments and expressions of suffering. It would be impossible in most cases to know of the existence or extent or character of pain without them. They are received therefore as acts rather than declarations, and admitted from necessity. The rule which admits declarations of present suffering has never been extended so as to include declarations either of past suffering or of the causes in the past of such suffering, so as to make such statements proof of the facts. Declarations concerning the past are narratives and not acts. Exclamations of suffering may be, and if honest are, parts of the occurrence itself.

It is difficult to lay down any very clear line of admission or exclusion where the exclamation refers to the feelings of the moment. But we think it would not be safe to receive such testimony in any case

where it is not the natural and ordinary expression of pain, called out without purpose, or in the course of medical treatment. The unstudied expressions of daily life, or the statements on which a medical adviser is expected to act, and which if feigned he should have skill enough to subject to some test of truth, stand on a footing which removes them in general from suspicion.

But we cannot think it safe to receive such statements which are made for the very purpose of getting up testimony, and not under ordinary circumstances. The physicians here were not called in to aid or give medical treatment. The case had been relinquished long before as requiring no further attendance. They were sent for merely to enable the plaintiff below to prove her case. The whole course of the plaintiff was taken to no other end. She had in her mind just what expressions her cause required. They were therefore made under a strong temptation to feign suffering if dishonest, and a hardly less strong tendency if honest to imagine or exaggerate it. The purpose of the examination removed the ordinary safeguards which furnish the only reason for receiving declarations which bear in a party's own favor.

The general rule in regard to other classes of hearsay evidence and statements admitted upon the same principle is that they must have been made ante litem motam, which is interpreted to mean not merely before suit brought, but before the controversy exists upon the facts. Stockton v. Williams, Walker's Ch., 120: 1 Doug. (Mich.), 546 (citing the Berkeley Peerage Case, 4 Campb., 401; Richards v. Bassett, 10 B. & C., 657; Doe d. Tilman v. Tarver, R. & M., 141; Monkton v. At. Gen., 2 Russ. & Myl., 160; Whitelocke v. Baker, 13 Ves., 514). The language of Lord Eldon in Whitelocke v. Baker has met with general acquiescence. He says: "All are admitted upon the principle, that they are the natural effusions of a party, who must know the truth; and who speaks upon an occasion, when his mind stands in an even position, without any temptation to exceed or fall short of the truth." p. 514.

It is not necessary to consider whether there may not be properly received in some cases the natural and usual expressions of pain made under circumstances free from suspicion, even post litem motam. The case must at least be a very plain one which will permit this. The present controversy presents no such difficulty. The physicians were called in, not to give medical aid but to make up medical testimony; and the declarations were made to them while engaged in that work. It would be difficult to find a case more plainly within the mischief of the excluding rule.

The principal remaining questions arise out of the rules of liability established by the charge.

The primary cause of the accident was the broken axle. Some stress seems also to have been laid on the condition of the track and the rate of speed. So far as appears upon the record, we have not discovered any proper evidence to authorize these matters to be considered. There is no testimony from such persons as are qualified to give opinions on the subject that either the condition of the road or the speed indicated negligence. Whether the structure of a road is such as to warrant fast travel is not a question which usually belongs to ordinary witnesses, and it would be dangerous to allow a jury to act on its own suspicions or prejudices in such a matter. The road, if in such a condition as would be regarded as safe by railroad men of usual intelligence and experience, could not be complained of for any possible deficiencies which would not be regarded by competent persons as existing, nor could the rate of speed be properly held excessive without similar evidence from men of experience. It is a matter of daily occurrence in many parts of the country, and of occasional occurrence everywhere, for cars to be run at very high rates of speed on railway tracks. No particular rate can be assumed, without proof, to be dangerous.

The main question, however, relates to responsibility for the condition of the axle. It was held by the court below that no diligence or care in the railroad company could exempt them from want of care in the manufacturers of the cars and axles.

This doctrine is we think entirely incorrect. Carriers of freight are liable whether careful or not, for any act or damage not caused by the act of God or of the public enemy. Their liability, therefore, does not arise from negligence or want of care. It arises from their failure to make an absolutely safe carriage and delivery, which they insure by their undertaking. The analogies of carriers of freight have nothing to do with passenger carriers. These are liable only when there has been actual negligence of themselves or their servants. If they exercise their functions in the same way with prudent railway companies generally, and furnish their road and run it in the customary manner which is generally found and believed to be safe and prudent, they do all that is incumbent upon them. M. C. R. R. v. Coleman, 28 Mich., 440; G. R. & I. R. R. v. Judson, 34 Mich., 506; Ft. Wayne, J. & S. R. R. v. Gildersleeve, 33 Mich., 133; M. C. R. R. v. Dolan, 32 Mich., 510. This general doctrine the court below laid down very clearly, but qualified it so as to make them absolutely responsible for the omissions or lack of skill or attention of the manufacturers from whom they made their purchases of stock, however high in standing and reputation as reliable persons.

There is no principle of law which places such manufacturers in the position of agents or servants of their customers. The law does not contemplate that railroad companies will in general make their own cars or engines, and they purchase them in the market, of persons supposed to be competent dealers, just as they buy their other ar-

ticles. All that they can reasonably be expected to do is to purchase such cars and other necessaries as they have reason to believe will be safe and proper, giving them such inspection as is usual and practicable as they buy them. When they make such an examination, and discover no defects, they do all that is practicable, and it is no neglect to omit attempting what is impracticable. They have a right to assume that a dealer of good repute has also used such care as was incumbent on him, and that the articles purchased of him which seem right are right in fact. Any other rule would make them liable for what is not negligence, and put them practically on the footing of insurers. The law has never attempted to hold passenger carriers for anything which they could not avoid by their own diligence.

The case of Richardson v. Great Eastern Railway Co., L. R. 1 C. P. Div. 342 (Court of Appeals), is quite in point and establishes the doctrine as it has been fixed by the general understanding since the carrying of passengers has been the subject of legal discussion. That was a passenger case, depending on the doctrine of negligence as applied to defective trucks. The axle of a truck belonging to another company, brought on the line of the respondents to be forwarded, was broken by reason of a flaw which might have been discovered by a minute examination, but which was not discovered in fact by such an examination as was customary and reasonably practicable. It was held no negligence could be imputed for not making a more minute examination than was made. In that case the court also held that it was not within the province of a jury to lay down rules after their own opinion, which imposed duties beyond the usual practice of prudent railways. See also Daniel v. Metropolitan Railway Co., L. R. 5 H. of L., 45, upon the right of a railway company to assume there is no negligence in others over whom they exercise no contral.

The injustice and illegality of holding passenger carriers to anything like a warranty of their carriages was very fully discussed and asserted in Readhead v. Midland Rw. Co., L. R. 4 Q. B., 379, The New York cases which were relied on upon the argument of the present cause were considered in the light of a large number of decisions, and disapproved, as we think correctly. They entirely ignore the true ground of responsibility as depending on the actual negligence of the carrier. There is no such thing as implied negligence, when there is none in fact.

We think the judgment erroneous, and it must be reversed with costs and a new trial be granted.

The other Justices concurred.

GLEESON v. VIRGINIA MIDLAND RY. CO.

(140 U. S. 435, 11 Sup. Ct. 859.)

In error to the supreme court of the District of Columbia.

This is an action for damages, brought in the supreme court of the District of Columbia. It appears from the bill of exceptions that at the trial the evidence introduced by the plaintiff tended to show that in January, 1882, he was a railway postal-clerk, in the service of the United States post-office department; that on Sunday, the 15th of that month, in the discharge of his official duty, he was making the run from Washington to Danville, Va., in a postal-car of the defendant, and over its road; that in the course of such run the train was in part derailed by a landslide which occurred in a railway cut, and the postal-car in which the plaintiff was at work was thrown from the track upon the tender, killing the engineer and seriously injuring the fireman; and that the plaintiff, while thus engaged in performing his duty, was thrown violently forward by the force of the collision, striking against a stove and a letter-box, three of his ribs being broken, and his head on the left side contused, which injuries are claimed to have permanently impaired his physical strength, weakened his mind, and led to his dismissal from his office, because of his inability to discharge its duties. Defense was made by the company under these propositions: That the landslide was caused by a rain which had fallen a few hours previous, and therefore was the act of God; that it was a sudden slide, caused by the vibration of the train itself, and which, therefore, the company was not chargeable with, since it had, two hours before, ascertained that the track was clear; and that the injury resulted from the plaintiff's being thrown against the postal-car's letter-box, for which the company was not responsible, since he took the risk incident to his employment. At the close of the testimony, the court, having given to the jury certain instructions in accordance with the requests of the plaintiff, charged the jury, at defendant's request, as follows: "(1) The burden of proof is on the plaintiff to show that the defendant was negligent, and that its negligence caused the injury. (2) The jury are instructed that the plaintiff, when he took the position of a postal-clerk on the railroad, assumed the risk and hazard attached to the position, and if, in the discharge of his duties as such, he was injured through the devices in and about the car in which he was riding, properly constructed for the purpose of transporting the mails, the railroad is not liable for such injury, unless the same were caused by the negligent conduct of the company or its employes. (3) The court instructs the jury that, while a large degree of caution is exacted generally from railway companies in order to avert accidents, the caution applies only to those accidents which could be prevented or averted by human care and foresight, and not to accidents occurring solely from the act of God. If they believe that the track and instruments of the defendant were in good order, its officers sufficient in number and competent, and that the accident did not

result from any deficiency in any of these requirements, but from a slide of earth, caused by recent rains, and that the agents and servants of the company had good reason to believe that there was no such obstruction in its track, and that they could not, by exercise of great care and diligence, have discovered it in time to avert the accident, then they should find for the defendant. (4) If the jury believe from the evidence that the defendant's instruments, human and physical, were suitable and qualified for the business in which it was engaged; that the accident complained of was caused by the shaking down of earth which had been loosened by the recent rains, and that the earth was shaken down by the passing of this train,—then the accident was not such an act of negligence for which the defendant would be responsible, and the jury should find for the defendant." The counsel for the plaintiff objected to the granting of the first of these prayers, and asked the court to modify it by adding the words "but that the injury to the plaintiff upon the car of the defendant, if the plaintiff was in the exercise of ordinary care, is prima facie evidence of the company's liability." But the court refused to modify the said prayer, and the plaintiff duly and severally excepted to the granting of each one of said prayers on behalf of the defendant, and to the refusal of the court to modify the said first prayer, as requested. The jury, so instructed, found for the defendant, and judgment was rendered accordingly. That judgment having been affirmed by the court in general term, (5 Mackey, 356,) this writ of error was taken.

LAMAR, J., after stating the facts as above, delivered the opinion of the court.

It will be most convenient in the decision of this case to consider the third instruction first. The objections made to it are three: (1) "It assumes that the accident was caused by an act of God, in the sense in which that term is technically used." It appears that the accident was caused by a land-slide, which occurred in a cut some 15 or 20 feet deep. The defendant gave evidence tending to prove that rain had fallen on the afternoon of Friday and on the Saturday morning previous; and the claim is that the slide was produced by the loosening of the earth by the rain. We do not think such an ordinary occurrence is embraced by the technical phrase "an act of God." There was no evidence that the rain was of extraordinary character, or that any extraordinary results followed it. It was a common, natural event; such as not only might have been foreseen as probable, but also must have been foreknown as certain to come. Against such an event it was the duty of the company to have guarded. Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightnings, earthquakes, sudden deaths and illnesses, have been held to be "acts of God;" but we know of no instance in which a rain of not unusual violence, and the probable results thereof in softening the superficial earth, have been so considered. In Dorman v. Ames, 12 Minn. 451, (Gil. 347,) it was held that a man is negligent if he fail to take precautions against such rises of high waters as are usual and ordinary, and reasonably to be anticipated at certain seasons of the year; and we think the same principle applies to this case. Ewart v. Street, 2 Bailey, 157, 162; Moffat v. Strong, 10 Johns. 11; Steam-Boat Co. v. Tiers, 24 N. J. Law, 697; Railway Co. v. Braid, 1 Moore P. C. (N. S.) 101. (2) The instruction does not hold the defendant "responsible for the condition of the sides of the cut made by it in the construction of the road, the giving way of which caused the accident." We think this objection is also well taken. The railroad cut is as much a part of the railroad structure as is the fill. They are both necessary, and both are intended for one result, which is the production of a level track over which the trains may be propelled. The cut is made by the company no less than the fill; and the banks are not the result of natural causes, but of the direct intervention of the company's work. If it be the duty of the company (as it unquestionably is) in the erection of the fills and the necessary bridges to so construct them that they shall be reasonably safe, and to maintain them in a reasonably safe condition, no reason can be assigned why the same duty should not exist in regard to the cuts. Just as surely as the laws of gravity will cause a heavy train to fall through a defective or rotten bridge to the destruction of life, just so surely will those same laws cause land-slides and consequent dangerous obstructions to the track itself from ill-constructed railway cuts. To all intents and purposes a railroad track which runs through a cut where the banks are so near and so steep that the usual laws of gravity will bring upon the track the debris created by the common processes of nature is overhung by those banks. Ordinary skill would enable the engineers to foresee the result, and ordinary prudence should lead the company to guard against it. To hold any other view would be to overbalance the priceless lives of the traveling public by a mere item of increased expense in the construction of railroads; and after all, an item, in the great number of cases, of no great moment.

In a late case in the queen's bench division,—Tarry v. Ashton, 1 Q. B. Div. 314,—two out of three judges declared in substance that a man who, for his own benefit, suspends an object, or permits it to be suspended, over the highway, and puts the public safety in peril thereby, is under an absolute duty to keep it in such a state as not to be dangerous. The facts of the case were these: The defendant became the lessee and occupier of a house from the front of which a heavy lamp projected several feet over the public foot pavement. As the plaintiff was walking along in November, the lamp fell on her, and injured her. It appeared that in the previous August the defendant employed an experienced gas-fitter to put the lamp in repair. At the time of the accident

a person employed by defendant was blowing the water out of the gas-pipes of the lamp, and in doing this a ladder was raised against the lamp-iron, or bracket, from which the lamp hung; and on the man mounting the ladder, owing to the wind and wet, the ladder slipped, and he, to save himself, clung to the lamp-iron, and the shaking caused the lamp to fall. On examination, it was discovered that the fastening by which the lamp was attached to the lamp-iron was in a decayed state. The jury found that there had been negligence on the part of the defendant personally; that the lamp was out of repair through general decay, but not to the knowledge of the defendant; that the immediate cause of the fall of the lamp was the slipping of the ladder; but that, if the lamp had been in good repair, the slipping of the ladder would not have caused the fall. Upon this it was held by Lush and Quain, JJ., that the plaintiff was entitled to a verdict on the ground that if a person maintains a lamp projecting over the highway for his own purposes, it is his duty to maintain it so as not to be dangerous to persons passing by; and if it causes injuries, owing to a want of repair, it is no answer on his part that he had employed a competent man to repair it. 1 Thomp. Neg. 346, 347. The case of Kearney v. Railroad Co., L. R. 6 Q. B. 759, 762, (in the exchequer chamber,) cited in the brief of counsel for plaintiff in error, is directly in point. In that case the plaintiff had been injured while walking along a public highway, by a brick which fell from a pier of the defendant's bridge. A train had just passed, and the counsel for the defendant submitted that there was no evidence of negligence. The court (Kelly, Chief Baron) says: "There can be no doubt that it was the duty of the defendants, who had built this bridge over the highway, to take such care that, where danger can be reasonably avoided, the safety of the public using the highway should be provided for. The question, therefore, is whether there was any evidence of negligence on the part of the defendants; and by that we all understand such an amount of evidence as to fairly and reasonably support the finding of the jury. The lord chief justice, in his judgment in the court below, said res ipsa loquitur, and I cannot do better than to refer to that judgment. It appears without contradiction that a brick fell out of a pier of the bridge without any assignable cause except the slight vibration caused by a passing train. This, we think, is not only evidence, but conclusive evidence, that it was loose; for otherwise so slight a vibration could not have struck it out of its place. * * * The bridge had been built two or three years, and it was the duty of the defendants from time to time to inspect the bridge, and ascertain that the brick-work was in good order, and all the bricks well secured." The principle of these decisions seems to us to be applicable to this case. If such be the law as to persons who, for their own purposes, cause projections to overhang the highway not constructed by them, a fortiori must it be the law as to those who, for their own purposes of profit, undertake to construct the highway itself, and to keep it serviceable and safe, yet who allow it to be practically overhung, from considerations of economy or through negligence. We think the case of Railroad Co. v. Sanger, 15 Grat. 237, to which we are referred by counsel for plaintiff in error, is strongly illustrative of the principle in this case, to which it bears a close resemblance. Some rocks had been piled up along-side of the track for the purpose of ballast, and some of them got upon the track, causing the injury. In rendering its opinion the court says: "Combining in themselves the ownership as well of the road as of the cars and locomotives, they are bound to the most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and all the subsidiary arrangements necessary to the safety of the passengers. And, as accidents as frequently arise from obstructions on the track as perhaps from any other cause whatever, it would seem to follow, obviously, that there is no one of the duties of a railroad company more clearly embraced within its warranty to carry their passengers safely, as far as human care and foresight will go, than the duty of employing the utmost care and diligence in guarding their road against such obstructions." See, also, McElroy v. Railroad Corp., 4 Cush. 400; Hutch. Carr. p. 524; Bennett v. Railroad Co., 102 U. S. 577. This view of the obligation of the company of course makes it immaterial that the slide was suddenly caused by the vibration of the train itself. It is not a question of negligence in failing to remove the obstruction, but of negligence in allowing it to get there.

We are also of the opinion that it was error to refuse to modify the first instruction for the defendant as requested by the plaintiff. Since the decisions in Stokes v. Saltonstall, 13 Pet. 181, and Railroad Co. v. Pollard, 22 Wall. 341, it has been settled law in this court that the happening of an injurious accident is, in passenger cases, prima facie evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. The rule announced in those cases has received general acceptance, and was followed at the present term in Coasting Co. v. Tolson, 139 U. S. —, ante, 653. The defendant seeks to uphold the action of the court in refusing the modification prayed for, by distinguishing the case at bar. It attempts to make two distinctions: (1) That the operation of the rule is confined to cases "where the accident results from any defective arrangement, mismanagement, or misconstruction of things over which the defendant has immediate control, and for the management, service, and construction of which it is responsible, or where the accident results from any omission or commission on the part of the railroad company with respect

to these matters entirely under its control." (2) That the injury from an act of God is established as a fact, wherefore the presumption of negligence from the occurrence of the accident cannot arise. Neither of these attempted distinctions is sound, since, as has been shown, the defect was in the construction of that over which the defendant did have control, and for which it was responsible, and since the slide was not caused by the act of God, in any admissable sense of that phrase. Moreover, if these distinctions were sound, still, as a matter of correct practice, the modification should have been made. The law is that the plaintiff must show negligence in the defendant. This is done prima facie by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility, or of the act of God, it is still none the less true that the plaintiff has made out his prima facie case. When he proves the occurrence of the accident the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defense. And it is for the jury to say, in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances. But when the court refuses to so frame the instructions as to present the rule in respect to the prima facie case, and so refuses on either of the grounds by which the refusal is sought to be supported herein, it leaves the jury without instructions to which they are entitled to aid them in determining what were the facts and causes of the accident, and how far those facts were or were not within the control of the defendant. This is error. Judgment reversed, and cause remanded, with direction to order a new trial, and to take further proceedings not inconsistent with this opinion.

Brewer, J., dissented from the opinion and judgment in this case on the ground that it is in contravention of the long established rules as to what may be considered on an incomplete record.

THE CHICAGO AND EASTERN RAILROAD COMPANY v. JAMES FLEXMAN.

(103 Ill. 546.)

Appeal from the Circuit Court for the Second District;—heard in that court on appeal from the Circuit Court of Iroquois County; the Hon. Franklin Blades, Judge, presiding.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the court:

This was an action brought by James Flexman, against appellant, to recover damages for personal injuries inflicted upon him while a passenger in appellant's cars, by a brakeman in the employ of the company.

The plaintiff, as appears from the evidence, procured a ticket from Hoopeston to Milford, and took passage on a freight train which carried passengers. Soon after plaintiff entered the car he laid down in a seat and went to sleep. When the train arrived at Milford he was notified by the conductor. As plaintiff was about to leave the car he missed his watch, and supposed it had been stolen. He then refused to leave the train until he recovered the watch, and the conductor consented that he might remain on the train until they should reach Watseka. After the train had started, a passenger assisted plaintiff in making a partial search for the watch, but it was not then found. The passenger then inquired of plaintiff who he thought had his watch, to which he replied, "That fellow," pointing at the brakeman. Immediately after the remark was made the brakeman struck plaintiff in the face with a railroad lantern, inflicting the injuries complained of. These are substantially the facts, over which there is no controversy by the parties.

After the plaintiff had introduced all his testimony, the defendant entered a motion to exclude the evidence from the jury, and asked for an order directing the jury to find a verdict for defendant. The court denied the motion, and the defendant excepted. This decision of the court presents the question whether the facts proven, conceding them to be true, constitute a cause of action against the defendant.

The point is made that as plaintiff only paid fare to Milford he ought not to be regarded as a passenger on the train after he left that place. We do not regard this position well taken. The conductor did not demand or require fare from the plaintiff; had he done so, no doubt the required amount would have been paid. As the conductor failed to call for fare, it must be regarded as waived. At all events, we have no hesitation in holding that the railroad company occupied the same position towards plaintiff that it would have occupied had he paid his fare.

But it is said, "that if the plaintiff was injured by a servant of appellant, it was an act outside of the employment of the servant who committed the act, and not in furtherance of his employment by the master." This position is predicated upon McManus v. Cricket, 1 East, 106, and like cases which have followed it. In the case cited Lord Kenyon said: "It is laid down by Holt, Ch. J., as a general position, 'that no master is chargeable with the acts of his servant but when he acts in the execution of the authority given him.' Now when a servant quits sight of the object for which he is employed, and without having in view his master's orders pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and, according to the doctrine of Lord Holt, his master will not be answerable for such act." The doctrine announced is no doubt correct when applied to a proper case. If, for example, a conductor or brakeman in

the employ of a railroad company should willfully or maliciously assault a stranger,—a person to whom the railroad company owed no obligation whatever,—the master in such a case would not be liable for the act of the servant; but when the same doctrine is invoked to control a case where an assault has been made by the servant of the company upon a passenger on one of its trains, a different question is presented—one which rests entirely upon a different principle.

What are the obligations and duties of a common carrier toward its passengers? In Keokuk Northern Line Packet Co. v. True, 88 Ill. 608, it was held that a steamboat company, as a carrier of passengers for hire, is, through its officers and servants, bound to the utmost practicable care and diligence to carry its passengers safely to their place of destination, and to use all reasonably practicable care and diligence to maintain among the crew of the boat, including deck hands and roustabouts, such a degree of order and discipline as may be requisite for the safety of its passengers. The same rule that governs a steamboat company must also be applied to a railroad company, as the duties and obligations resting upon the two are the same, or any other company which carries passengers for hire. In Goddard v. Grand Trunk Ry. Co. 57 Me. 202, in discussing this question, the court says: "The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully; and if he entrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. * * * He must not only protect his passengers against the violence and insults of strangers and co-passengers, but, a fortiori, against the violence and insults of his own servants. If this duty to the passenger is not performed,—if this protection is not furnished,—but, on the contrary, the passenger is assaulted and insulted through the negligence of the carrier's servant, the carrier is necessarily responsible." In Bryant v. Rich, 106 Mass. 180, where the plaintiff, a passenger on a steamboat, was assaulted and injured by the steward and some of the table waiters, the defendant, as a common carrier, was held liable for the injury. In Croaker v. Chicago and Northwestern Ry. Co. 36 Wis. 657, where the conductor of a railroad train kissed a female passenger against her will, the court, in an elaborate opinion, held the railroad company liable for compensatory damages. It is there said: "We can not think there is a question of the respondent's right to recover against the appellant for a tort which was a breach of the contract of carriage." In Shirley v. Billings, 8 Bush, 147, where a passenger on defendant's boat was assaulted and injured by an officer on the boat, the defendant was held liable. See, also, McKinley v. Chicago and Northwestern R. R. Co. 44 Iowa, 314, and N. O., St. L. and C. R. R. Co. v. Burke, 53 Miss. 200. Many authorities holding the same doctrine might be cited, but we do not regard it necessary. It is true there are authorities holding the opposite view, but we do not think they declare the reason or logic of the law, and we are not prepared to follow them.

The appellant was a common carrier of passengers. As such it was not an insurer against any possible injury that a passenger might receive while on the train, but the company was bound to furnish a safe track, cars and machinery of the most approved quality, and place the trains in the hands of skillful engineers and competent managers,—the agents and servants were bound to be qualified and competent for their several employments. Again, the law required appellant, as a common carrier, to use all reasonable exertion to protect its passengers from insult or injury from fellow passengers who might be on the train, and if the agents of appellant in charge of the train should fail to use reasonable diligence to protect its passengers from injuries from strangers while on board the train, the company would be liable. So, too, the contract which existed between appellant as a common carrier and appellee as a passenger, was a guaranty on behalf of the carrier that appellee should be protected against personal injury from the agents or servants of appellant in charge of the train. The company placed these men in charge of the train. It alone had the power of removal, and justice demands that it should be held responsible for their wrongful acts towards passengers while in charge of the train. Any other rule might place the traveling public at the mercy of any reckless employe a railroad company might see fit to employ, and we are not inclined to establish a precedent which will impair the personal security of a passenger.

We are of opinion that the evidence showed a legal cause of action in plaintiff, and the court did not err in overruling the motion to exclude the evidence from the jury. Two instructions given for the plaintiff, have been somewhat criticized, but we think they were in the main correct.

The judgment will be affirmed.

Judgment affirmed.

MARION v. C., R. I. & P. R. CO.

(59 Ia. 428, 13 N. W. 415.)

Appeal from Jefferson District Court.

Action to recover for a personal injury. The plaintiff avers in his petition that he climbed upon one of the defendant's freight trains while in motion; that he did so without a ticket and without the consent of the company; that one of the defendant's brakemen, in the course of his employment, negligently and willfully forced him from the train while in motion, and caused him to fall through a bridge, from which he received the injury complained of.

The defendant for answer denied all the allegations of the petition not admitted, and did not admit that one of its brakemen, in the course of his employment, negligently or willfully forced the plaintiff from the train. There was a trial to a jury, and ver-

dict and judgment were rendered for the plaintiff. The defendant appeals.

ADAMS, J. There was evidence tending to show that the conductor was vested with the sole power to determine who should be allowed to ride upon the train and who should be removed therefrom. Upon this point the defendant asked the court to give an instruction in these words: "Acts done by an employe while engaged in the service of his employer are not necessarily done in the course of his employment as the term is used in law, and if an employe, while engaged in the service of his principal to perform a special service, goes beyond or outside the scope of his employment, and in doing so injures one to whom, like the plaintiff in this case, the employer owes no duty, the employer is not liable." The court refused to give this instruction, and gave an instruction in these words: "Even though the instructions and rules of the company placed the matter of the removal of trespassers, or non-paying passengers, from the trains under the immediate charge and discretion of the conductor, and it was the duty of the brakeman to put off such persons only by the direction of the conductor as his superior, the defendant is not relieved from liability simply because in this instance the brakeman acted without orders or direction from the conductor. But if the brakeman, not as a part of his duty as an employe of the defendant, but for the gratification of his own feelings, willfully or maliciously assaulted the plaintiff, and in this assault the plaintiff fell to the ground, then the defendant is not liable. The point you are to observe is this: that as the defendant owed the plaintiff no duty as a common carrier, therefore, unless the brakeman, as an employe of the company engaged in operating the train, acted for the purpose of putting him off and freeing the train from him as a trespasser, the defendant is not liable for this act." The giving of this instruction and the refusal to give the instruction asked are assigned as errors.

The rule is familiar that an employer is liable for the torts of an employe only where they are committed in the course of his employment. The difficulty has been to determine what acts should be deemed within the course of his employment. If in this case the conductor had forced the plaintiff from the train while in motion and while crossing a bridge, the act very clearly would, under the evidence, be deemed to be in the course of his employment, and that too even if it were shown that he had been expressly instructed to eject no person from the train when in motion, and especially when crossing a place as dangerous as a bridge. In one sense, the specific act would not be in the course of his employment, but his general employment to remove trespassers from the train would be sufficient to render the company liable.

But it appears to us that the act of an employe of a railroad company in removing a trespasser from a train cannot be considered the act of the company, unless he was engaged generally to remove trespassers, or specifically to remove the particular trespasser. The court below appears to have thought otherwise. The instruction given proceeds upon the theory that where a person is employed to do one thing, and he volunteers to do another, his act shall nevertheless be deemed to be within the scope of his employment if his purpose was to serve his employer. But in our opinion the purpose of the employe is not in a case like the one at bar material. The court, we think, was misled by a distinction which has been drawn by courts in a different class of cases. Where the question is as to whether the employer is liable for a willful injury done by an employe it is sometimes important to inquire whether the employe's purpose was to serve his employer by the willful act. Illinois Central Railroad Co. v. Downey, 18 Ill., 259; Wright v. Wilcox, 19 Wend., 343; Moore v. Sanborn, 2 Mich., 519; Croft v. Alison, 4 B. & Ald., 590; Johnson v. Barber, 5 Gilman, 425; Foster v. Essex Bank, 17 Mass., 479. The rule is that an employer is not liable for a willful injury done by an employe, though done while in the course of his employment, unless the employe's purpose was to serve his employer by the willful act. Where the employe is not acting within the course of his employment, the employer is not liable, even for the employe's negligence, and the mere purpose of the employe to serve his employer has no tendency to bring the act within the course of his employment. Where a female servant having authority to light fires in a house, but not to clean the chimneys, lit a fire for the sole purpose of cleaning a chimney, it was held that her employer was not liable for an injury caused by her negligence in lighting the fire. Mackenzie v. McLeod, 10 Bing., 385. See, also, Towanda Coal Co. v. Heenan, 86 Pa. St., 418.

In our opinion the court erred in the instruction given and in refusing the instruction asked by the defendant. Several other questions are presented, but in the view which we have taken of the case they will probably not arise upon another trial.

Reversed.

THE ILLINOIS CENTRAL RAILROAD COMPANY v. WILLIAM R. GREEN.

(81 Ill. 19.)

Appeal from the Circuit Court of Cook county; the Hon. W. W. Farwell, Judge, presiding.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action on the case, for personal injury to appellee whilst a passenger on the cars of appellant.

The appellee took the cars of appellant at Odin, in this State, going south, at about nine o'clock in the evening of May 25, 1870. He was going to a place about seven miles east of Mt. Vernon, and took a ticket to Ashley, which is some five miles north of Little Muddy bridge. The accident occurred in getting off the train at this bridge. There

was no station there, but there was a water tank, and it was a regular stopping place for supplying water to the engines, and for no other purpose.

Appellee's account of the affair is substantially as follows: That the conductor on the train took his ticket beween Odin and Centralia; that he objected to the conductor taking his ticket, because appellee was a stranger on the road, and wanted to know when he arrived at Ashley; that the conductor said to him, "give yourself no uneasiness, we always see that our passengers are put off at their regular stations;" that they stopped at Centralia, and remained there awhile; that Centralia is fourteen miles from Ashley; that he went to sleep, and remained so until he heard the locomotive whistle and the station called out of Irvington, which was seven and one-half miles from Ashley; that it was four miles from Irvington to Richview; that Irvington and Richview were the only stations between Centralia and Ashley; that after leaving Irvington he went to sleep again; that he heard the whistle, and no station announced, and then when the cars traveled along again he supposed they were going down grade, which he took to be a grade from Ashley to Richview, and he began to think he was reaching his station, and he inquired if they were coming to Ashley, and the response was, by passengers on the cars, that they had passed Ashley and were coming to the next station; that when the cars became about still he stood up at his seat and looked back, and asked the passengers if they saw anything of the conductor on the car, and they remarked they did not; that he felt that he had been neglected, and went to the door, and, finding it unlocked, turned around and said, "gentlemen, this is right, I suppose," and being answered in the affirmative, he then opened the door and went out on the platform; a light was shining on the platform, but there was no brakeman there; that he put out his foot to reach the platform, if he could, and there being no platform as he expected, it gave him a jerk and pulled both feet off the car, and left him hanging by one hand; his weight pulled him loose, and he fell and received the injury; that it was between 10 and 11 o'clock at night when he arrived at Little Muddy bridge, and was quite dark. In falling, appellee did not strike anything till he struck the ground under the bridge, a distance of some thirty feet. He said he knew he was not at Ashley before he went out of the car.

There was further testimony that the train, at the time, between Odin and Centralia, was under the charge of conductor Gilman. Gilman testified that he could not remember having any conversation with any passenger on that train, and says, if a passenger got on at Odin with a ticket for Ashley, he would punch the ticket and hand it back. The train, at Centralia, was handed over by Gilman to conductor Morgan, who says that the train consisted of a sleeping coach, a ladies' car, a gentlemen's car, a second class and baggage car combined, and an express car. On leaving Centralia, he says, he went through the train and took up all tickets to local points, as far south as DuQuoin. The train was large, and stopped at all regular stations. The stations were called. That is the brakeman's business, although he did it also. That night, one brakeman was stationed between the sleeping coach and ladies' car. He would call the stations on both of these cars. The other brakeman was between the baggage car and the next car to it—the gentlemen's car. Thus located, all the brakes of the four cars were under the control of the two brakemen. The train stopped at Little Muddy creek that night to take water. The bridge is for trains to pass on. The train stands partly on the bridge while they take water. No station there, and no platform. Bridge never used except for cars. No light there that night when the train stopped. Several passengers got off at Ashley that night, among them women and children, and were attended to by the conductor. That the general custom of railroads is, to notify passengers of the stations by calling out the names of the stations as they are reached.

Thos. Winters was the brakeman stationed that night between the baggage car and the gentlemen's car. He testifies that he called the station as the train arrived at Ashley, on the night of the accident. He remembers it from the fact that Morgan, the conductor, the next day asked him if he had called that station, and he then remembered that he had.

A Mr. Turlay, of Centralia, who was on the train, states that he saw a passenger get up and walk out of the rear door of the car at Little Muddy bridge, and he supposed that he was going to the ladies' car on account of the annoyance occasioned to him by the conversation of a party of four persons who were sitting opposite to him, Mr. Turlay being one of the number; that the man never asked any question of any one, so far as he heard.

We are of opinion the evidence in this case discloses no cause of action.

It is said there was negligence in carrying the appellee past his station.

Conceding all that is claimed in that respect, appellee would not, for such cause, be justified in jumping off the train, or otherwise needlessly exposing himself to injury, and then claim the liability of appellant for the injury he might receive in consequence. The injury here received had no proper connection with being carried past a destined station; and for such act, appellant can not be held responsible for any such remote and unnatural consequence thereof, as the injury here sued for.

It is then insisted that the stoppage of a passenger car at such a place as the one in question, without some precaution to notify passengers of danger, was an act of gross negligence.

But why notify passengers of danger? It was a stopping place for getting water, not

for passengers. The bridge was intended solely for the passage of cars, not for the alighting of passengers upon it. The place for the passenger, here, was inside, not outside of the car. The train, and the appellee in his proper place inside the car, were as safe upon the bridge as they would have been any where away from it. The fact that the cars were upon the bridge, involved no danger or risk to the passenger, so long as he remained in his right place, within the car.

There was a right to presume that the passenger would keep in his place inside the car. It was not to be anticipated that he would be getting off the car where he had no business to do so, and that there was any necessity for providing against it.

It can not be said that there was any invitation to appellee to alight where he did. The mere stopping of the train is not to be so regarded.

It may be inferred, from appellee's testimony, that he heard the whistle at the bridge. If so, it was not a signal of approach to a station. The testimony of the conductor, on that head, was: "They (brakemen) know where the tank is, and the engineer does not whistle in coming to it, with the exception that, once in a while, when the engineer sees the train is going by the tank, he will then give a little toot—whistle down brakes; don't know whether he whistled that night or not. There is a fixed whistle for down brakes, one short whistle, and is used on all portions of the line. They use the same whistle when they want to stop, except at regular stations they whistle a long whistle, and don't whistle any stop whistle at all. This short toot is used to apply the brakes between stations, where there is danger, when you want the train to stop at an irregular place where there is danger, or anything on the track, but in stopping regularly we don't use that at all."

Appellee testified that he was accustomed to travel on railways. He was not justified in taking the whistle as notice of approaching a station. Any encouragement to get off, which, according to his testimony, he might have received from any passenger, of course, is not to be imputed to the company, as in any way its act. Appellee getting off the car where he did was an entirely uncalled for and voluntary act of his own, uninvited and unencouraged by any one in the management of the train, and he took the risk of the consequence. The act of thus getting off in the darkness of night, at an unknown and dangerous place, was one of gross carelessness, whereby appellee exposed himself to the injury which he received. The harm which one brings upon himself, he is to be considered as not having received. So far as his relations to others are concerned, such harm is uncaused. Chicago and Alton Railroad Co. v. Becker, 76 Ill. 31.

Had appellee used ordinary prudence, the casualty would not have happened. Having failed in this, the company ought not to be liable. Chicago and Northwestern Railroad Co. v. Sweeney, 52 Ill. 331; and see Chicago and Alton Railroad Co. v. Gretzner, 46 id. 75; Chicago, Burlington and Quincy Railroad Co. v. Van Patten, 64 id. 511; Chicago, Rock Island and Pacific Railroad Co. v. Bell, 70 id. 103; Todd v. Old Colony, etc. Railroad Co. 3 Allen, 18; Louisville and Nashville Railroad Co. v. Sickings, 5 Bush, 1; Pittsburgh and Connellsville Railroad Co. v. Andrews, 39 Md. 329; 2 Redf. Am. Railway Cases, 552, in note to McClurg's case; The Indianapolis, etc. Railroad Co. v. Rutherford, 29 Ind. 82.

It is a requisite to the liability of a railway company, as a passenger carrier, that the passenger should not have been guilty of any want of ordinary care and prudence which directly contributed to the injury. 2 Redfield Railways, 224, 236.

The judgment must be reversed, there being no cause of action under the evidence.

Judgment reversed.

BOYLAN v. HOT SPRINGS R. CO.

(132 U. S. 146, 10 Sup. Ct. 50.)

In error to the circuit court of the United States for the northern district of Illinois. This was an action of assumpsit against a railroad corporation by a person who, after taking passage on one of its trains, was forcibly expelled by the conductor. At the trial in the circuit court the plaintiff testified that on March 18, 1882, he purchased at the office of the Wabash, St. Louis & Pacific Railway Company, in Chicago, a ticket for a passage to Hot Springs and back, (which is copied in the margin, and which, as was alleged in the declaration and appeared upon the face of the ticket, was then signed by him as well as by the ticket agent, and witnessed by a third person,) and upon this ticket traveled on the defendant's railroad to Hot Springs. He was asked by his counsel when he first actually knew that the ticket required him to have it stamped at Hot Springs. The question was objected to by the defendant, and ruled out by the court. He further testified that on April 19, 1882, when leaving Hot Springs on his return to Chicago, he went to the baggage-office, and requested the baggage-master to check his baggage, and, on his asking to see the ticket, showed it to him, and he thereupon punched the ticket, checked the baggage, and gave him the checks for it; and also that the gateman asked to see the ticket, and he showed it to him, and then passed through the gate, and took his seat in the cars. This testimony was objected to by the defendant, on the ground that no statement or action of the baggage-master or of the gateman would constitute a waiver of any of the written conditions of the contract; and it was admitted by the court, subject to the objection. The plaintiff then testified that soon after leaving Hot Springs the conductor, in taking the tickets of passengers, came to him, and, upon being shown his ticket, said it was not good because he had failed to have it stamped at Hot Springs. The plaintiff replied that the baggage-master, when checking his baggage, had said nothing to him about it, and he

did not know it was necessary. The conductor answered that he must either go back to Hot Springs and have the ticket stamped, or else pay full fare, but did not demand any specific sum of fare, or tell him what the fare was, and, upon his refusing to pay another fare or to leave the train, forcibly put him off at the next station, notwithstanding he resisted as much as he could, and in so doing injured him in body and health. On motion of the defendant, upon the grounds, among others, that this was an action of assumpsit for breach of contract, and that the plaintiff failed to produce to the conductor a ticket or voucher which entitled him to be carried on the train, and that until the plaintiff identified himself at the office at Hot Springs, and had the ticket stamped and signed by the agent there, he had no subsisting contract between himself and the defendant for a return passage to Chicago, the court declined to permit the plaintiff to testify to the consequent injury to his business and to his ability to earn money, excluded all evidence offered as to the force used in removing him from the train, and as to his expulsion from the train, (although corresponding to allegations inserted in the declaration,) and directed a verdict for the defendant. The plaintiff excepted to the rulings of the court, and, after verdict and judgment for the defendant, sued out this writ of error.

Mr. JUSTICE GRAY, after stating the facts as above, delivered the opinion of the court.

This is an action of assumpsit, and cannot be maintained without proof of a breach of contract by the defendant to carry the plaintiff. The only contract between the parties was an express one, signed by the plaintiff himself as well as by the defendant's agent at Chicago, and contained in a ticket for a passage to Hot Springs and back. The plaintiff, having assented to that contract by accepting and signing it, was bound by the conditions expressed in it, whether he did or did not read them or know what they were. The question, when he first knew that the ticket required him to have it stamped at Hot Springs, was therefore rightly excluded as immaterial.

By the express conditions of the plaintiff's contract, he had no right to a return passage under his ticket, unless it bore the signature and stamp of the defendant's agent at Hot Springs; and no agent or employe of the defendant was authorized to alter, modify, or waive any condition of the contract. Neither the action of the baggage-master in punching the ticket and checking the plaintiff's baggage, nor that of the gateman in admitting him to the train, therefore, could bind the defendant to carry him, or estop it to deny his right to be carried.

The plaintiff did not have his ticket stamped at Hot Springs, or make any attempt to do so, but insisted on the right to make the return trip under the unstamped ticket, and without paying further fare. As he absolutely declined to pay any such fare, the fact that the conductor did not inform him of its amount is immaterial. The unstamped ticket giving him no right to a return passage, and he not having paid, but absolutely refusing to pay, the usual fare, there was no contract in force between him and the defendant to carry him back from Hot Springs. There being no such contract in force, there could be no breach of it; and, no breach of contract being shown, this action of assumpsit, sounding in contract only, and not in tort, cannot be maintained to recover any damages, direct or consequential, for the plaintiff's expulsion from the defendant's train. The plaintiff, therefore, has not been prejudiced by the exclusion of the evidence concerning the circumstances attending his expulsion, and the consequent injuries to him or his business. The case is substantially governed by the judgment of this court in Mosher v. Railway Co., 127 U. S. 390, 8 Sup. Ct. Rep. 1324, and our conclusion in the case at bar is in accord with the general current of decision in the courts of the several states. See, besides the cases cited at the end of that judgment, the following: Churchill v. Railroad Co., 67 Ill. 390; Petrie v. Railroad Co., 42 N. J. Law. 449; Pennington v. Railroad Co., 62 Md. 95; Rawitzky v. Railroad Co., 40 La. Ann. 47, 3 South. Rep. 387. Nor was anything inconsistent with this conclusion decided in either of the English cases relied on by the learned counsel for the plaintiff. Each of those cases turned upon the validity and effect of a by-law made by the railway company, not of a contract signed by the plaintiff, and otherwise essentially differed from the case at bar. In Jennings v. Railway Co., L. R. 1 Q. B. 7, the by-law required every passenger to obtain a ticket before entering the train, and to show and deliver up his ticket whenever demanded. The plaintiff took a ticket for himself, as well as tickets for three horses and three boys attending them, by a particular train, which was afterwards divided into two, in the first of which the plaintiff traveled, taking all the tickets with him; and when the second train was about to start the boys were asked to produce their tickets, and, being unable to do so, were prevented by the company's servants from proceeding with the horses. An action by the plaintiff against the company for not carrying his servants was sustained, because the company contracted with him only, and delivered all the tickets to him; and Lord Chief Justice Cockburn, with whom the other judges concurred, said: "It is unnecessary to determine whether, if the company had given the tickets to the boys, and the boys had not produced their tickets, it would have been competent for the company to have turned them out of the carriage." In Butler v. Railway Co., L. R. 21 Q. B. Div. 207, the ticket referred to conditions published by the company, containing a similar by-law, which further provided that any passenger traveling without a ticket, or not showing or delivering it up when requested, should pay the fare from the station whence the train originally started. The plaintiff, having lost his ticket, was unable to produce it when demanded, and, refusing

to pay such fare, was forcibly removed from the train by the defendant's servants. The court of appeal, reversing a judgment of the queen's bench division, held the company liable, because the plaintiff was lawfully on the train under a contract of the company to carry him, and no right to expel him forcibly could be inferred from the provisions of the by-law in question, requiring him to show his ticket or pay the fare; and each of the judges cautiously abstained from expressing a decided opinion upon the question whether a by-law could have been so framed as to justify the course taken by the company. Judgment affirmed.

RAILROAD COMPANY v. LOCKWOOD.

(17 Wall. 357.)

Error to the Circuit Court for the Southern District of New York; the case being thus:

Lockwood, a drover, was injured whilst travelling on a stock train of the New York Central Railroad Company, proceeding from Buffalo to Albany, and brought this suit to recover damages for the injury. He had cattle in the train, and had been required, at Buffalo, to sign an agreement to attend to the loading, transporting, and unloading of them, and to take all risk of injury to them and of personal injury to himself, or to whomsoever went with the cattle; and he received what is called a drover's pass; that is to say, a pass certifying that he had shipped sufficient stock to pass free to Albany, but declaring that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. The agreement stated its consideration to be the carrying of the plaintiff's cattle at less than tariff rates. It was shown on the trial, that these rates were about three times the ordinary rates charged, and that no drover had cattle carried on those terms; but that all signed similar agreements to that which was signed by the plaintiff, and received similar passes. Evidence was given on the trial tending to show that the injury complained of was sustained in consequence of negligence on the part of the defendants or their servants, but they insisted that they were exempted by the terms of the contract from responsibility for all accidents, including those occurring from negligence, at least the ordinary negligence of their servants; and requested the judge so to charge. This he refused, and charged that if the jury were satisfied that the injury occurred without any negligence on the part of the plaintiff, and that the negligence of the defendants caused the injury, they must find for the plaintiff, which they did. Judgment being entered accordingly, the railroad company took this writ of error.

It is unnecessary to notice some subordinate points made, as this court was of opinion that all the questions of fact were fairly left to the jury, and that the whole controversy depended on the main question of law stated.

Mr. JUSTICE BRADLEY delivered the opinion of the court.

It may be assumed in limine, that the case was one of carriage for hire; for though the pass certifies that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his cattle. The question is, therefore, distinctly raised, whether a railroad company carrying passengers for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage.

As the duties and responsibilities of public carriers were prescribed by public policy, it has been seriously doubted whether the courts did wisely in allowing that policy to be departed from without legislative interference, by which needed modifications could have been introduced into the law. But the great hardship on the carrier in certain special cases, where goods of great value or subject to extra risk were delivered to him without notice of their character, and where losses happened by sheer accident without any possibility of fraud or collusion on his part, such as by collisions at sea, accidental fire, &c., led to a relaxation of the rule to the extent of authorizing certain exemptions from liability in such cases to be provided for, either by public notice brought home to the owners of the goods, or by inserting exemptions from liability in the bill of lading, or other contract of carriage. A modification of the strict rule of responsibility, exempting the carrier from liability for accidental losses, where it can be safely done, enables the carrying interest to reduce its rates of compensation; thus proportionally relieving the transportation of produce and merchandise from some of the burden with which it is loaded.

The question is, whether such modification of responsibility by notice or special contract may not be carried beyond legitimate bounds, and introduce evils against which it was the direct policy of the law to guard; whether, for example, a modification which gives license and immunity to negligence and carelessness on the part of a public carrier or his servants, is not so evidently repugnant to that policy as to be altogether null and void; or, at least null and void under certain circumstances.

In the case of sea-going vessels, Congress has, by the act of 1851, relieved shipowners from all responsibility for loss by fire unless caused by their own design or neglect; and from responsibility for loss of money and other valuables named, unless notified of their character and value; and has limited their liability to the value of ship and freight, where losses happen by the embezzlement or other act of the master, crew, or passengers; or by collision, or any cause occurring without their privity or knowledge; but the master and crew themselves are held responsible to the parties injured by their negligence or misconduct. Similar enactments have been made by State legislatures. This seems to

be the only important modification of previously existing law on the subject, which in this country has been effected by legislative interference. And by this, it is seen, that though intended for the relief of the ship-owner, it still leaves him liable to the extent of his ship and freight for the negligence and misconduct of his employes, and liable without limit for his own negligence.

It is true that the first section of the above act relating to loss by fire has a proviso, that nothing in the act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship-owners, This proviso, however, neither enacts nor affirms anything. It simply expresses the intent of Congress to leave the right of contracting as it stood before the act.

The courts of New York, where this case arose, for a long time resisted the attempts of common carriers to limit their common-law liability, except for the purpose of procuring a disclosure of the character and value of articles liable to extra hazard and risk. This, they were allowed to enforce by means of a notice of non-liability, if the disclosure was not made. But such announcements as "all baggage at the risk of the owner," and such exceptions in bills of lading as "this company will not be responsible for injuries by fire, nor for goods lost, stolen, or damaged," were held to be unavailing and void, as being against the policy of the law.

But since the decision in the case of The New Jersey Steam Navigation Company v. Merchants' Bank, by this court, in January Term, 1848, it has been uniformly held, as well in the courts of New York as in the Federal courts, that a common carrier may, by special contract, limit his common-law liability; although considerable diversity of opinion has existed as to the extent to which such limitation is admissible.

The case of The New Jersey Steam Navigation Company v. Merchants' Bank, above adverted to, grew out of the burning of the steamer Lexington. Certain money belonging to the bank had been intrusted to Harnden's Express, to be carried to Boston, and was on board the steamer when she was destroyed. By agreement between the steamboat company and Harnden, the crate of the latter and its contents were to be at his sole risk. The court held this agreement valid, so far as to exonerate the steamboat company from the responsibility imposed by law; but not to excuse them for misconduct or negligence, which the court said it would not presume that the parties intended to include, although the terms of the contract were broad enough for that purpose; and that inasmuch as the company had undertaken to carry the goods from one place to another, they were deemed to have incurred the same degree of responsibility as that which attaches to a private person engaged casually in the like occupation, and were, therefore, bound to use ordinary care in the custody of the goods, and in their delivery, and to provide proper vehicles and means of conveyance for their transportation; and as the court was of opinion that the steamboat company had been guilty of negligence in these particulars, as well as in the management of the steamer during the fire, they held them responsible for the loss.

As this has been regarded as a leading case, we may pause for a moment to observe that the case before us seems almost precisely within the category of that decision. In that case, as in this, the contract was general, exempting the carrier from every risk and imposing it all upon the party; but the court would not presume that the parties intended to include the negligence of the carrier or his agents in that exception.

It is strenuously insisted, however, that as negligence is the only ground of liability in the carriage of passengers, and as the contract is absolute in its terms, it must be construed to embrace negligence as well as accident, the former in reference to passengrs, and both in reference to the cattle carried in the train. As this argument seems plausible, and the exclusion of a liability embraced in the terms of exemption on the ground that it could not have been in the mind of the parties is somewhat arbitrary, we will proceed to examine the question before propounded, namely, whether common carriers may excuse themselvs from liability for negligence. In doing so we shall first briefly review the course of decisions in New York, on which great stress has been laid, and which are claimed to be decisive of the question. Whilst we cannot concede this, it is nevertheless, due to the courts of that State to examine carefully the grounds of their decision and to give them the weight which they justly deserve. We think it will be found, however, that the weight of opinion, even in New York, is not altogether on the side that favors the right of the carrier to stipulate for exemption from the consequences of his own or his servants' negligence.

The first recorded case that arose in New York after the before-mentioned decision in this court, involving the right of a carrier to limit his liability, was that of Dorr v. The New Jersey Steam Navigation Company, decided in 1850. This case also arose out of the burning of the Lexington, under a bill of lading which excepted from the company's risk "danger of fire, water, breakage, leakage, and other accidents." Judge Campbell, delivering the opinion of the court, says: "A common carrier has in truth two distinct liabilities,—the one for losses by accident or mistake, where he is liable as an insurer; the other for losses by default or negligence, where he is answerable as an ordinary bailee. It would certainly seem reasonable that he might, by express special contract, restrict his liability as insurer; that he might protect him-

self against misfortune, even though public policy should require that he should not be permitted to stipulate for impunity where the loss occurs from his own default or neglect of duty. Such we understand to be the doctrine laid down in the case of The New Jersey Steam Navigation Company v. The Merchants' Bank, in 6th Howward, and such we consider to be the law in the present case." And in Stoddard v. Long Island Railroad Company, another express case, in which it was stipulated that the express company should be alone responsible for all losses, Judge Duer for the court, says: "Conforming our decision to that of the Supreme Court of the United States, we must, therefore, hold: 1st. That the liability of the defendants as common carriers was restricted by the terms of the special agreement between them and Adams & Co., and that this restriction was valid in law. 2d. That by the just interpretation of this agreement the defendants were not to be exonerated from all losses, but remained liable for such as might result from the wrongful acts, or the want of due care and diligence of themselves or their agents and servants. 3d. That the plaintiffs, claiming through Adams & Co., are bound by the special agreement." The same view was taken in subsequent cases, all of which show that no idea was then entertained of sanctioning exemptions of liability for negligence.

It was not till 1858, in the case of Wells v. New York Central Railroad Company, that the Supreme Court was brought to assent to the proposition that a common carrier may stipulate against responsibility for the negligence of his servants. That was the case of a gratuitous passenger travelling on a free ticket, which exempted the company from liability. In 1862 the Court of Appeals by a majority affirmed this judgment, and in answer to the suggestion that public policy required that railroad companies should not be exonerated from the duty of carefulness in performing their important and hazardous duties, the court held that the case of free passengers could not seriously affect the incentives to carefulness, because there were very few such, compared with the great mass of the travelling public. Perkins v. The New York Central Railroad Company, was also the case of a free passenger, with a similar ticket, and the court held that the indorsement exempted the company from all kinds of negligence of its agents, gross as well as ordinary; that there is, in truth, no practical distinction in the degrees of negligence.

The next cases of importance that arose in the New York courts were those of drovers' passes, in which the passenger took all responsibility of injury to himself and stock. The first was that of Smith v. New York Central Railroad Company, decided in March, 1859. The contract was precisely the same as that in the present case. The damage arose from a flattened wheel in the car, which caused it to jump the track. The Supreme Court, by Hogeboom, J., held that the railroad company was liable for any injury happening to the passenger, not only by the gross negligence of the company's servants, but by ordinary negligence on their part. "For my part," says the judge, "I think not only gross negligence is not protected by the terms of the contract, but what is termed ordinary negligence, or the withholding of ordinary care, is not so protected. I think notwithstanding the contract, the carrier is responsible for what, independent of any peculiar responsibility attached to his calling or employment, would be regarded as fault or misconduct on his part." The judge added that he thought the carrier might, by positive stipulation, relieve himself to a limited degree from the consequences of his own negligence or that of his servants. But, to accomplish that object, the contract must be clear and specific in its terms, and plainly covering such a case. Of course, this remark was extrajudicial. The judgment itself was affirmed by the Court of Appeals in 1862 by a vote of five judges to three. Judge Wright strenuously contended that it is against public policy for a carrier of passengers, where human life is at stake, to stipulate for immunity for any want of care. "Contracts in restraint of trade are void," he says, "because they interfere with the welfare and convenience of the State; yet the State has a deep interest in protecting the lives of its citizens. He argued that it was a question affecting the public, and not alone the party who is carried. Judge Sutherland agreed in substance with Judge Wright. Two other judges held that if the party injured had been a gratuitous passenger the company would have been discharged, but in their view he was not a gratuitous passenger. One judge was for affirmance, on the ground that the negligence was that of the company itself. The remaining three judges held the contract valid to the utmost extent of exonerating the company, notwithstanding the grossest neglect on the part of its servants.

In that case, as in the one before us, the contract was general in its terms, and did not specify negligence of agents as a risk assumed by the passenger, though by its generality it included all risks.

The next case, Bissell v. The New York Central Railroad Company, first decided in September, 1859, differed from the preceding in that the ticket expressly stipulated that the railroad company should not be liable under any circumstances, "whether of negligence by their agents, or otherwise," for injury to the person or stock of the passenger. The latter was killed by the express train running into the stock train, and the jury found that his death was caused by the gross negligence of the agents and servants of the defen-

dants. The Supreme Court held that gross negligence (whether of servants or principals) cannot be excused by contract in reference to the carriage of passengers for hire, and that such a contract is against the policy of the law, and void. In December, 1862, this judgment was reversed by the Court of Appeals, four judges against three; Judge Smith, who concurred in the judgment below, having in the meantime changed his views as to the materiality of the fact that the negligence stipulated against was that of the servants of the company, and not of the company itself. The majority now held that the ticket was a free ticket, as it purported to be, and, therefore, that the case was governed by Welles v. The Central Railroad Company; but whether so, or not, the contract was founded on a valid consideration, and the passenger was bound by it even to the assumption of the risk arising from the gross negligence of the company's servants. Elaborate opinions were read by Justice Selden in favor, and by Justice Denio against the conclusion reached by the court. The former considered that no rule of public policy forbids such contracts, because the public is amply protected by the right of every one to decline any special contract, on paying the regular fare prescribed by law, that is, the highest amount which the law allows the company to charge. In other words, unless a man chooses to pay the highest amount which the company by its charter is authorized to charge, he must submit to their terms, however onerous. Justice Denio, with much force of argument, combated this view, and insisted upon the impolicy and immorality of contracts stipulating immunity for negligence, either of servants or principals, where the lives and safety of passengers are concerned. The late case of Poucher v. New York Central Railroad Company, is in all essential respects a similar case to this, and a similar result was reached.

These are the authorities which we are asked to follow. Cases may also be found in some of the other State courts which, by dicta or decision either favor or follow, more or less closely, the decisions in New York. A reference to the principal of them is all that is necessary here.

A review of the cases decided by the courts of New York shows that though they have carried the power of the common carrier to make special contracts to the extent of enabling him to exonerate himself from the effects of even gross negligence, yet that this effect has never been given to a contract general in its terms. So that if we only felt bound by those precedents, we could, perhaps, find no authority for reversing the judgment in this case. But on a question of general commercial law, the Federal courts administering justice in New York have equal and co-ordinate jurisdiction with the courts of that State. And in deciding a case which involves a question of such importance to the whole country; a question on which the courts of New York have expressed such diverse views, and have so recently and with such slight preponderancy of judicial suffrage, come to the conclusion that they have, we should not feel satisfied without being able to place our decision upon grounds satisfactory to ourselves, and resting upon what we consider sound principles of law.

In passing, however, it is apposite to call attention to the testimony of an authoritative witness as to the operation and effect of the recent decisions referred to. "The fruits of this rule," says Judge Davis, "are already being gathered in increasing accidents, through the decreasing care and vigilance on the part of these corporations; and they will continue to be reaped until a just sense of public policy shall lead to legislative restriction upon the power to make this kind of contracts."

We now proceed to notice some cases decided in other States, in which a different view of the subject is taken.

In Pennsylvania, it is settled by a long course of decisions, that a common carrier cannot, by notice or special contract, limit his liability so as to exonerate him from responsibility for his own negligence or misfeasance, or that of his servants and agents. "The doctrine is firmly settled," says Chief Justice Thompson, in Farnham v. Camden and Amboy Railroad Company, "that a common carrier cannot limit his liability so as to cover his own or his servants' negligence." This inability is affirmed both when the exemption stipulated for is general, covering all risks, and where it specifically includes damages arising from the negligence of the carrier or his servants. In Pennsylvania Railroad Company v. Henderson, a drover's pass stipulated for immunity of the company in case of injury from negligence of its agents, or otherwise. The court, Judge Read delivering the opinion, after a careful review of the Pennsylvania decision, says: "This indorsement relieves the company from all liability for any cause whatever, for any loss or injury to the person or property, however it may have been occasioned; and our doctrine, settled by the above decisions, made upon grave deliberation, declares that such a release is no excuse for negligence."

The Ohio cases are very decided on this subject, and reject all attempts of the carrier to excuse his own negligence, or that of his servants. In Davidson v. Graham, the court, after conceding the right of the carrier to make special contracts to a certain extent, says: "He cannot, however, protect himself from losses occasioned by his own fault. He exercises a public employment, and diligence and good faith in the discharge of his duties are essential to the public interests. . . . And public policy forbids that he should be relieved by special agreement from that degree of diligence and fidelity which the law has exacted in the discharge of his duties." In Welsh v. Pittsburg, Fort

Wayne, and Chicago Railroad, the court says: "In this State, at least, railroad companies are rapidly becoming almost the exclusive carriers both of passengers and goods. In consequence of the public character and agency which they have voluntarily assumed, the most important powers and privileges have been granted to them by the State." From these facts, the court reasons that it is specially important that railroad companies should be held to the exercise of due diligence at least. And as to the distinction taken by some, that negligence of servants may be stipulated for, the court pertinently says: "This doctrine, when applied to a corporation which can only act through its agents and servants, would secure complete immunity for the neglect of every duty." And in relation to a drover's pass, substantially the same as that in the present case, the same court, in Cleveland Railroad v. Curran, held: 1st. That the holder was not a gratuitous passenger; 2dly. That the contract constituted no defence against the negligence of the company's servants, being against the policy of the law, and void. The court refers to the cases of Bissell v. The New York Central Railroad, and of Pennsylvania Railroad v. Henderson, and expresses its concurrence in the Pennsylvania decision. This was in December Term, 1869.

The Pennsylvania and Ohio decisions differ mainly in this, that the former give to a special contract (when the same is admissible) the effect of converting the common carrier into a special bailee for hire, whose duties are governed by his contract, and against whom, if negligence is charged, it must be proved by the party injured; whilst the latter hold that the character of the carrier is not changed by the contract, but that he is a common carrier still, with enlarged exemptions from responsibility, within which the burden of proof is upon him to show that an injury occurs. The effect of this difference is to shift the burden of proof from one party to the other. It is unnecessary to adjudicate that point in this case, as the judge on the trial charged the jury, as requested by the defendants, that the burden of proof was on the plaintiff.

In Maine, whilst it is held that a common carrier may, by special contract, be exempted from responsibility for loss occasioned by natural causes, such as the weather, fire, heat, frost, &c., yet in a case where it was stipulated that a railroad company should be exonerated from all damages that might happen to any horses or cattle that might be sent over the road, and that the owners should take the risk of all such damages, the court held that the company were not thereby excused from the consequences of their negligence, and that the distinction between negligence and gross negligence in such a case is not tenable. "The very great danger," says the court, "to be anticipated by permitting them" [common carriers] "to enter into contracts to be exempt from losses occasioned by misconduct or negligence, can scarcely be overestimated. It would remove the principal safeguard for the preservation of life and property in such conveyances."

To the same purport it was held in Massachusetts in the late case of School District v. Boston, &c., Railroad Company, where the defendant set up a special contract that certain iron castings were taken at the owner's risk of fracture or injury during the course of transportation, loading, and unloading, and the court say: "The special contract here set up is not alleged, and could not by law be permitted, to exempt the defendants from liability for injuries by their own negligence."

To the same purport, likewise, are many other decisions of the State courts, some of which are argued with great force and are worthy of attentive perusal, but, for want of room, can only be referred to here.

These views as to the impolicy of allowing stipulations against liability for negligence and misconduct are in accordance with the early English authorities. St. Germain, in The Doctor and Student, pointedly says of the common carrier: "If he would per case refuse to carry it" [articles delivered for carriage] "unless promise were made unto him that he shall not be charged for no misdemeanor that should be in him, the promise were void, for it were against reason and against good manners, and so it is in all other cases like."

A century later this passage is quoted by Attorney-General Noy in his book of Maxims as unquestioned law. And so the law undoubtedly stood in England until comparatively a very recent period. Serjeant Steven, in his Commentaries, after stating that a common carrier's liability might, at common law, be varied by contract, adds that the law still held him responsible for negligence and misconduct.

The question arose in England principally upon public notices given by common carriers that they would not be responsible for valuable goods unless entered and paid for according to value. The courts held that this was a reasonable condition, and, if brought home to the owner, amounted to a special contract valid in law. But it was also held that it could not exonerate the carrier if a loss occurred by his actual misfeasance or gross negligence. Or, as Starkie says, "proof of a direct misfeasance or gross negligence is in effect an answer to proof of notice." But the term "gross negligence" was so vague and uncertain that it came to represent every instance of actual negligence of the carrier or his servant—or ordinary negligence in the accustomed mode of speaking. Justice Story, in his work on bailments, originally published in 1832, says that it is now held that, in cases of such notices, the carrier is liable for losses and injury occasioned not only by gross negligence, but by ordinary negligence; or, in other words, the carrier is bound to ordinary diligence.

In estimating the effect of these decisions it must be remembered that, in the cases covered by the notices referred to, the exemption claimed was entire, covering all cases of loss, negligence as well as others. They are, therefore, directly in point.

In 1863, in the great case of Peck v. The North Staffordshire Railway Company, Mr. Justice Blackburn, in the course of a very clear and able review of the law on the subject, after quoting this passage from Justice Story's work, proceeds to say: "In my opinion, the weight of authority was, in 1832, in favor of this view of the law, but the cases decided in our courts between 1832 and 1854 established that this was not the law, and that a carrier might, by a special notice, make a contract limiting his responsibility even in the cases here mentioned, of gross negligence, misconduct, or fraud on the part of his servants; and, as it seems to me, the reason why the legislature intervened in the Railway and Canal Traffic Act, 1854, was because it thought that the companies took advantage of those decisions (in Story's language), 'to evade altogether the salutary policy of the common law.'"

This quotation is sufficient to show the state of the law in England at the time of the publication of Justice Story's work; and it proves that, at that time, common carriers could not stipulate for immunity for their own or their servants' negligence. But in the case of Carr v. Lancashire Railroad Company, and other cases decided whilst the change of opinion alluded to by Justice Blackburn was going on (several of which related to the carriage of horses and cattle), it was held that carriers could stipulate for exemption from liability for even their own gross negligence. Hence the act of 1854 was passed, called the Railway and Canal Traffic Act, declaring that railway and canal companies should be liable for negligence of themselves or their servants, notwithstanding any notice or condition, unless the court or judge trying the cause should adjudge the conditions just and reasonable. Upon this statute ensued a long list of cases deciding what conditions were or were not just and reasonable. The truth is, that this statute did little more than bring back the law to the original position in which it stood before the English courts took their departure from it. But as we shall have occasion to advert to this subject again, we pass it for the present.

It remains to see what has been held by this court on the subject now under consideration.

We have already referred to the leading case of The New Jersey Steam Navigation Company v. Merchants' Bank. On the precise point now under consideration, Justice Nelson said, "If it is competent at all for the carrier to stipulate for the gross negligence of himself and his servants or agents, in the transportation of goods, it should be required to be done, at least, in terms that would leave no doubt as to the meaning of the parties."

As to carriers of passengers, Mr. Justice Grier, in the case of Philadelphia and Reading Railroad v. Derby, delivering the opinion of the court, said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of 'gross.'" That was the case of a free passenger, a stockholder of the company, taken over the road by the president to examine its condition; and it was contended in argument that, as to him, nothing but "gross negligence" would make the company liable. In the subsequent case of The Steamboat New World v. King, which was also the case of a free passenger carried on a steamboat, and injured by the explosion of the boiler, Curtis, Justice, delivering the judgment, quoted the above proposition of Justice Grier, and said: "We desire to be understood to reaffirm that doctrine, as resting not only on public policy, but on sound principles of law.

In York Company v. Central Railroad, the court, after conceding that the responsibility imposed on the carrier of goods by the common law may be restricted and qualified by express stipulation, adds: "When such stipulation is made, and it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement." In the case of Walter v. The Transportation Company, decided at the same term, it is true, the owner of a vessel destroyed by fire on the lakes, was held not to be responsible for the negligence of the officers and agents having charge of the vessel; but that was under the act of 1851, which the court held to apply to our great lakes as well as to the sea. And in Express Company v. Kountze Brothers, where the carriers were sued for the loss of gold-dust delivered to them on a bill of lading excluding liability for any loss or damage by fire, act of God, enemies of the government, or dangers incidental to a time of war, they were held liable for a robbery by a predatory band of armed men (one of the excepted risks), because they negligently and needlessly took a route which was exposed to such incursions. The judge, at the trial, charged the jury that although the contract was legally sufficient to restrict the liability of the defendants as common carriers, yet if they were guilty of actual negligence, they were responsible; and that they were chargeable with negligence unless they exercised the care and prudence of a prudent man in his own affairs. This was held by this court to be a correct statement of the law.

Some of the above citations are only expressions of opinion, it is true; but they are the expressions of judges whose opinions are entitled to much weight; and the last-cited case is a judgment upon the precise point. Taken in connection with the concurring decisions of State courts before cited, they seem to us decisive of the question, and leave but little to be added to the considerations which they suggest.

It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character and becomes an ordinary bailee for hire, and, therefore, may make any contract he pleases. That is, he may make any contract whatever, because he is an ordinary bailee; and he is an ordinary bailee because he has made the contract.

We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries, and at different times, without changing the character of the employment. The common law subjects the common carrier to insurance of the goods carried, except as against the act of God or public enemies. The civil law excepts, also, losses by means of any superior force, and any inevitable accident. Yet the employment is the same in both cases. And if by special agreement the carrier is exempted from still other responsibilities, it does not follow that his employment is changed, but only that his responsibilities are changed. The theory occasionally announced, that a special contract as to the terms and responsibilities of carriage changes the nature of the employment, is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, whilst the nature of his business render him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes the risk of inevitable accidents in the carriage of his goods. Suppose the contract relates to a single crate of glass or crockery, whilst at the same time the carrier receives from the same person twenty other parcels, respecting which no such contract is made. Is the company a public carrier as to the twenty parcels and a private carrier as to the one?

On this point there are several authorities which support our view, some of which are noted in the margin.

A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York City and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character.

But it is contended that though a carrier may not stipulate for his own negligence, there is no good reason why he should not be permitted to stipulate for immunity for the negligence of his servants, over whose actions, in his absence, he can exercise no control. If we advert for a moment to the fundamental principles on which the law of common carriers is founded, it will be seen that this objection is inadmissible. In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment. And to assert that he may do so seems almost a contradiction in terms.

Now, to what avail does the law attach these essential duties to the employment of the common carrier, if they may be waived in respect to his agents and servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants? It is carefulness and diligence in performing the service which the law demands, not an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law.

It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liabil-

ity, that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried. Thus, in Dorr v. The New Jersey Steam Navigation Company, the court sums up its to limit the precise extent of their own respective risks and liabilities, in a matter no way affecting the public morals, or conflicting with the public interests, would, in my judgment, be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right."

Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation.

The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business. In the present case, for example, the freight agent of the company testified that though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And the reason is obvious enough,—if they did not accept this, they must pay tariff rates. These rates were 70 cents a hundred pounds for carrying from Buffalo to Albany, and each horned animal was rated at 2,000 pounds, making a charge of $14 for every animal carried, instead of the usual charge of $70 for a car-load; being a difference of three to one. Of course no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are; and how necessary it is to stand firmly by those principles of law by which the public interests are protected.

If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment; then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose positions in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness. It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable, that the courts sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against; it was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright and to injure themselves in that state, when such articles or live animals became injured without their fault or negligence. And when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to them without the violation of any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of society and the better administration of the laws, had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule, that he must be responsible at all events. Hence, the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law.

Hence, as before remarked, we regard the English statute called the Railway and Canal Traffic Act, passed in 1854, which declared void all notices and conditions made by common carriers except such as the judge, at the trial, or the courts should hold just and reasonable, as substantially a return to the rules of the common law. It

would have been more strictly so, perhaps, had the reasonableness of the contract been referred to the law instead of the individual judges. The decisions made for more than half a century before the courts commenced the abnormal course which led to the necessity of that statute, giving effect to certain classes of exemptions stipulated for by the carrier, may be regarded as authorities on the question as to what exemptions are just and reasonable. So the decisions of our own courts are entitled to like effect when not made under the fallacious notion that every special contract imposed by the common carrier on his customers must be carried into effect, for the simple reason that it was entered into, without regard to the character of the contract and the relative situation of the parties.

Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part; when they ask to go still further, and to be excused for negligence—an excuse so repugnant to the law of their foundation and to the public good—they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then, the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity.

On this subject the remarks of Chief Justice Redfield, in his recent collection of American Railway Cases, seem to us eminently just. "It being clearly established, then," says he, "that common carriers have public duties which they are bound to discharge with impartiality, we must conclude that they cannot, either by notices or special contracts, release themselves from the performance of these public duties, even by the consent of those who employ them; for all extortion is done by the apparent consent of the victim. A public officer or servant, who has a monopoly in his department, has no just right to impose onerous and unreasonable conditions upon those who are compelled to employ him." And his conclusion is, that notwithstanding some exceptional decisions, the law of to-day stands substantially as follows: "1. That the exemption claimed by carriers must be reasonable and just, otherwise it will be regarded as extorted from the owners of the goods by duress of circumstances, and therefore not binding. 2. That every attempt of carriers, by general notices or special contract, to excuse themselves from responsibility for losses or damages resulting in any degree from their own want of care and faithfulness, is against that good faith which the law requires as the basis of all contracts or employments, and, therefore, based upon principles and a policy which the law will not uphold."

The defendants endeavor to make a distinction between gross and ordinary negligence, and insist that the judge ought to have charged that the contract was at least effective for excusing the latter.

We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, that of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply "negligence." And this seems to be the tendency of modern authorities. If they mean more than this, and seek to abolish the distinction of degrees of care, skill, and diligence required in the performance of various duties and the fulfilment of various contracts, we think they go too far; since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed. The compilers of the French Civil Code undertook to abolish these distinctions by enacting that "every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it." Toullier, in his commentary on the code, regards this as a happy thought, and a return to the law of nature. But such an iron rule is too regardless of the foundation principles of human duty, and must often operate with great severity and injustice.

In the case before us, the law, in the absence of special contract, fixes the degree of care and diligence due from the railroad company to the persons carried on its trains. A failure to exercise such care and diligence is negligence. It needs no epithet properly and legally to describe it. If it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or which, in other words, will excuse them for negligence in the performance of that duty, then the company remains liable for such negligence. The question whether the company was guilty of negligence in this case, which caused the injury sustained by the plaintiff, was fairly left to the jury. It was unnecessary to tell them whether, in the language of law writers, such negligence would be called gross or ordinary.

The conclusions to which we have come are—

First. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

Secondly. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

Thirdly. That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter.

Fourthly. That a drover travelling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire.

These conclusions decide the present case, and require a judgment of affirmance. We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passenger instead of a passenger for hire.

Judgment affirmed.

QUIMBY v. BOSTON & M. R. CO.

(150 Mass. 365, 23 N. E. 205.)

Report from superior court, Essex county; ALBERT MASON, Judge.

An action of tort by Asahel Quimby against the Boston & Maine Railroad, for personal injuries sustained in a collision upon its railroad.

DEVENS, J. When the plaintiff received his injury he was travelling upon a free pass given him at his own solicitation, and as a pure gratuity, upon which was expressed his agreement that, in consideration thereof, he assumed all risk of accident which might happen to him while traveling on or getting off the trains of the defendant railroad corporation on which the ticket might be honored for passage. The ticket bore on its face the words, "provided he signs the agreement on the back hereof." In fact the agreement was not signed by the plaintiff, he not having been required to do so by the conductor who honored it as good for the passage, and who twice punched it. The fact that the plaintiff had not signed, and was not required to sign, we do not regard as important. Having accepted the pass, he must have done so on the conditions fully expressed therein, whether he actually read them or not. Squire v. Railroad Co., 98 Mass. 239; Hill v. Railway Co., 144 Mass. 284, 10 N. E. Rep. 836; Railroad Co. v. Chipman, 146 Mass. 107, 14 N. E. Rep. 940. The object of the provision as to signing is to furnish complete evidence that the person to whom the pass is issued assents thereto; but one who actually avails himself of such a ticket, and of the privileges it confers, to secure a passage, cannot be allowed to deny that he made the agreement expressed therein, because he did not and was not required to sign it. Railway Co. v. McGown, 65 Tex. 643; Railroad Co. v. Read, 37 Ill. 484; Wells v. Railway Co., 24 N. Y. 181; Perkins v. Railway Co., Id. 196. If this is held to be so, the case presents the single inquiry whether such a contract is invalid, which has not heretofore been settled in this state, and upon which there has been great contrariety of opinion in different courts. If the common carrier accepts a person as a passenger, no such contract having been made, such passenger may maintain an action for negligence in transporting him, even if he be carried gratuitously. Having admitted him to the rights of a passenger, the carrier is not permitted to deny that he owes to him the duty which, as carrying on a public employment, he owes to those who have paid him for the service. Files v. Railroad Co., 149 Mass. 204, 21 N. E. Rep. 311; Todd v. Railroad Co., 3 Allen 18; Com. v. Railroad Co., 108 Mass. 7; Littlejohn v. Railroad Co., 148 Mass. 478, 20 N. E. Rep. 103; Railroad Co. v. Derby, 14 How. 468; The New World v. King, 16 How. 469. But the question whether the carrier may, as the condition upon which he grants to the passenger a gratuitous passage, lawfully make an agreement with him by which the passenger must bear the risks of transportation, obviously differs from this.

In a large number of cases the English decisions, as well as those of New York, have held that where a drover was permitted to accompany animals upon what was called a "free pass," issued upon the condition that the user should bear all risks of transportation, he could not maintain an action for an injury received by the negligence of the carrier's servants. A similar rule would without doubt be applied where a servant, from the peculiar character of goods, as delicate machinery, was permitted to accompany them, and in other cases of that nature. That passes of this character are "free passes," properly so called, has been denied in other cases, as the carriage of the drover is a part of the contract for the carriage of the animals. The cases on this point were carefully examined and criticised by Mr. Justice Bradley in Railroad Co. v. Lockwood, 17 Wall. 367, and it is there held that such a pass is not gratuitous, as it is given as one of the terms upon which the cattle are carried. The decision is put upon the ground that the drover was a passenger carried for hire, and that with such passenger a contract of this nature could not be made. The court, at the conclusion of the opinion, expressly waives the discussion of the question here presented, and, as it states, purposely refrains from expressing any opinion as to what would have been the result had it considered the plaintiff a free passenger instead of one for hire. Railway Co. v. Stevens, 95 U. S. 655, in which the same distinguished judge delivered the opinion of the court, is put upon the ground that the transportation of the defendant, although not paid for by him in money, was not a matter of charity or gratuity in any sense, but was by virtue of an agreement in which the mutual interest of the parties was consulted.

Whether the English and New York authorities rightly or wrongly hold that one traveling upon a "drover's pass," as it is sometimes called, is a free passenger, they show that, in the opinion of these courts, a contract can properly be made with a free passenger that he shall bear the risks of transportation. This is denied by many courts whose opinions are entitled to weight. It will be observed that in the case at bar there is no question of any willful or malicious injury, and that the plaintiff was injured by the carelessness of the defendant's servants. The cases in which the passenger was strictly a free passenger, accepting his ticket as a pure gratuity, and upon the agreement that he would himself bear the cost of transportation, are comparatively few. They have all been carefully considered in two recent cases, to which we would call attention. These are Griswold v. Railway Co., 53 Conn. 371, (1885,) and that of Railway Co. v. McGown, ubi supra, (1886,) in which the precise question before us was raised, and decided, after a careful examination of the authorities, in a different manner by the highest court of Connecticut and that of Texas. No doubt existed in either case, in the opinion of the court, that the ticket of the passage was strictly a gratuity, and it was held by the former court that, under these circumstances, the carrier and the passenger might lawfully agree that the passenger should bear the risks of transportation, and that such agreement would be enforced, while the reverse was held by the court of Texas. We are brought to the decision of the question unembarrassed by any weight of authority without the commonwealth that can be considered as preponderating.

It is urged on behalf of the plaintiff that, while the relation of passenger and carrier is created by contract, it does not follow that the duty and responsibility of the carrier are dependent upon the contract; that while, with reference to matters indifferent to the public, parties may contract according to their own pleasure, they cannot do so where the public has an interest; that, as certain duties are attached by law to certain employments, these cannot be waived or dispensed with by individual contracts; that the duty of the carrier requires that he should convey his passengers with safety; that he is properly held reponsible in damages if he fails to do so by negligence, whether the negligence is his own or that of his servants, in order that this safety may be secured to all who travel. It is also said that the carrier and the passenger do not stand upon an equality; that the latter cannot stand out and higgle or seek redress in courts; that he must take the alternatives the carrier presents, or practically abandon his business in the transfer of merchandise, and must yield to the terms imposed on him as a passenger; that he ought not to be induced to run the risk of transportation, for being allowed to travel at a less fare, or for any similar reason, and thus to tempt the carrier or his servants to carelessness which may affect others as well as himself; and that, in a few words, public policy forbids that contracts should be entered into with a public carrier by which he shall be exonerated from his full responsibility. Most of this reasoning can have no application to a strictly free passenger, who receives a passage out of charity or as a gratuity. Certainly the carrier is not likely to urge upon others the acceptance of free passes, as the success of his business must depend on his receipts. There can be no difficulty in the adjustment of terms where passes are solicited as gratuities. When such passes are granted by such of the railroad officials as are authorized to issue them, or other public carriers, it is in deference largely to the feeling of the community in which they are exercising a public employment. The instances cannot be so numerous that any temptation will be offered to carelessness in the management of their trains, or to an increase in their fares, in both of which subjects the public is interested. In such instances one who is ordinarily a common carrier does not act as such, but is simply in the position of a gratuitous bailee. The definition of a "common carrier," which is that of a person or corporation pursuing the public employment of carrying goods or passengers for hire, does not apply under such circumstances. The service which he undertakes to render is one which he is under no obligation to perform, and is outside of his regular duties. In yielding to the solicitation of the passenger, he consents, for the time being, to put off his public employment, and to do that which it does not impose upon him. The plaintiff was in no way constrained to accept the gratuity of the defendant. It had been yielded to him only on his own solicitation. When he did, there is no rule of public policy, we think, that prevented the carrier from prescribing, as the condition of it, that it should not be compelled, in addition to carrying the passenger gratuitously, also to be responsible to him in damages for the negligence of its servants. It is well known that, with all the care that can be exercised in the selection of servants for the management of various appliances of a railroad train, accidents will sometimes occur from momentary carelessness or inattention. It is hardly reasonable that besides the gift of free transportation the carrier should be held responsible for these, when he has made it the condition of his gift that he should not be. Nor, in holding that he need not be under these circumstances, is any countenance given to the idea that the carrier may contract with a passenger to convey him for a less price on being exonerated from responsibility for the negligence of his servants. In such a case the carrier would still be acting in the public employment exercised by him, and should not escape its responsibilities, or limit the obligations which it imposes upon him.

In some cases it has been held that while a carrier cannot limit his liability for gross negligence, which has been defined as his own personal negligence, (or that of the corporation itself, where that is the carrier,) he can contract for the exemption from liability for the negligence of his servants.

It may be doubted whether any such distinction in degrees of negligence, and the right of a carrier to exempt himself from responsibility therefor, can be profitably made or applied. The New World v. King, 16 How. 469. It is to be observed, however, that in the case at bar the injury occurred through the negligence of defendant's servants, and not through any failure on the part of the corporation to prescribe proper rules or furnish proper appliances of the conduct of its business. We are of opinion that where one accepts, purely as a gratuity, a free passage upon a railroad train, upon the agreement that he will assume all risk of accident which may happen to him while traveling on such train, by which he may be injured in his person, no rule of public policy requires us to declare such contract invalid and without binding force. By the terms of the report there must therefore be judgment for defendant.

D. JACOBUS
v.
ST. PAUL & C. RY. CO.
(20 Minn. 125.)

Appeal by defendant from an order of the court of common pleas, Ramsey county, denying a new trial.

BERRY, J. The plaintiff brings this action to recover damages for injuries occasioned to his person by the alleged gross negligence of defendant's servants in charge of defendant's railway train, upon which plaintiff was traveling. Plaintiff was riding upon a free pass, which together with the conditions indorsed, is in these words, viz.:

"St. Paul & Chicago Railway.

"Pass D. Jacobus upon the conditions indorsed hereon, until Dec. 31, 1871, unless otherwise ordered. Not transferable.

D. C. Shepard,
"Chf. Eng. and Supt."

"Conditions.

"The person who accepts and uses this free ticket thereby assumes all risk of accident, and agrees that the company shall not be liable under any circumstances, whether of negligence of its agents or otherwise, for any injury of the person, or for any loss or injury to his property, while using or having the benefit of it."

Upon the pleadings and the charge of the court, the first question arising in this case is, whether the pass, with its conditions, protects defendant from liability for injury received by plaintiff while riding upon such pass, even though the injury was caused by gross negligence upon defendant's part. In our own opinion, this question should be answered in the negative, for the reason that the degree of care and diligence exacted of a bailee should be proportioned to the importance of the business and of the interests at stake. Holly v. Boston Gas-light Co. 8 Gray, 131; Goddard v. G. T. R. Co. 57 Me. 202. "The law imposes upon the common carrier of passengers the greatest care and foresight for the safety of his passengers, and holds him liable for the slightest neglect." McLean v. Burbank, 11 Minn., 288, (Gil. 189.) And for like reasons the same extreme care is required, though the passenger be carried gratuitously. Having undertaken to carry, the duty arises to carry safely. Phil. & R. R. Co. v. Derby, 14 How. 486; Nolton v. Western Ry. 15 N. Y. 444; Steamboat New World v. King, 16 How. 474; 2 Redf. Railw. 184-5, and notes; Perkins v. N. Y. Cent. R. Co. 24 N. Y. 196; Todd v. Old Col. & F. R. Co. 3 Allen, 21.

In the case at bar, however, the plaintiff was not merely a gratuitous passenger, i. e., a passenger carried without payment of fare or other consideration. He was a passenger upon a free pass expressly conditioned that the defendant should not be liable to him for any injury of his person while he was using or having the benefit of such pass. Does this circumstance distinguish his case from that of a merely gratuitous passenger? Upon the question whether conditions of this kind are valid and effectual to exonerate the carrier of passengers, the adjudications differ. In New York the conditions appear to be held sufficient to absolve the carrier from liability, even for the gross negligence of his employes. Wells v. N. Y. Cent. Ry. 24 N. Y. 181; Perkins v. Same, Id. 196; Bissell v. Same, 25 N. Y. 442. In New Jersey it is held that such conditions are good as against ordinary negligence, with a very decided intimation that the exemption from liability comprehends gross negligence also. Kenney v. Cent. R. Co. 34 N. J. 513.

In Pennsylvania, Illinois, Indiana, and several otner states the courts hold that no such condition will avail to protect the carrier from responsibility for the gross negligence of its employes. Ill. Cent. Co. v. Read, 37. Ill. 484; 19 Ill. 136; Ind. Cent. R. Co. v. Munday, 21 Ind. 48; Pa. R. Co. v. McClosky's Adm'r, 23 Pa. St. 532; Mobile & Ohio Ry. Co. v. Hopkins, 41 Ala. 489.

There are two distinct considerations upon which the stringent rule as to the duty and liability of carriers of passengers rests. One is a regard for the safety of the passenger on his own account, and the other is a regard for his safety as a citizen of the state. The latter is a consideration of public policy growing out of the interest which the state or government as parens patriae has in protecting the lives and limbs of its subjects. Shear. & R. Neg. § 24; C. P. & A. R. Co. v. Curran, 19 Ohio St. 12; Phil. & Reading R. Co. v. Derby, supra; Steam-boat New World v. King, supra; Smith v. N. Y. Cent. R. Co. 24 N. Y. 222; Ill. C. R. Co. v. Read, supra; Pa. R. Co. v. Henderson, 51 Pa. 315; Bissell v. N. Y. C. R. Co. 25 N. Y. 455, per Denio, J.; N. Y. Cent. R. Co. v. Lockwood, (U. S. Sup. Ct.) not yet reported

So far as the consideration of public policy is concerned, it cannot be overrid-

den by any stipulation of the parties to the contract of passenger carriage, since it is paramount from its very nature. No stipulation of the parties in disregard of it, or involving its sacrifice in any degree, can, then, be permitted to stand. Whether the case be one of a passenger for hire, a merely gratuitous passenger, or of a passenger upon a conditioned free pass, as in this instance, the interest of the state in the safety of the citizen is obviously the same. The more stringent the rule as to the duty and liability of the carrier, and the more rigidly it is enforced the greater will be the care exercised, and the more approximately perfect the safety of the passenger. Any relaxation of the rule as to duty or liability naturally, and, it may be said, inevitably, tends to bring about a corresponding relaxation of care and diligence upon the part of the carrier. We can conceive of no reason why these propositions are not equally applicable to passengers of either of the kinds above mentioned.

It is said, however, that it is unreasonable "to suppose that the managers of a railroad train will lessen their vigilance and care for the safety of the train and its passengers because there may be a few on board for whom they are not responsible." In the first place, if this consideration were allowed to prevail, it would prove too much; for it could be urged with equal force and propriety in the case of a merely gratuitous passenger as in a case like this at bar. Yet, as we have seen, no such consideration is permitted to relieve the carrier from the same degree of liability for a gratuitous passenger as for a passenger for hire.

Again, suppose (what is not at all impossible or improbable, as, for instance, in case of a free excursion) that most or all of the passengers upon a train were gratuitous, or riding upon conditioned free passes, the consideration urged would be no answer to a claim that the carrier should be responsible. A general rule can hardly be based upon such calculations of chances. Moreover, while it might not ordinarily occur that the presence of a free passenger upon a train, for injury to whom the carrier would not be liable, would tend to lessen the carrier's sense of responsibility and his vigilance, it still remains true that the greater the sense of responsibility the greater the care; and that any relaxation of responsibility is dangerous.

Besides these considerations, it is to be remembered that the care and vigilance which a carrier exercises do not depend alone upon a mere sense of responsibility, or upon the existence of an abstract rule imposing stringent obligations upon him. It is the enforcement of the rule, and of the liability imposed thereby—the mulcting of the carrier for his negligence—which brings home to him in the most practical, forcible, and effectual way, the necessity for strictly fulfilling his obligations.

It may be that on a given occasion the gratuitous passenger, or the passenger upon a free pass, is the only person injured, (as, for aught that appears, was the fact in this instance,) or the only party who will proceed against the carrier, the only person who will practically enforce upon the carrier the importance of a faithful discharge of his duty. These considerations, as it seems to us, ought to be decisive upon the point that sound public policy requires that the rule as to the liability of the carrier for the safety of the passenger should not be relaxed though the passenger be gratuitous, or, as in this case, riding upon a conditioned free pass. It is contended that there was no proof of gross negligence on defendant's part, and that, therefore, the verdict was not justified. There was evidence that the train was a mixed train; that it was running from 40 to 45 miles an hour, according to the plaintiff, and according to the other witnesses from 15 to 22 miles an hour; that the lumber was upon a platform car, and that the stake of the lumber car, in consequence of the breaking of which the injury occurred, was a stick of butternut cord wood, and was cross-grained. There was also the testimony of J. T. Maxfield, of St. Paul, a passenger who appears to be an intelligent and entirely disinterested witness, and who says: "I felt anxious about the lumber car. I was afraid of the speed. * * * I was apprehensive of danger from the character of our train. I spoke to the brakeman about it. * * * Have traveled on trains a good deal." And taking all these facts together,—to say nothing about others appearing in the case,—it cannot be said that there was not evidence in the case proper to be considered by the jury, and having some reasonable tendency to establish negligence, which has been well described as being a negative word signifying the absence of such care as it is the duty of the negligent party to exercise in the particular case. Grill v. General, etc., Collier Co. L. R. 1 C. P. 612; Steam-boat New World v. King, supra. We will go further, even, and say that the evidence, in our opinion, had a reasonable tendency to establish gross negligence in the sense of a great degree of negligence. Ang. Carr. § 22. As to the point of the degree of negligence necessary to sustain this action, it is, however, to be remarked, in view of the stringent rule as to liability, that where the question is between a railway carrier of passengers and a passenger, there would seem to be no occasion for the ordinary distinction of different degrees of negligence, as slight, ordinary, and gross. As is well and forcibly said by Mr. Justice Grier in Phila. & Reading R. Co., supra: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the

epithet of 'gross.'" So in Steam-boat New World v. King, Mr. Justice Curtis, referring to the doctrine thus announced, says: "We desire to be understood to reaffirm that doctrine as resting not only on public policy, but on sound principles of law." A similar view of the impracticability of a distinction between different kinds of negligence as applicable to cases of this kind is taken in Perkins v. N. Y. Cent. R. Co. supra. The carrier being bound to exercise the greatest care, and being liable for the slightest neglect, what is said by Rolfe, B., in Wilson v. Brett, 11 Mees. & W. 113, and indorsed by Willis, J., in Grill v. General, etc., Collier Co. L. R. 1 C. P. 612, is in point in a case of this kind, viz., that he "could see no difference between negligence and gross negligence; that it was the same thing with the addition of a vituperative epithet." See, also, Ang. Carr. § 23, and Briggs v. Taylor, 28 Vt. 180.

It is further argued on behalf of the defendant, that the plaintiff, by his own negligence, contributed to the injury sustained, and for that reason, he cannot recover. This argument is founded upon the fact that plaintiff was in the baggage car at the time of the accident, and, as defendant contends, wrongfully there. But, in the first place, the evidence is conflicting as to whether or not the plaintiff was informed of the rule of the company excluding passengers from the baggage car. If he was not so informed, and was suffered to remain there without objection, it could hardly be said that his presence there was negligence. Dunn v. G. T. Ry. 58 Me. 187. Again, if it be admitted that the plaintiff was duly informed of the regulation of the company excluding passengers from the baggage car, the evidence shows that he was, at least, permitted to remain there by the conductor. If he was thus permitted to remain, so that he was there with the knowledge of the conductor, and without any attempt on the part of the conductor to enforce the company's rule by removing him, his presence there would not be such negligence as would exonerate the defendant from the consequences of its negligence or want of care. On the contrary, his presence there, under such circumstances, would render it the duty of the company, in view of the fact that he was there, to exercise the highest care required for his safety, and to refrain from the slightest neglect tending to his injury. Dunn v. G. T. Ry. supra; Isbell v. N. Y. & N. H. Ry. Co. 27 Conn. 393; 2 Redf. Railw. Cas. 474-502.

Still, again, admitting that the plaintiff was cognizant of the rule of the company excluding passengers from the baggage car, and that he persisted in remaining there without the permission or consent, yet with the knowledge, of the conductor, and was guilty of negligence in so doing, this negligence would not prevent his recovering unless it were contributory to the injury received. To be thus contributory, in a legal sense, it must be a proximate cause of the injury,—that is, it must have been near in the order of causation, (Shear. & R. Neg. 37, 38,) and it must have contributed to some extent, directly to the injury, and must have been not a mere technical or formal wrong contributing either incidentally or remotely, or not at all, to the injury. Isbell v. N. Y. & N. H. R. Co. supra; 2 Redf. Railw. Cas. 485-490.

Now, notwithstanding the fault or negligence of the plaintiff in remaining in the baggage car, and admitting that the baggage car was a place of greater danger than the passenger car, and that the plaintiff would not have been injured if he had not been there, his presence there, with the knowledge of the conductor, made it defendant's duty to exercise care to avoid injuring him while there; and if injury resulted from want of such care, the defendant is liable. Isbell v. N. H. & N. H. R. Co. supra. If the injury resulted from want of such care,—i. e., negligence on defendant's part,—such negligence, and not plaintiff's fault in being in the baggage car, would be the immediate and direct—the more proximate—cause of the injury, and defendant would be responsible for the same. Isbell v. N. Y. & N. H. R. Co. supra; C. C. & C. R. Co. v. Elliott, 4 Ohio St. 476; Shear. & R. Neg. § 25; Keith v. Pinkham, 43 Me. 503; Huelsenkamp, v. Citizens' Ry. Co. 37 Mo. 537; Richmond v. Sac. R. Co. 18 Cal. 351; Lackawanna & B. R. Co. v. Chenewith, 52 Pa. 386.

In our opinion there was evidence in the case for the consideration of the jury in reference to these views of the law, and from which they might reasonably find that plaintiff's negligence in this case was not contributory to the injury received by him.

These considerations dispose of the case, the result being that the order denying a new trial is affirmed.

BALTIMORE & OHIO SOUTHWESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR, v. WILLIAM VOIGT.

(176 U. S. 498, 20 Sup. Ct. 385.)

On a certificate from the United States Circuit Court of Appeals for the Sixth Circuit asking if an express messenger is a passenger within a rule which prevents exemption of liability for negligence. Answered in the negative.

Statement by Mr. JUSTICE SHIRAS:

The following statement and question were certified to this court by the judges of the circuit court of appeals for the sixth circuit:

"This was an action brought by William Voigt, the defendant in error, against the Baltimore & Ohio Southwestern Railway Company, the plaintiff in error, to recover for damages sustained by him in consequence of a collision between two trains of the plaintiff in error, upon one of which—a fast passenger train—he was riding at the time of the accident. He was an express messenger riding in a car which was

set apart for the use of the United States Express Company, and occupied by that company for its purposes under a contract between the express company and the railway company. The plaintiff alleged in his petition that he was traveling as a passenger for hire on one of the defendant's trains, being an express messenger on said train. In fact, he was upon said train only by virtue of his employment as express messenger of his company, and the abovementioned contract between his company and the railway company. The answer of the railway company set up two grounds of defense. The first admitted that Voigt was an express messenger on its train, but denied that he was traveling as a passenger for hire. The railway company also admitted that on the occasion of the injury complained of, the train on which he was riding came into collision with another of its trains, and that in the collision Voigt sustained injuries. The second ground of defense, inasmuch as it sets out the specific matter in controversy, is here set forth in detail:

"'For a second and separate defense the railway company answered that on the day in question it was, and had for a long time prior thereto been, a corporation under the laws of Ohio, engaged in the operation of its railroad from Cincinnati to St. Louis and other places, and was so engaged at the time of the collision referred to; and that on the 1st day of March, 1895, it entered into a contract with the United States Express Company, a joint-stock company duly authorized by law to carry on the express business and to enter into such contract; and that by said contract it was agreed between the express company and the railway company, among other things, that the railway company would furnish for the express company, on the railway company's line between Cincinnati and St. Louis, cars adapted to the carriage of such express matter as the express company desired to have transported over said line; and that it was part of said contract that one or more employees of said express company should accompany said goods in said cars over the said line of said railroad, and for such purpose should be transported in said cars free of charge; and that it was further provided in said contract that the express company should protect the railway company and hold it harmless from all liability the railway company might be under to employees of the express company for injury they might sustain while being transported by the railway company over its lines for the purpose aforesaid, whether the injuries were caused by negligence of the railway company or its employees, or otherwise. The railway company further averred that, pursuant to said contract with the express company, it placed upon its line of railroad for said express company certain cars known as express cars; and that it was hauling one of said cars on one of its trains on the 30th of December, 1895, at the time said collision occurred; and that prior to the time of the accident Voigt had made application to the express company in writing for employment by it as an express messenger; and that in pursuance to said application he was, prior to and at the time of the collision, employed by the express company under a contract in writing between him and it, by the terms whereof he did assume the risk of all accidents and injuries that he might sustain in the course of his said employment, whether occasioned by negligence and whether resulting in death or otherwise, and did undertake and agree to indemnify and hold harmless the said express company from any and all claims that might be made against it arising out of any claim or recovery on his part for any damages sustained by him by reason of any injury, whether such injury resulted from negligence or otherwise, and did agree to pay to said express company on demand any sum which it might be compelled to pay in consequence of any such claim, and did agree to execute and deliver to the corporation operating the transportation line (in this instance the railway company) upon which he might be injured, a good and sufficient release under his hand and seal of all claims, demands, and causes of action arising out of any such injury or connected with or resulting therefrom, and did ratify all agreements made by the express company with any transportation line (in this instance said railway company), in which said express company had agreed or might agree that the employees of said express company should have no cause of action for injuries sustained in the course of their employment upon the line of such transportation company; and that the said Voigt did further agree to be bound by each and every of the agreements above mentioned as fully as if he were a party thereto. He did agree that his contract with the express company should inure to the benefit of any corporation upon whose line said express company should forward merchandise (in this instance the said railway company), as fully and completely as if made directly with the corporation. In said defense it was further set forth that at the time the plaintiff sustained the injuries for which the suit was brought he was in an express car being transported by the railway company over its line from Cincinnati to St. Louis, pursuant to said contract between said express company and the railway company, and that said Voigt was at the time of the collision upon said car in pursuance to his contract with said express company, and not otherwise.'

"To this second defense a demurrer was interposed by Voigt on the ground that the allegations therein did not constitute a defense to the action. Upon the hearing of this demurrer it was sustained, and an entry was made of record, finding the demurrer well taken. The opinion of the court sustaining the demurrer is published in 79 Fed. Rep. 561. The decision of the

court went upon the ground that, although Voigt was an express messenger riding upon an express car in the circumstances stated, he was a passenger for hire and entitled to the rights accorded by law to ordinary passengers traveling by a train of a common carrier, and, further, that it was not competent for the railway company to absolve itself from the duties which rest upon a common carrier in reference to its passengers. A stipulation in writing was filed waiving a trial by jury, and the case was tried by the court. The finding of the issues was in favor of the plaintiff, and the damages were assessed at the sum of $6,000, and judgment was thereupon entered that the plaintiff recover that sum, with costs. The defendant brings the case here on writ of error, and assigns errors, the substance of which is involved in the ruling of the court below sustaining the demurrer to the second defense of the answer of the defendant; and the controversy here involves the question whether in point of law a messenger of an express company, occupying a car of a railway company assigned to an express company for the prosecution of its business under a contract fixing the relations of the railway company and the express company which, for the consideration shown by the contract, absolves the railway company from the consequence of its negligence to the express company and its employees and to which the employee agrees upon entering the service of the express company, stands in the ordinary relation of a common carrier of passengers for hire to the employee of the express company. The rule is undoubtedly well settled that a railway company standing in the relation of a common carrier to a passenger for hire cannot absolve itself from liability or the consequences of its negligence in carriage, but the members of the court are in doubt whether the defendant in error comes within the rule above mentioned, and therefore upon the foregoing statement of fact it is ordered that the following question be certified to the Supreme Court of the United States for its instruction:

"Question.

"A railroad company engaged as common carrier in the business of transporting passengers and freight for hire entered into a contract in writing with an express company authorized by law to do and actually doing the business known as express business, by which contract the railroad company agreed, solely upon the considerations and terms hereinafter mentioned, to furnish for the exclusive use of such express company, in the conduct of its said express business over said railway company's lines, certain privileges, facilities, and express cars to be used and employed exclusively by said express company in the conduct of such express business; and to transport said cars and contents, consisting of express matter, in its fast passenger trains, together with one or more persons in charge of said express matter, known as express messengers, for that purpose to be allowed to ride in said express cars; to transport such express messengers for the purposes and under the circumstances aforesaid free of charge. And by said contract it was agreed on the part of said express company to pay said railroad company for such privileges and facilities, and for the furnishing and use of said express car or cars, and for such transportation thereof, a compensation named in said contract; and by which contract it was further agreed by the express company to protect the railroad company and hold it harmless from all liability it might be under to employees of the express company for any injuries sustained by them while being so transported by said railroad company, whether the injuries were caused by negligence of the railroad company or its employees, or otherwise. A person made application to said express company in writing to be employed by it as express messenger on the railroad of the company between which and such express company a contract as aforesaid existed; and such applicant, pursuant to the application aforesaid, was employed by said express company under a contract in writing signed by him and it, whereby it was agreed between him and such express company that he did assume the risk of all accident or injury he might sustain in the course of said employment, whether occasioned by negligence or otherwise, and did undertake and agree to indemnify and hold harmless said express company from any and all claims that might be made against it arising out of any claim or recovery on his part for any damages sustained by him by reason of any injury, whether such damage resulted from negligence or otherwise; and to pay said express company on demand any sum which it might be compelled to pay in consequence of any such claim, and to execute and deliver to said railroad company a good and sufficient release under his hand and seal of all claims and demands and causes of action arising out of or in any manner connected with said employment, and expressly ratified the agreement aforesaid between said express company and said railroad company.

"Does said railroad company assume towards such express messenger while being carried in the course of his said employment in one of said express cars attached to a passenger train of said railroad company, pursuant to the contracts aforesaid, the ordinary liability of a common carrier of passengers for hire, so as to render said railroad company liable as such to said express messenger, notwithstanding the contracts aforesaid, for injuries he might sustain by reason of a collision between the train to which said express car is attached and another train of said railroad company, caused by the negligence of employees of the railroad company?"

Mr. JUSTICE SHIRAS delivered the opinion of the court:

The question we are asked to answer is

whether William Voigt, the defendant in error, can avoid his agreement that the railroad company should not be responsible to him for injuries received while occupying an express car as a messenger, in the manner and circumstances heretofore stated, by invoking that principle of public policy which has been held to forbid a common carrier of passengers for hire to contract against responsibility for negligence.

The circuit judge thought the case could not be distinguished from the case of New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627, where a recovery was maintained by a drover injured while traveling on a stock train of the New York Central Railroad Company proceeding from Buffalo to Albany, on a pass which certified that he had shipped sufficient stock to give him a right to pass free to Albany, but which provided that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. This court held that a drover traveling on a pass, for the purpose of taking care of his stock on the train, is a passenger for hire, and that it is not lawful for a common carrier of such passenger to stipulate for exemption from responsibility for the negligence of himself or his servants. This case has been frequently followed, and it may be regarded as establishing a settled rule of policy. Grand Trunk R. Co. v. Stevens, 95 U. S. 655, 24 L. ed. 535; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469.

The principles declared in those cases are salutary, and we have no disposition to depart from them. At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare. It was well said by Sir George Jessel, M. R., in Printing & N. Registering Co. v. Sampson, L. R. 19 Eq. 465:

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider,—that you are not lightly to interfere with this freedom of contract."

Upon what principle, then, did the cases relied on proceed, and are they applicable to the present one? They were mainly two. First, the importance which the law justly attaches to human life and personal safety, and which therefore forbids the relaxation of care in the transportation of passengers which might be occasioned by stipulations relieving the carrier from responsibility. This principle was thus stated by Mr. Justice Bradley in the opinion of the court in the case of New York C. R. Co. v. Lockwood:

"In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties,—an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly, for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other, it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment. And to assert that he may do so seems almost a contradiction in terms."

The second fundamental proposition relied on to nullify contracts to relieve common carriers from liability for losses or injuries caused by their negligence is based on the position of advantage which is possessed by companies exercising the business of common carriers over those who are compelled to deal with them. And again we may properly quote a passage from the opinion in the Lockwood Case as a forcible statement of the situation:

"The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle, or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this or abandon his business. . . . If the customer had any real freedom of choice, if he had a reasonable or practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is almost concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel

and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality."

Upon these principles we think the law of to-day may be fairly stated as follows: 1. That exemptions claimed by carriers must be reasonable and just, otherwise they will be regarded as extorted from the customers by duress of circumstances, and therefore not binding. 2. That all attempts of carriers, by general notices or special contract, to escape from liability for losses to shippers, or injuries to passengers, resulting from want of care or faithfulness, cannot be regarded as reasonable and just, but as contrary to a sound public policy, and therefore invalid.

But are these principles, well considered and useful as they are, decisive of, or indeed applicable to, the facts presented for judgment in the present case?

We have here to consider not the case of an individual shipper or passenger dealing, at a disadvantage, with a powerful corporation, but that of a permanent arrangement between two corporations embracing within its sphere of operation a large part of the transportation business of the entire country. We need not, in this inquiry, examine the nature of the business of an express company, or rehearse the particular services it renders the public. That has been done, sufficiently for our present purpose, in the Express Cases, 117 U. S. 1, sub. nom. Memphis & L. R. R. Co. v. Southern Exp. Co. 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628, and from the opinion in that case we shall make some pertinent extracts:

"The express business . . . has grown to an enormous size, and is carried on all over the United States and in Canada, and has been extended to Europe and the West Indies. It has become a public necessity, and ranks in importance with the mails and the telegraph. It employs for the purposes of transportation all the important railroads in the United States, and a new road is rarely opened to the public without being equipped in some form with express facilities. It is used in almost every conceivable way, and for almost every conceivable purpose, by the people and by the government. All have become accustomed to it, and it cannot be taken away without breaking up many of the long-settled habits of business, and interfering materially with the conveniences of social life.

"When the business began, railroads were in their infancy. They were few in number, and for comparatively short distances. There has never been a time, however, since the express business was started, that it has not been encouraged by the railroad companies, and it is no doubt true . . . that 'no railroad company in the United States . . . has ever refused to transport express matter for the public, upon the application of some express company, of some form of legal constitution. Every railway company . . . has recognized the right of the public to demand transportation by the railway facilities which the public has permitted to be created, of that class of matter which is known as express matter.' Express companies have undoubtedly invested their capital and built up their business in the hope and expectation of securing and keeping for themselves such railway facilities as they needed, and railroad companies have likewise relied upon the express business as one of their important sources of income.

"But it is neither averred in the bills, nor shown by the testimony, that any railroad company in the United States has ever held itself out as a common carrier of express companies, that is to say, as a common carrier of common carriers. On the contrary, it has been shown, and in fact it was conceded upon the argument, that, down to the time of bringing these suits, no railroad company had taken an express company on its road for business except under some special contract, verbal or written, and generally written, in which the rights and the duties of the respective parties were carefully fixed and defined. These contracts, as is seen by those in this record, vary necessarily in their details, according to the varying circumstances of each particular case, and according to the judgment and discretion of the parties immediately concerned. It also appears that, with very few exceptions, only one express company has been allowed by a railroad company to do business on its road at the same time. . . . The reason is obvious why special contracts in reference to this business are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As the things carried are to be kept in the personal custody of the messenger or other employee of the express company, it is important that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the expressman in charge. As the business to be done is 'express,' it implies access to the train for loading at the latest, and for unloading at the earliest, convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. Railroad companies are by law carriers of both persons and property. Passenger trains have, from the beginning, been provided for the transportation primarily of passengers and their baggage. This must be done with reasonable promptness and with reasonable comfort to the passenger. The express business on passenger trains is in a degree subordinate

to the passenger business, and it is consequently the duty of a railroad company in arranging for the express to see that there is as little interference as possible with the wants of the passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner its own particular duties. All this must necessarily be a matter of bargain, and it by no means follows that, because a railroad company can serve one express company in one way, it can as well serve another company in the same way, and still perform its other obligations to the public in a satisfactory manner. The car space that can be given to the express business on a passenger train is to a certain extent limited, and, as has been seen, that which is allotted to a particular carrier must be, in a measure, under his exclusive control. No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at times fill all the space the railroad company can well allow for the business. . . . In this way three or four important and influential companies were able substantially to control, from 1854 until about the time of the bringing of these suits, all the railway express business in the United States, except upon the Pacific roads and in certain comparatively limited localities. In fact, as is stated in the argument for the express companies, the Adams was occupying, when these suits were brought, one hundred and fifty-five railroads, with a mileage of 21,216 miles; the American, two hundred roads, with a mileage of 28,000 miles; and the Southern, ninety-five roads, with a mileage of 10,000 miles. Through their business arrangements, with each other and with other connecting lines, they have been able for a long time to receive and contract for the delivery of any package committed to their charge at almost any place of importance in the United States and in Canada, and even at some places in Europe and the West Indies. They have invested millions of dollars in their business, and have secured public confidence to such a degree that they are trusted unhesitatingly by all who need their services. The goodwill of their business is of very great value if they can keep their present facilities for transportation. The longer their lines and the more favorable their connections, the greater will be their own profits and the better their means of serving the public. In making their investments and in extending their business they have undoubtedly relied on securing and keeping favorable railroad transportation, and in this they were encouraged by the apparent willingness of railroad companies to accommodate them; but the fact still remains that they have never been allowed to do business on any road except under a special contract, and that as a rule only one express company has been admitted on a road at the same time."

The cases from the opinions in which are taken the foregoing extracts were suits brought by certain express companies which had been doing business on certain railroads under special contracts between the respective companies, to compel the railroad companies to permit them to continue business on the roads on terms to be fixed by the courts; in other words, to demand as a right what they had theretofore enjoyed by permission of special contracts. This the court declined to do, and directed the bills to be dismissed.

Our citations have been intended partly to disclose, in a succinct form, the nature of the express business, but more particularly to show that, in essence, the express business is one that requires the participation of both the companies on terms agreed upon in special contracts, thus creating, to a certain extent, a sort of partnership relation between them in carrying on a common carrier business.

We are not furnished in this record with an entire copy of the contract between the plaintiff in error, the Baltimore & Ohio Southwestern Railway Company, and the United States Express Company, but it is sufficiently disclosed in the statement made by the judges of the circuit court of appeals, that the companies were doing an express business together as common carriers under an agreement entered into on March 1, 1895; that by said contract it was agreed that the railway company would furnish, on its line between Cincinnati and St. Louis, for the express company, cars adapted to the carriage of express matter over said line; that one or more employees of said express company should accompany said goods in said cars over the said line, and for such purpose should be transported in said cars, free of charge; that the express company should protect the railway company and hold it harmless from all liability for injuries sustained by the employees of the express company while being transported for the said purpose over the railroad; that Voigt, the defendant in error, had agreed in writing to indemnify the express company against any liability it might incur by reason of said agreement between the companies, so far as he was concerned, and further agreed to release the railroad company from liability for injuries received by him while being transported in the express cars; that, in consideration of such agreement on his part, Voigt was employed as an express messenger, and while so employed, and while occupying as such messenger a car assigned to the express company, received injuries occasioned by a collision, on December 30, 1895, between

the train which was transporting the express car and another train belonging to the same railroad company.

It is evident that, by these agreements, there was created a very different relation between Voigt and the railway company than the usual one between passengers and railroad companies. Here there was no stress brought to bear on Voigt as a passenger desiring transportation from one point to another on the railroad. His occupation of the car specially adapted to the use of the express company was not in pursuance of any contract directly between him and the railroad company, but was an incident of his permanent employment by the express company. He was on the train, not by virtue of any personal-contract right, but because of a contract between the companies for the exclusive use of a car. His contract to relieve the companies from any liability to him or to each other for injuries he might receive in the course of his employment, was deliberately entered into as a condition of securing his position as a messenger. His position does not resemble the one in consideration in the Lockwood and similar cases, where the dispensation from liability for injuries was made a condition of a transportation which the passenger had a right to demand, and which the railroad companies were under a legal duty to furnish. Doubtless, had Voigt only desired the method of transportation afforded the ordinary passenger, he would have been entitled to the rule established for the benefit of such a passenger. But this he did not desire. He was not asking to be carried from Cincinnati to St. Louis, but was occupying the express car as part of his regular employment, and as provided in a contract which, as we have seen, the railroad company was under no legal compulsion to enter into.

The relation of an express messenger to the transportation company, in cases like the present one, seems to us to more nearly resemble that of an employee than that of a passenger. His position is one created by an agreement between the express company and the railroad company, adjusting the terms of a joint business,—the transportation and delivery of express matter. His duties of personal control and custody of the goods and packages, if not performed by an express messenger, would have to be performed by one in the immediate service of the railroad company. And, of course, if his position was that of a common employee of both companies, he could not recover for injuries caused, as would appear to have been the present case, by the negligence of fellow servants.

However this may be, it is manifest that the relation existing between express messengers and transportation companies, under such contracts as existed in the present case, is widely different from that of ordinary passengers, and that to relieve the defendant in error from the obligation of his contract would require us to give a much wider extension of the doctrine of public policy than was justified by the facts and reasoning in the Lockwood Case.

This subject has received attentive consideration in several of the state courts.

In Bates v. Old Colony R. Co. 147 Mass. 255, 17 N. E. 633, it was held that if an express messenger holding a season ticket from a railroad company, and desiring to ride for the conduct of his business in a baggage car, agrees to assume all risk of injury therefrom, and to hold the company harmless therefor, the agreement is not invalid as against public policy, and he cannot recover for injuries caused by negligence of the company's servants. In its opinion the court said:

"The question of a right of carriers to limit their liability for negligence in the discharge of their duties as carriers by contract with their customers or passengers in regard to such duties does not arise under this contract as construed in this case. See New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; Griswold v. New York & N. E. R. Co. 53 Conn. 371, 4 Atl. 261. It was not a contract for carriage over the road, but for the use of a particular car. The consideration of the plaintiff's agreement was not the performance of anything by the defendant which it was under any obligation to do, or which the plaintiff had any right to have done. It was a privilege granted to the plaintiff. The plaintiff was not compelled to enter into the contract in order to obtain the rights of a passenger. Having these rights, he sought something more. . . . The fact that the plaintiff was riding in the baggage car as an express messenger in charge of merchandise which was being transported there shows more clearly that the contract by the express company and the plaintiff was not unreasonable or against public policy. He was there as a servant engaged with the servants of the railroad corporation in the service of transportation on the road. His duties were substantially the same as those of the baggage-master in the same car; the latter relating to merchandise carried for passengers, and the former to merchandise carried for the express company. His actual relations to the other servants of the railroad corporation engaged in the transportation were substantially the same as those of the baggage-master, and would have been the same had he been paid by the corporation instead of by the express company. Had the railroad done the express business, the messenger would have been held by law to have assumed the risk of the negligence of the servants of the railroad. It does not seem that a contract between the express company and the plaintiff on the one hand, and the defendant on the other, that the express messenger in performing his duties should take the same risk of injury from the negligence of the servants of the railroad engaged in the transportation that he would take if employed by the railroad

to perform the same duties, would be void as unreasonable or as against public policy."

The same ruling prevailed in the subsequent case of Hosmer v. Old Colony R. Co. 156 Mass. 506, 31 N. E. 652.

Robertson v. Old Colony R. Co. 156 Mass. 526, 31 N. E. 650, was an action brought for personal injuries caused to the plaintiff, an employee of the proprietors of a circus, while riding in a car belonging to the proprietors, drawn by the defendant company over its road under a written agreement, in which it was provided that the circus company should agree to exonerate and save harmless the defendant from any and all claims for damages to persons or property during the transportation, however occurring; and it was held that, as the defendant company was under no common-law or statutory obligation to carry the plaintiff in the manner he was carried at the time of the accident, it did not stand towards him in the relation of a common carrier, and that the plaintiff could not recover.

Griswold v. New York & N. E. R. Co. 53 Conn 371, 4 Atl. 261, where a restaurant keeper had the privilege to sell fruits and sandwiches on the trains, and to engage and keep a servant for that purpose on the trains, riding on a free pass, it was held that such servant could not recover for injuries sustained on the train caused by the negligence of the company's servants, because he was not a passenger.

The supreme court of Michigan, in Coup v. Wabash, St. L. & P. R. Co. 56 Mich. 111, 22 N. W. 215, where a railroad company, under a special agreement, was to furnish men and motive power to transport a circus of the plaintiff from Cairo to Detroit on cars belonging to the plaintiff, stopping at certain named points for exhibition, the plaintiff paying a fixed price therefor, held that such transportation was not a transaction with a common carrier as such, that the contract was valid, and that the railway company was not liable for injury due to negligence.

Where a railroad company made a special contract in writing with the owner of a circus to haul a special train between certain points, at specified prices, and stipulating that the railroad company should not be liable for any damage to the persons or property of the circus company from whatever cause, it was held by the circuit court of appeals of the seventh circuit, citing Coup v. Wabash, St. L. & P. R. Co. 56 Mich. 111, 22 N. W. 215, and Robertson v. Old Colony R. Co. 156 Mass. 506, 31 N. E. 650, that the railroad company was not acting as a common carrier, and was not liable under the contract for injuries occasioned by negligent management of its trains. In its opinion the court quoted the following passage from New York C. R. Co. v. Lockwood: "A common carrier may undoubtedly become a private carrier or bailee for hire when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry." Chicago, M. & St. P. R. Co. v. Wallace, 24 U. S. App. 589, 66 Fed. Rep. 506, 14 C. C. A. 257, 30 L. R. A. 101.

Louisville, N. A. & C. R. Co. v. Keefer, 146 Ind. 21, 38 L. R. A. 93, 44 N. E. 796, was a case in all respects like the present. It was a suit by a messenger of the American Express Company against the railroad company for personal injuries. The contracts between the express company, the messenger, and the railroad company were in terms similar to those existing in the present case, and the defense was the same as that made here. It was held that the contracts were valid and that the defense was good. It was said:

"Under the doctrine declared in the Express Cases, 117 U. S. 1, sub nom. Memphis & L. R. R. Co. v. Southern Exp. Co. 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628, the property was being carried by appellant, not as a common carrier in the performance of a public duty, but being carried, with a messenger in charge, as a private carrier, the right to have it and him carried having first been secured to the express company by private contract, the only way known to the law by which the right, either as to the goods or appellee as express messenger in charge, could be acquired.

"Appellee, when he went on the appellant's train and took charge of the express packages in the baggage car, did not go as a passenger who merely desired to be carried on the train from one point to another. Carriage was not the object of his going upon the train; that was merely incidental. His purpose was not to be upon the train, in the cars provided for passengers, but that he might handle and care for the property of his employer thereon in the space set apart in the baggage car for that purpose. Under the authorities cited it was not the duty of appellant, as a common carrier, to carry for the express company the goods or messenger in charge of them. The contract between appellant and the express company gave it and its messenger rights which appellant as a common carrier could not have been compelled to grant."

By the supreme court of Indiana, in Pittsburgh, C. C. & St. L. R. Co. v. Mahoney, 148 Ind. 196, 40 L. R. A. 101, 46 N. E. 917, 47 N. E. 464, it was held that railway companies may contract as private carriers in transporting express matter for express companies, and in such capacity may require exemption from liability for negligence as a condition to the obligation to carry, and that a release by an employee of an express company of all liability for injuries sustained by the negligence of the employer or otherwise includes the liability of the express company to hold a railroad company with which it does business harmless against claims by employees of the express company for injuries, and precludes an action against the railroad company for causing his death while in discharge of his duty as employee of such express company.

A precisely similar question was presented in the case of Blank v. Illinois C. R. Co.

and was decided the same way by the court of appeals for the first district of Illinois, in an opinion rendered March 14, 1899. 80 Ill. App. 475. The court cites the Express Cases, and approves and applies the reasoning in the Indiana cases; and this judgment has been affirmed by the supreme court of Illinois. 182 Ill. 332, 55 N. E. 332.

The same doctrine prevails in the state of New York. Bissell v. New York C. R. Co. 25 N. Y. 442, 82 Am. Dec. 369; Poucher v. New York C. R. Co. 49 N. Y. 263, 10 Am. Rep. 364. Though it must be allowed that the New York decisions are not precisely in point, as those courts do not accept the doctrine of New York C. R. Co. v. Lockwood to its full extent, but hold that no rule of public policy forbids contractual exemption from liability, because the public is amply protected by the right of everyone to decline any special contract, on paying the regular fare prescribed by law, that is, the highest amount which the law allows the company to charge.

As against these authorities there are cited, on behalf of the defendant in error, several cases in which it has been held that postal clerks, in the employ of the government, and who pay no fare, are entitled to the rights of ordinary passengers for hire; and it is contended that their relation to the railroad company is analogous to that of express messengers. Arrowsmith v. Nashville & D. R. Co. 57 Fed. Rep. 165; Gleeson v. Virginia Midland R. Co. 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct Rep. 859; Cleveland, C. C. & St. L. R. Co v. Ketcham, 133 Ind. 346, 19 L. R. A. 339, 33 N. E. 116; Seybolt v. New York, L. E. & W. R. Co. 95 N. Y. 562, 47 Am. Rep. 75.

There is, however, an obvious distinction between a postal clerk and the present case of an express messenger in this, that the messenger has agreed to the contract between the express and the railroad companies, exempting the latter from liability, but no case is cited in which the postal clerk voluntarily entered into such an agreement. To make the cases analogous it should be made to appear that the government, in contracting with railroad company to carry the mails, stipulated that the railroad company should be exempted from liability to the postal clerk, and that the latter, in consideration of securing his position, had concurred in releasing the railroad company.

Brewer v. New York, L. E. & W. R. Co. 124 N. Y. 59, 11 L. R. A. 483, 26 N. E. 324, is also cited as a case wherein a recovery was maintained by an express messenger against a railroad company, and where there existed an agreement between the express company and the railroad company that the latter should be indemnified and protected against from all risks and liabilities. But the court put its judgment against the railroad company expressly upon the ground that the messenger had no knowledge or information of the contract between the companies, and was not himself a party to the agreement to exempt the railroad company.

Kenney v. New York C. & H. R. R. Co. 125 N. Y. 422, 26 N. E. 626, was also a case where, in an action for damages by an express messenger against a railroad company, the plaintiff was permitted to recover, notwithstanding there was an agreement between the companies that the railroad company should be released and indemnified for any damage done to the agents of the express company, whether in their employ as messengers or otherwise. But it did not appear that there had been any assent to a knowledge of this contract on the part of the messenger; and the court said:

"Our decision, however, is placed upon the ground that this contract does not, in unmistakable language, provide for an exemption from liability for the negligence of the defendant's employees. The rule is firmly established in this state that a common carrier may contract for immunity from its negligence or that of its agents; but that to accomplish that object the contract must be so expressed, and it must not be left to a presumption from the language. Considerations based upon public policy and the nature of the carrier's undertaking influence the application of the rule, and forbid its operation except when the carrier's immunity from the consequences of negligence is read in the agreement ipsissimis verbis."

Chamberlain v. Pierson, 59 U. S. App. 59, 87 Fed. Rep. 421, 31 C. C. A. 158, in the circuit court of appeals of the fourth circuit, was a case in which an express messenger was injured while traveling on a railroad which had a contract with the express company, exonerating the foreman from responsibility for injuries to the agents of the latter, and in which said agreement was ineffectually pleaded in bar of the action. The court said:

"The discussion of this feature of the case presents the question: Was the plaintiff below, as a messenger of the express company, bound by the contract between the railroad company and the express company to assume all risks to life and limb to which he was exposed in performing his duties on the train as an express messenger? He was not a party to the contract, never ratified it, and in his testimony, when asked if he knew of this provision of the contract, . . . answered, 'If I had known that I wouldn't have gone.'"

Without enumerating and appraising all the cases respectively cited, our conclusion is that Voigt, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger within the meaning of the case of New York C. R. Co. v. Lockwood; that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the

benefit of it by securing his appointment as such messenger; and that such a contract did not contravene public policy.

Accordingly, we answer the question submitted to us by the judges of the Circuit Court of Appeals in the negative; and it is so ordered.

Mr. JUSTICE HARLAN, dissenting:

In New York C. R. Co. v. Lockwood, 17 Wall. 357, 384, 21 L. ed. 627, 641, it was held that a "common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law;" that "it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants;" that "these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter;" and that " a drover traveling on a pass, such as was given in this case, . . . is a passenger for hire." The railroad pass referred to declared that its acceptance was to be considered a waiver of all claims for damages or injuries received on the train. The above principles have been recognized and enforced by this court in numerous cases.

I am of opinion that the present case is within the doctrines of New York C. R. Co. v. Lockwood, and that the judgment should be affirmed upon the broad ground that the defendant corporation could not, in any form, stipulate for exemption from responsibility for the negligence of its servants or employees in the course of its business, whereby injury comes to any person using its cars, with its consent, for purposes of transportation. That the person transported is not technically a passenger and does not ride in a car ordinarily used for passengers is immaterial.

ALLENDER v. C. R. I. & P. R. R. CO.

(37 Ia. 264.)

Appeal from Jefferson Circuit Court.

Action to recover damages for injuries received by cars on defendant's road.

On the 5th day of November, 1870, the defendant operated a railroad in Jefferson county, and had a depot at Fairfield, which was then the terminal station of the road. About half-past four o'clock in the afternoon of that day plaintiff, a resident of Jefferson county, eighteen years of age, and who had never ridden on the cars, applied at the depot of defendant, in Fairfield, for passage to Acheson, the next station on the road.

She was informed by the ticket agent that the regular train had gone, but that a freight train would leave about 5 o'clock, which would have a car on which she could ride. She informed the agent that she would rather go on that than wait for the passenger train, and then went to the house of an acquaintance near the depot.

In a short time she returned, went to the door of the ticket office, asked for a ticket, and inquired how long it would be before she could go. The agent informed her that the train would start in about twenty minutes; told her that she could pay her fare to the conductor, and that she had better go and get on the car and be ready. She told the agent that she had never ridden on the cars before, and asked him if they would not back up to the station. He said the regular passenger train did.

The caboose attached to this freight train had seats like a passenger car in one end, the other part being for the conductor and train men. There were steps, a door and a platform at each end, and doors in the side in the part used by the trainmen.

At the place in question the defendant's road had three tracks. The caboose stood on the track farthest from the depot, and about two hundred and fifty feet north of it. The engine stood up the track still further north. To the rear or south end of the caboose was attached a flat car. The bunter of the flat car was out. About five feet south of the flat car stood a box-car.

The ticket agent went with the plaintiff out on the platform over the first track to the middle track, in view of the caboose car, pointed it out with his finger, and directed her to go to it and get on.

The plaintiff passed north up the track until she came to the south end of the flat car, and then, seeing no means of entering the caboose car, as she supposed, she undertook to pass between the flat car and the box-car, a few feet south of it, hoping to find an opening by which she might enter the car on the other side, first looking up and down the track, and discovering nothing in motion. At this time the brakeman and conductor were engaged in making up the train. Four freight cars detached from the locomotive, the conductor upon them, were very slowly coming down from the north to be attached to the caboose. When they came near the caboose the conductor got off and walked alongside to make the coupling. The concussion was slight, but was sufficient to carry the caboose and flat car far enough back to almost close the space through which the plaintiff was at that moment passing. She was caught between the flat car and the box car about the hips, and received the injuries for which she sues.

Jury trial. Verdict for plaintiff for $5,000. Motion for new trial overruled. Judgment upon the verdict. Defendant appeals.

The furtner material facts appear in the opinion.

DAY, J. I. The first point urged by appellant is that there is no evidence of negligence on the part of defendant. This branch of the case is discussed as though the only acts upon which plaintiff can ground her right of recovery are those connected with the backing and coupling of the four freight cars, or the positive direction of the agent to plaintiff to go through the opening in the cars; and it is urged that the backing and coupling were conducted

with skill and care, and that the agent did not direct plaintiff to go through the opening between the cars, as the evidence shows he did not see it.

Appellant, we think, places too narrow a construction upon the issue. The first count of the petition alleges that at the date of the injury plaintiff applied at the ticket-office in Fairfield for passage to Acheson, and placed herself in defendant's care as a passenger; that the agent received her as a passenger, directed her to go to the car, pointed out the way, and that she, in obeying such direction, passed across the track of said road, and, without her fault, and by negligence of defendant, was crushed between two cars and seriously injured. The immediate cause of her injury was the closing of the space between the box and flat cars when she was between them. If the space had not closed, or if plaintiff had not been in it, she would not have been injured in the manner she was.

Whether the injury is ultimately to be traced to the manner in which the four moving box-cars came in contact with the caboose, or to the neglect to bring the train to the platform, or to the act of the agent in directing her to get on the car before the train was made up, or to the failure to have some one present to show her the way into the car, or to some other neglect or omission, the petition does not state. It alleges only that in obeying the agent's directions, she was, by the negligence of defendant, crushed between two cars and injured. The averment is broad enough to cover any act of negligence contributing to the injury. With this understanding of the issue, we are unable to say that the general verdict of the jury, attributing negligence to the defendant, is not supported by the evidence.

The plaintiff, a young woman, inexperienced in railway travel and unattended, applied for passage on defendant's cars. She was told she could go on a freight train, to which was attached a car on which she could ride. When she asked if the cars would not back up to the station, she was told the regular passenger train did, and was directed to go and get in and be ready, twenty minutes before the train started, and whilst cars were switching on the tracks making up the train. She was thus sent across two tracks, two hundred and fifty feet north of the depot, to make her way into the caboose. The evidence shows that when this train was made up it was usual for the conductor to give the ticket agent a signal, so that passengers might then get on; and that about half the time the train backed down to the platform. If the agent had not directed plaintiff to get on the car until he received this signal, or if he had caused the train to come to the platform, or had accompanied plaintiff to the car, or had stationed some one there to show her the way to enter, it is not probable that the accident would have happened. Whether certain facts proved amount in a given case to negligence is usually a question of fact for the jury.

The defendant, through its agents, having omitted all of the precautions above named, we cannot say, as mere matter of law, that it was not guilty of negligence.

II. It is further urged that the plaintiff, by her own negligence, contributed to the injury. We do not, upon this branch of the case, feel justified in interfering with the verdict, If plaintiff, seeing the cars approach, or without looking for them, had undertaken to cross the track, and been injured, she would have been guilty of contributory negligence. Dodge v. The Burlington, C. R. & M. R'y. Co., 34 Iowa, 276.

The evidence, however, is positive that when plaintiff came within about two feet of the opening she looked both up and down the track, and saw nothing moving. It is clear that at that time the four freight cars were in fact moving; but they were moving very slowly, and were coming almost directly toward her. It is an optical fact, to which the experience of all bears witness, that motion under such circumstances is not readily detected. A distant object may even rapidly approach a beholder, and yet appear to be standing still. And whilst the rapid motion of a near object would likely be detected, yet its motion, if very slow, might escape observation.

If to this be superadded the fact that the locomotive—the only thing which it would naturally be supposed would produce motion of railroad cars—was seen standing far up the track, it is not at all improbable that plaintiff looked, as she testifies she did, and yet failed to discover any movng cars.

Seeing the locomotive standing far away, looking up and down the track and discovering no car in motion, we cannot say that she was, nevertheless, as matter of law, guilty of negligence in attempting, under such circumstances, to cross the track.

III. The court gave to the jury sixteen instructions, which, in the main, quite fairly present the case. To six of them the defendant makes objection. Some of them are exceptionable because they suggest to the jury matters outside of the evidence produced. The sixteenth instruction given is as follows:

"And she may recover, not only the amount of damages which she suffered prior to the commencement of this suit, but also all the damages proceeding continuously from the injury complained of which she has suffered up to the present time, and which it is reasonably certain she will suffer in the future. There must, however, be a reasonable certainty as to such future damages. Yet she cannot recover for the damage which she might have avoided by the exercise of slight care and diligence after she became aware of the injury of which she complains."

This instruction is erroneous. It is the

duty of a person placed in the condition of plaintiff to exercise not slight, but reasonable care and diligence to effect a speedy and complete cure. And for injuries or suffering caused or enhanced by the neglect to use such care she cannot recover. Collins v. City of Council Bluffs, 32 Iowa, 324.

Evidence was introduced which, appellant claims, shows a failure to exercise such care, as her failure to consult a physician or take medicine after the lapse of about one week from the injury, and her going to work soon after the injury was received.

It was the right of the defendant to have the verdict of the jury as to whether plaintiff exercised ordinary care in the means employed to effect a cure. And we cannot say that it has not been prejudiced by the failure to submit this question under the proper instruction.

For the error in this instruction the cause must be reversed, but as the questions raised in the other instructions complained of, may arise upon the new trial, it is necessary that we should consider and determine them.

Whilst in the main, the instructions given very fairly present the case, yet some of them have objectionable features which should be avoided on the new trial.

The seventh instruction is as follows:

"If you believe that the plaintiff entered into an office or waiting room provided by defendant for passengers, and informed the depot or ticket agent of her intention and desire to become a passenger; that she placed herself, in good faith, under his direction as such; that such agent directed her in getting on (attempting to get on) the car; these facts, if established to your satisfaction by the evidence, would be sufficient to justify you in finding that the relation of passenger existed although she had not purchased a ticket, and had not entered a car." This instruction is not only right in principle, but it is supported by authority.

If the actual purchase of a ticket, or the entering of a car, is necessary in order to constitute the relation of a passenger, then no one taking passage on a railway at a way station where no tickets are sold, can demand of the company the exercise of that high degree of care which a common carrier owes a passenger, until he had actually obtained admission to the car. If the doctrine of the instruction be not right, then a person taking passage at a way station, without the means of procuring a ticket, might be precipitated under the wheels and injured, from a defect in the steps, and yet could demand of the company the exercise of only ordinary care.

The rule given by the court is distinctly recognized in Shearman & Redfield on Negligence, section 262, and cases cited, and we have no doubt of its correctness.

The eighth instruction is as follows: "The plaintiff's right to recover is not affected by her having contributed to her injury, unless she was in fault in so doing; if her share in the transaction was innocent and not incautious, and she was without fault on her part, it furnishes no excuse for the defendant. And if you find, from the evidence, that the defendant's agent, by his own act, threw the plaintiff off her guard, and gave her good reason to believe that vigilance was not needed, the lack of such vigilance on her part is no bar to her right to recover." Complaint is made of the last sentence of this instruction. Whilst this clause is, undoubtedly, the law in a proper case (Shearman & Redfield on Negligence, § 28, and cases cited), yet it should not have been given here, because not applicable to the evidence produced. It was doubtless given because of the testimony of plaintiff that the agent told her to go down and she would see a way to get in, and there would be no trouble nor danger. If the plaintiff was guilty of any negligence, it was in the manner of entering the space between the box and flat cars. The evidence is undisputed that neither she nor the agent saw this space at the time he directed her to go and get on the caboose.

If she had been injured in going to the caboose, because of obstruction in, or the imperfection of the way, it might fairly have been said that if she was rendered incautious because of the statement of the agent that there would be no danger, she could recover notwithstanding the lack of her vigilance. But it cannot with any fairness, be claimed that the general statement of the agent that there would be no trouble nor danger, could have been understood by her to mean that there would be no trouble nor danger in going through an opening five feet wide between two cars, and thus passing beyond the caboose and across the track on which it stood, and that she might do this act, without the exercise of care and vigilance. We have already seen, that the mere crossing of this track, between this space, exercising proper vigilance and care to discover the approach of moving cars, was not negligence as a matter of law.

But, in doing this act, she cannot be exonerated from the necessity of exercising due care, because of the general statement of the agent that there would be no danger or trouble in getting to or on the car.

The ninth instruction is as follows:

"It is the duty of a railroad company to use due care, not only in conveying its passengers upon the journey, but also in all preliminary matters, such as their reception into the car and their accommodation while waiting for it; and whether bound to render assistance in taking passengers aboard its cars or not, it is liable for the consequences of negligence in giving directions to passengers as to the mode of entering."

This instruction is almost in the exact language of passages contained in section

275 of Shearman & Redfield on Negligence. It is not urged that this instruction is inherently wrong, but that it is inapplicable to the issues. It is urged that the petition nowhere charges that there was negligence in giving directions as to the mode of entering the car.

We have before seen that this view of the issue is too narrow a one, that the charge is a general one, that plaintiff was injured by the negligence of defendant. The particular act of negligence is a matter of proof.

The tenth instruction is as follows:

"Whether or not it was the duty of defendants' agents to have assisted plaintiff in getting on the car is a question for you to determine (under the instructions here given) from the evidence in the case, and to this end it is proper for you to consider the train and the car, their distance from the platform and depot, the facility with which access could be had, the sex, age and inexperience of the plaintiff, if these were known to defendants' agents, and all the facts and circumstances surrounding the case." It is claimed that the fair meaning of this instruction is, that if the jury believe that the defendants' agents knew plaintiff was an inexperienced girl, and the car was some distance from the depot, then it was the duty of the agent to have escorted plaintiff to the car, and assisted her in getting on it.

The instruction does not, as we understand it, mean this. The jury are told that they are to determine from the evidence whether or not it was the duty of defendant to have assisted plaintiff in getting on the car. In Shearman & Redfield on Negligence, section 278, it is said: "The obligation of a carrier to assist passengers in getting on and off depends largely upon the nature of his vehicle, the facility with which access may be had without assistance, and similar circumstances." The circumstances of this case were the following: Plaintiff had never ridden on the cars, and she so informed the defendants' agent. She was about to take passage on a freight train, to which was attached a car for the accommodation of passengers; it stood two hundred and fifty feet north of the depot, and on the third track therefrom; the train was being made up; plaintiff asked if it would not come to the platform; she was told to go and get on and be ready. Under these circumstances the jury are told, not that the inexperience of plaintiff and the distance of the train from the platform made it the duty, as a question of law, for defendant to assist her on the train, but that these facts were proper to be considered by them, in determining the duty of defendant. In this sense the instruction seems to us unobjectionable.

The thirteenth instruction, and the only remaining one of which defendant complains, is as follows:

"When the carrier of passengers by railway does not receive passengers into the car at the platform erected for that purpose, and suffers or directs passengers to enter at out-of-the-way places, it is its duty to use its utmost care in preventing accidents to passengers while so entering, [and to provide for them a safe and convenient way and manner of access to the train, and in preventing the interposition of any obstacles which would unnecessarily impede or expose them to harm while proceeding to take seats in the cars], and if you find in this case that the defendants' agents were negligent within the meaning of this instruction, and that plaintiff was injured thereby, still the question remains whether or not the plaintiff on her part contributed by her own negligence to the injury; and if you find she did so contribute, she cannot recover. If she did not contribute, she can recover."

Material in brackets is ours. The objectionable feature of this instruction is, that there is no evidence whatever of any failure on the part of the defendant, in respect to any of the matter indicated in brackets.

In determining the correctness of the instructions given, we have incidentally passed upon the refusal to give those asked by defendant, and need give them no further notice. As the cause must be reversed, we need not consider the question as to the excessiveness of the damages.

Reversed.

BRIEN v. BENNETT.
(8 Car. & P. 724.)

Case.—The declaration stated that the defendant was the proprietor of an omnibus for carrying passengers from Hammersmith and divers other places to London, and being such owner, the plaintiff at the request of the defendant, "agreed to become and became a passenger by the said omnibus to be safely and securely conveyed" from Hammersmith to London for reasonable fare and reward to the defendant, "and the defendant then received the plaintiff as such passenger as aforesaid, and thereupon it became and was the duty of the defendant to use due and proper care that the plaintiff should be safely and securely carried and conveyed by the said omnibus," yet the defendant, not regarding his duty, did not use proper care, &c., but on the contrary neglected it, so that by the negligence of the defendant and his servant in that behalf, "the plaintiff, whilst such passenger as aforesaid," fell from the said omnibus upon the ground, and was greatly hurt, &c. Pleas, 1st, not guilty; 2nd, denying that the defendant was the proprietor of the omnibus; 3rd, "that the plaintiff did not become a passenger by the said omnibus, nor did the defendant receive him the plaintiff as such passenger in manner and form as in the said declaration is alleged," (concluding to the country.)

It appeared that the defendant's omnibus was passing on its journey, when the plaintiff, who was a gentleman considerably advanced in years, held up his finger to cause the driver of the omnibus to stop and take him

up, and that upon his doing so the driver pulled up, and the conductor opened the omnibus door; and that just as the plaintiff was putting his foot on the step of the omnibus, the driver supposing that the plaintiff had got into it, drove on, and the plaintiff fell on his face on the ground, and was much hurt.

LORD ABINGER, C. B. I think that the stopping of the omnibus implies a consent to take the plaintiff as a passenger, and that it is evidence to go to the jury.

Verdict for the plaintiff—Damages 5l.

CATHARINE HOAR, ADMINISTRATRIX v. MAINE CENTRAL RAILROAD COMPANY.

(70 Me. 65.)

On report.

Case. The declaration is as follows:

"In a plea of the case, for that on the eleventh day of December, A. D. 1875, the defendants were the owners and operated a railroad known as the Maine Central Railroad, passing through the towns of Waterville and West Waterville, in the county of Kennebec, and were common carriers of passengers and persons between said Waterville and West Waterville, and were then and there bound and required by law to carry and transport all passengers and other persons lawfully in and upon its said railroad carefully and safely, and with due regard for the preservation of their lives and limbs; and were required to employ careful, faithful and suitable persons for servants and employees, to run and manage their trains, locomotive engines and cars, and were bound to run and manage the same carefully and with due regard to the limbs of those legally in their cars.

"Yet the defendants, well knowing their duty and obligations, did, on said day last named, at said Waterville, through and by their foreman of a section, their agent and servant, Silas H. Potter, then and there employed in their business, and then and there entrusted by defendants with the care and control of one of its hand-cars, which was run on said day from said Waterville to West Waterville, upon and over said railroad, by said Potter and others, invite, request and authorize said deceased, John Hoar, then and there alive and in good health (and until a short time previous thereto having been for many years employed by defendants as section man), to ride with him, the said Potter, upon said hand-car from said Waterville to West Waterville, over and upon said railroad of defendants, which invitation and request said deceased then and there accepted, and in pursuance thereof got upon said hand-car with said Potter and one Jere Murphy, and then and there proceeded to ride from said Waterville to West Waterville over said railroad, all which was then and there well known to said defendants and to their servants, officers and agents.

"And the plaintiff avers that the defendants did then and there negligently, carelessly, wantonly, and in total disregard of law and of the safety of said Hoar and of their passengers and others lawfully traveling in and upon its cars, over and upon its road, at said Waterville, and of their lives and limbs, by other of defendants' servants and agents then and there entrusted by defendants with the control and management of a locomotive engine of the defendants, then and there propelled by steam, and attached to and drawing a paymaster's car, and those having control of said locomotive engine and paymaster's car, then and there being employed by defendants in their business upon said railway, without any notice to said Hoar or to any person on said hand-car, and without the actual knowledge of said Hoar, dispatch and send with great violence and velocity on said railway, and over the same track upon which said hand-car was then and there lawfully passing, with the said Hoar and others then and there lawfully thereon, said locomotive engine being then and there attached to said paymaster's car, against and upon said hand-car upon which said Hoar was lawfully riding, and without warning or notice to said Hoar, then and there instantly (to wit: at about the hour of seven o'clock and twenty minutes A. M., on the 11th day of December, A. D. 1875,) fracturing the skull of said Hoar, and then and there inflicting upon him mortal and fatal wounds and injuries, whereof said Hoar thereafterwards, to wit: on the same day at about the hour of one o'clock P. M., after suffering great pain and torture and agony during said period of time, died.

"And the plaintiff avers that the said defendants did not employ careful, faithful and suitable persons for servants and employees to run and manage their locomotive engine, car and train, but put the same in charge of negligent, careless and heedless persons and employees, and said deceased was then and there in the exercise of due care and diligence, said injury, suffering and loss of life being the direct result of the negligence, carelessness and recklessness of defendants, and without the fault of said Hoar or of any other persons on said hand-car.

"Also for that the defendant corporation, before and at the time of committing the grievances hereinafter named, to wit: on the eleventh day of December, A. D. 1875, were the owners and operated a railroad running from Bangor to Portland, Maine, through the towns of Waterville and West Waterville, in the county of Kennebec; that the said John Hoar, then in full life, at the special instance, request and invitation of said defendants, got upon a hand-car of said defendants to ride from said Waterville to West Waterville, over and upon the defendants' said road, and the defendants then and there so received the said Hoar, to carry him from said Waterville to West Waterville, and then and there it became the duty of the defendants to provide safe and sufficient transportation to said Hoar, between said Waterville and West Waterville, and to employ safe, careful and suitable employees to manage their locomotive engine, car and train with care, and with due regard for the life and

limb of said Hoar and others lawfully on defendants' cars and railway, and to run their locomotive engines, cars and trains in a careful and safe manner. Yet the said defendant corporation, not regarding their duty in that behalf, did not provide safe and sufficient transportation from said Waterville to West Waterville for said Hoar, and did not employ safe, careful and suitable employees to manage their locomotive engines, cars and trains with care, and with due regard for life and limb of said Hoar and others lawfully on defendants' cars and railway, and did not then and there run their locomotive, engine, car and train in a careful manner, but on the contrary, the said defendant corporation employed such careless and heedless employees and servants to manage their said locomotive engine, car and train, and did manage and control them with such recklessness and negligence, that said locomotive engine, car and train were drawn with great speed and violence upon and against the car upon which the said Hoar was lawfully riding, as aforesaid, on said eleventh day of December, A. D. 1875, at a few minutes past seven o'clock in the forenoon, and without any notice to said Hoar, then and there wounding, bruising and crushing the said Hoar, by reason of which injuries the said Hoar thereafterwards, at about one o'clock of the same day, died, during which time the said Hoar underwent great pain of body and mind; and the plaintiff avers that the injuries so received by said Hoar were in consequence of the great negligence and carelessness of the defendant corporation as aforesaid, and without the fault of the said Hoar.

"Also for that the said defendants, on the eleventh day of December, A. D. 1875, were the owners and operators of a railroad extending from Bangor to Portland, in the state of Maine, and running through the towns of Waterville and West Waterville; and were bound by law to have due regard for the life and limb of such persons as were lawfully on their railroad and in their cars, and were required to employ careful and suitable persons to run and manage their engines, cars and trains, and the said John Hoar, deceased, was then and there at said Waterville, lawfully and properly riding in a railway vehicle provided for that purpose by the defendants, their servants and agents, over and upon said defendants' railroad between said Waterville and West Waterville, and at the request of the defendants, their servants and agents.

"Yet the said defendants, well knowing their duty and legal obligations toward said Hoar, and all persons lawfully being or riding upon its cars or other vehicles, did not provide careful and suitable persons to run and manage their cars, engines and trains, but did on said eleventh day of December, A. D. 1875, at said Waterville, wantonly, willfully, unlawfully, and with gross negligence, kill and slay said John Hoar (then in full life but since deceased), by inflicting then and there upon the body of said Hoar a mortal and fatal wound with a locomotive engine of the defendants, then and there propelled by steam, upon said railroad, which locomotive engine of the defendants the defendants propelled, hurled, projected and discharged over said railroad with great velocity and violence, directly against and upon the vehicle above named, upon which the said John Hoar was lawfully riding, then and there fractured the skull of the said Hoar, and then and there inflicting frightful, excruciating and intolerable agony, anguish, distress, pain and misery upon him, so that, after enduring the same for the space of about five hours, he died on said eleventh day of December, A. D. 1875, at said Waterville, and the plaintiff avers that said Hoar came to his death then and there as aforesaid, solely by the gross negligence and culpable carelessness of the defendants, as aforesaid, and while in the exercise of due care and diligence, and without any negligence or want of care on his part."

At the first term the defendant filed a separate demurrer to each count in the declaration, which was joined, both parties reserving the right of amendment. Thereupon the parties agreed to submit the case to the law court for their determination of the sufficiency of each count.

APPLETON, C. J. The material and substantive allegations in the several counts in the plaintiff's writ are that the defendants are common carriers of passengers between Waterville and West Waterville; that as such carriers they are bound to carry all passengers and persons lawfully on their road carefully and safely over the same; that the plaintiff's intestate, being invited by one Potter, a foreman of a section in their employ and entrusted by them with the care and control of one of their hand-cars, to ride with him on said hand-car from Waterville to West Waterville, accepted the invitation; that the plaintiff's intestate while riding was run over by one of the defendant's engines to which a pay-master's car was attached and injured so that he died, and that this was through the negligence of the defendants and their servants, the deceased being in the exercise of due care.

To each count of the declaration the defendants filed a general demurrer.

I. The liability of a railroad company differs as to their duty to their servants and to passengers. They are liable to servants for injuries resulting from want of due care in the selection of fellow servants, but if duly selected, they do not guaranty against their negligence. Blake v. M. C. R. R. Co., 70 Me. 60. Not so as to passengers, to whom they are responsible for injuries arising from their negligence or incapacity, irrespective of the question of more or less care in their selection. It is obvious that there is no defect in the declaration so far as it relates to the negligence of the defendants, if they are to be deemed common carriers by hand-cars.

II. The plaintiff's intestate was to be carried gratuitously. But that does not place

him in a different position, so far as relates to his right to protection from neglect, from a pay passenger—if he is to be regarded as a passenger to be carried by the defendants. Phil. & Read. R. R. Co. v. Derby, 14 How. (U. S.) 468. Wilton v. Middlesex R. R. Co., 107 Mass. 108. Whar. Neg., § 355.

III. The plaintiff places her right to recover upon a neglect by the defendants of their duties to the intestate as common carriers. To impose upon the defendants the duties and responsibilities of common carriers, they must be shown to be such. The grave and important question, then, is whether the defendants, though common carriers of passengers along their road and in their cars for that purpose, are common carriers of passengers by their hand-cars used by their section men. Were the defendants chartered as common carriers save by their cars for passengers? Have they by their acts or conduct held out to the public, or authorized their agents to hold out to the public, that they were common carriers by their hand-cars? If they have not been chartered, and have not in any way held themselves out, as common carriers by hand-cars, then the duties and obligations resting upon them as carriers have not arisen.

If the defendants were common carriers in relation to the plaintiff's intestate, they would be bound to carry all who should apply. Were, then, the defendants bound to carry on their hand-cars any one asking to be so conveyed? Assuredly not.

In Graham v. Toronto, Grey & Bruce Railway Co., 23 Up. Can. (C. P.) 514, the defendants agreed, with a contractor for the construction of their railway, to furnish a construction train for ballasting and laying the track for a portion of their road then under construction; the defendants to provide the conductor, engineer and fireman; the contractor furnishing the brakemen. On October 31, 1872, after work was over for the day and the train was returning to Owen Sound, where the plaintiff, one of the contractor's workmen, lived, the plaintiff, with the permission of the conductor but without the authority of the defendants, got on. Through the negligence of the person in charge of the train an accident happened, and the plaintiff was injured. "The fact," remarks Hagarty, C. J., "that the defendants' engine driver or conductor allowed him to get on the platform, does not alter my view of the case.

"I cannot distinguish it from the case of a cart sent by its owner under his servant's care to haul bricks or lumber for a house he is building. A workman, either with the driver's assent or without any objections from him, gets upon the cart. It breaks down, or by careless driving runs against another vehicle, or a lamp post, and the workman is injured. I cannot understand by what process of reasoning the owner can in such case be held to incur any liability to the person injured. Nor, in my opinion, would the fact that the owner was aware that the driver of his cart often let a friend or person doing work at his house drive in his cart, make any difference. . . It could never be, I think, in the reasonable expectation of these defendants that they were incurring any liability as carriers of passengers, or that they should provide against contingencies that might affect them in that character."

A similar question arose in Sheerman v. Toronto, Grey & Bruce Railway Co., 34 Up. Can. (Q. B.) 451, where one of the workmen was being carried, without reward, on a gravel train, and was injured so that he died, it was held that the deceased was not lawfully on the cars with the consent of the defendants, and a nonsuit was directed. "The workmen," observes Wilson, J., "were not lawfully on the cars. They were not passengers being carried by the defendants. They were acting on their own risk, not at the risk of the defendants, and however unfortunate the disaster may have been, it is only right the legal responsibility should fall on those who ought to bear it, and not upon those upon whom it does not rest." In this case "it appeared that it was not necessary the defendants should carry the men to and from their work, and that they never agreed to do more than to provide cars for carrying ballasting and materials for track laying."

The defendants not being common carriers, so far as relates to their liability to the plaintiff's intestate, the declaration not disclosing facts which show such liability, must be adjudged bad. Eaton v. Delaware, L. & W. R. R. Co., 57 N. Y. 383. Union Pacif. R. R. Co. v. Nichols, 8 Kan. 505. In Dunn v. Grand Trunk R. R. Co., 58 Maine, 187, the plaintiff was riding in a saloon car attached to a freight train, and paid the customary fare for conveyance in a passenger car.

IV. A master is bound by the acts of his servant in the course of his employment, but not by those obviously and utterly outside of the scope of such employment. If not common carriers, a section foreman with his hand-car has no right to impose upon the defendants the onerous responsibilities arising from that relation. He has no right to accept passengers for transportation and bind the defendants for their safe carriage, and every man may safely be presumed to know thus much.

If the risk is much greater by this mode of conveyance, the plaintiff's intestate by adopting it assumed the extra risks arising therefrom, and must be held to abide the unfortunate consequences.

No one becomes a passenger except by the consent, express or implied, of the carrier. There is no allegation of express consent by the defendants, nor of anything from which consent can be implied that the plaintiff's intestate should be carried at their risk by this unusual mode of conveyance.

Declaration bad.

WALTON, BARROWS, VIRGIN AND LIBBEY, JJ., concurred.

ELLEN WILTON vs. MIDDLESEX RAILROAD COMPANY.

(107 Mass. 108.)

Tort against a street railroad corporation for personal injuries alleged to have been received by the plaintiff through the negligence of the driver of one of the defendants' horse-cars.

At the trial in this court, the plaintiff offered to prove "that on July 16, 1868, at which time she was nine years of age, she went out about seven o'clock in the evening to walk; that she was in company with four or five other girls, on the Charlestown bridge, and near the draw, and one of the defendants' cars came along very slowly; that there were no passengers on the platform, and the driver beckoned to the girls to get on, and they accordingly got on the platform, while the car was going slowly; that the driver then struck his horses, and they started on a fast trot; that the plaintiff had one foot on the step, and by reason of the sudden start lost her balance; that she called to the driver to stop, but the car kept on, and she fell so that one of the wheels passed over her arm, and she was obliged to have it amputated; and that she used due care and the driver was careless." It was admitted that the plaintiff was not a passenger for hire, and that the driver had no authority to take the girls upon the car and carry them, unless such authority was to be implied by the fact of his employment by the defendants as a driver. Upon the plaintiff's offer of proof, the case was reserved by the chief justice for the consideration of the full court; if the plaintiff was entitled to recover thereon, the case to stand for trial; otherwise, judgment to be given for the defendants.

MORTON, J. The plaintiff was injured while riding upon one of the defendants' cars. At the trial, she offered to prove that she was in the exercise of due care, and that the driver of the car was careless. For the purposes of this hearing, therefore, we are to assume that she was injured by the negligence of a servant of the defendants, in the course of his employment; and that her own want of care did not contribute to the injury. It follows, that she can maintain this action; unless we sustain the position taken by the defendants, that she was unlawfully upon the car, and therefore not entitled to recover.

The facts which the plaintiff offered to prove, bearing upon this question, are as follows: The plaintiff, a girl of nine years of age, was walking with several other girls upon the Charlestown bridge about seven o'clock in an evening in July. One of the defendants' cars came along very slowly, and the driver beckoned to the girls to get on. They thereupon got upon the front platform. It was admitted that the plaintiff was not a passenger for hire, and that the driver had no authority to take the girls upon the car and carry them, unless such authority is to be implied by the fact of his employment as driver.

Upon these facts, it is clear that it would be competent for the jury to find that the beckoning by the driver was intended and understood as an invitation to the plaintiff to get upon the car and ride. In accepting this invitation and getting upon the car, we think she was not a trespasser, there being no evidence of collusion between her and the driver to defraud the corporation.

A master is bound by the acts of his servant in the course of his employment. They are deemed to be the acts of the master. Ramsden v. Boston & Albany Railroad Co. 104 Mass. 117, and cases cited. The driver of a horse-car is an agent of the corporation, having charge, in part, of the car. If, in violation of his instructions, he permits persons to ride without pay, he is guilty of a breach of his duty as a servant. Such act is not one outside of his duties, but is an act within the general scope of his agency, for which he is responsible to his master. In the case at bar, the invitation to the plaintiff to ride was an act within the general scope of the driver's employment, and if she accepted it innocently she was not a trespasser. It is immaterial that the driver was acting contrary to his instructions.

It follows, that the plaintiff, being lawfully upon the car, though she was a passenger without hire, is entitled to recover, if she proves that she was using due care at the time of the injury and that she was injured by the negligence of the driver. Philadelphia & Reading Railroad Co. v. Derby, 14 How. 468, 483.

In the present aspect of the case, we are not called upon to consider to what extent the defendants might be held liable if it were shown that the plaintiff was unlawfully riding upon the car.

Case to stand for trial.

ALBERT D. SWAN vs. MANCHESTER & LAWRENCE RAILROAD.

(132 Mass. 116.)

Tort in two counts. The first count was for expelling the plaintiff from the defendant's cars at Windham, in the State of New Hampshire. The second count was for refusing to sell the plaintiff a ticket entitling him to be carried over the defendant's railroad from said Windham to Lawrence, in this Commonwealth. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court on appeal, upon agreed facts, the material parts of which appear in the opinion.

DEVENS, J. The regulation that all passengers, who shall purchase tickets before entering the cars of a railroad company to be transported therein, shall be entitled to a small discount from the advertised rates of fare, but, if such ticket is not purchased, the full rate of fare shall be charged, is a reasonable one, and in no way violates the rule, which in New Hampshire has the sanction of the statute law, that the rates shall be the same for all persons be-

tween the same points. Commonwealth v. Power, 7 Met. 596. Johnson v. Concord Railroad, 46 N. H. 213. St. Louis, Alton & Terre Haute Railroad v. South, 43 Ill. 176. Illinois Central Railroad v. Johnson, 67 Ill. 312. Indianapolis, Peru & Chicago Railroad v. Rinard, 46 Ind. 293. Du Laurans v. St. Paul & Pacific Railroad, 15 Minn. 49.

The number of persons carried, the rapidity with which the cars move, the frequency and shortness of their stops, the delay and inconvenience of making change, the various details to be attended to by the conductor while the train is in motion or at stations, and the importance to the railroad company of conducting its business at fixed places, render the mode of payment by tickets previously purchased one of advantage to the railroad company and of convenience to the public. A passenger who is without a ticket and declines to pay full fare may ordinarily be ejected from a train at a station, as one who absolutely refuses to pay his fare. State v. Goold, 53 Maine, 279. Stephen v. Smith, 29 Vt. 160. Hilliard v. Goold, N. H. 230, and cases above cited.

These positions are not controverted by the plaintiff, who maintains that, although he had no ticket, he was entitled to be carried for the price of one, in view of his failure to procure one under the circumstances hereafter stated. The table of prices advertised by the defendant authorized the ticket seller to make a discount of fifteen cents, had the plaintiff purchased one for the journey he proposed to make from Derry to Lawrence, the advertised fare being sixty-five cents. Until the time advertised for the departure of the train from Derry had expired, the ticket seller had been in his office. He left it after that time, and while the train was approaching, in order to aid the station agent, as he was accustomed to do, in loading the baggage upon the passenger trains. While the plaintiff did not approach the ticket office to find it vacant and the ticket seller absent until after the time had expired for the departure of the train as advertised, there was sufficient time for him to have procured his ticket before the train actually started from the station, if the ticket seller had then been in the office. He entered the train without a ticket, and the conductor, acting according to the rules of the company, demanded the full price for the fare, sixty-five cents, which the plaintiff refused to pay, insisting upon his right to be carried for fifty cents, the price of a ticket, which he tendered, but which the conductor refused, telling the plaintiff he must leave the train at the next station, unless the demand for full fare was complied with. On the arrival of the train at the next station, the plaintiff, failing to comply with the demand of the conductor, was ordered by him to leave the train, which he did.

Upon this part of the case, the plaintiff contends that inasmuch as he went into the office to procure a ticket, and was unable to so do, as above stated, he was entitled to be carried for the price of a ticket, which he tendered, and that his exclusion from the train was therefore unjustifiable.

It has been held in a few cases that the offer to carry passengers at a less rate if tickets were procured, was in the nature of a proposal, like other proposals to enter into a contract, dependent for its acceptance upon the compliance with its condition; that it might be withdrawn at any time; that closing the office for the sale of tickets was such withdrawal; and that the offer carried with it no obligation on the part of the company to open an office, or to keep such office open for any length of time, it being merely an offer to make the deduction if the ticket should be procured. Crocker v. New London, Willimantic & Palmer Railroad, 24 Conn. 249. Bordeaux v. Erie Railway, 8. Hun, 579.

In a much larger number of cases, and with much better reason, it has been held that where the railroad undertakes to conduct its business by means of tickets, whether it requires, as it may, the possession of a ticket as a prerequisite to entering its cars, or whether it offers a deduction from the regular or advertised rate to one who shall procure a ticket in advance, it is a part of its duty to afford a reasonable opportunity to obtain its tickets. St. Louis, Alton & Terre Haute Railroad v. South, ubi supra. Chicago & Alton Railroad v. Flagg, 43 Ill. 364. Jeffersonville Railroad v. Rogers, 28 Ind. 1. Indianapolis, Peru & Chicago Railroad v. Rinard, ubi supra. Du Laurans v. St. Paul & Pacific Railroad, ubi supra.

Adopting on this part of the case the rule most favorable to the plaintiff, he was afforded a fair and reasonable opportunity to obtain a ticket. Delays must necessarily from time to time arise in the progress of a train from a variety of incidental circumstances, but at the stations everything may be definitely arranged with reference to the time when by the schedule the train is to depart. A traveller should be at the station sufficiently early to make the ordinary preparation for his journey according to this, and has a right to expect that other matters in which he is interested will be accommodated to the schedule arranged; that suitable persons will then be at the station to take charge of his baggage and to provide him with a ticket. The plaintiff had a reasonable opportunity to procure a ticket, if for a time sufficient to attend to the business, and up to the time when the train was advertised to depart, the ticket office was open and there was a proper person in attendance. The delay of the train did not enlarge his rights, nor could it entitle him to insist that at the station whence he was to start the office of the ticket seller should not be closed until after its arrival. Trains may be delayed for hours, especially during the storms of winter, from causes which cannot be controlled.

The ticket sellers, especially at the numerous small stations, must have imposed upon them various other duties; and it would not be a reasonable rule that should compel them to be at their posts sometimes for hours after the time when everything at the station should have been arranged for the departure. St. Louis, Alton & Terre Haute Railroad v. South, ubi supra.

The cases of Porter v. New York Central Railroad, 34 Barb. 353, Nellis v. New York Central Railroad, 30 N. Y. 505, and Chase v. New York Central Railroad, 26 N. Y. 523, all depend upon a statute of New York applicable to the New York Central Railroad Company alone, which requires it, at every station on its road where there is a ticket office, to keep the same open "at least one hour prior to the departure of each passenger train from such station." This has been held to mean its actual departure, and that road is necessarily governed by this positive provision of law.

The plaintiff, having no right to insist on being carried for the price of a ticket, and declining to pay the regular fare, was properly expelled from the train on its arrival at Windham, one of the stations on the road.

While the train stopped at Windham, and after the plaintiff's expulsion therefrom, he applied to the ticket seller for a ticket from Windham to Lawrence, tendered him the money therefor, which the ticket seller accepted, but, upon being informed of the fact by the conductor that the plaintiff had taken passage at Derry, and requested not to sell him a ticket, declined so to do, and tendered to the plaintiff his money, which the plaintiff declined to receive, at the same time stating "that he wished to go on that train." Under the direction of the conductor, the train started, leaving the plaintiff at the station, and he proceeded thence to Lawrence by carriage, a distance of twelve miles, there not being another train until five hours later.

If his original expulsion from the train were lawful, the plaintiff contends, on these facts, that the railroad company has no justification for refusing thereafter to transport him to Lawrence. The plaintiff did not seek to purchase a ticket from Windham, or offer the money therefor, except to prosecute his journey to Lawrence by the same train, which he had entered at Derry, and from which he had been rightfully expelled. Because tickets are sold from Windham to Lawrence, he contends that he desired to make a new contract at the regular price from that point, which the defendant, as a common carrier of passengers, had no right to refuse. Whatever might be his rights, if he had sought to purchase a ticket for or go by a subsequent train from Windham, he sought to continue a transaction which had begun by his entering the cars at Derry to go to Lawrence, when he had thus impliedly contracted to pay the regular fare for that journey, which included the distance from Windham. He was not in the situation of a passenger whose journey was to commence at Windham; he had already been brought from Derry, and the claim that he should have been carried by the same train from Windham, on paying from that point, was a claim that he might renew the same contract he had already broken, by paying for the distance over which the journey was yet to be prosecuted, while he made no payment for the distance over which he had already been transported. While the journey which he had begun and for which he had contracted to pay continued, he could not at his pleasure break it into two separate transactions. That which he sought to make had been included in his original contract, and the defendant was not obliged to readmit him to the same train, from which his expulsion had been proper, so long at least as he persisted in his violation of the contract he had originally made.

In O'Brien v. Boston & Worcester Railroad, 15 Gray, 20, it was held that a person, who had been properly ejected for nonpayment of fare at a place where there was no station, could not, by again entering the cars and tendering the fare, obtain the right to be carried by them.

If this case is distinguishable, as the plaintiff suggests, by the fact that the expulsion there was not at a station, and the reentry into the cars was at a place where the company was not bound to receive passengers, it is also distinguishable, and in this matter not in favor of the plaintiff, by the fact that the person there expelled offered to pay the entire fare for the journey which he had begun.

If the rightful expulsion take place at a station, it is not an unreasonable rule that the person expelled should pay the fare over the distance already travelled before he can purchase a ticket from such station for the remainder of the journey which will entitle him to be carried on the same train. This point was directly adjudged in Stone v. Chicago & Northwestern Railroad, 47 Iowa, 82, and in O'Brien v. New York Central & Hudson River Railroad, 80 N. Y. 236.

The case of State v. Campbell, 3 Vroom, 309, goes further than we are required to do in the present inquiry. The traveller there had an excursion ticket from New Brunswick to New York, good for a single day, which had passed, and the ticket was thus exhausted. He had also a regular ticket, which then entitled him to a passage between the same points. The latter ticket he kept in his pocket, refused to exhibit any other than the exhausted ticket, and was ejected from the cars at Newark, a station on the road. He then exhibited the regular ticket, which would have entitled him to the passage if previously shown, and claimed to re-enter the cars. His previous conduct was held to fully justify his exclusion from the same train.

The only other case cited by the plaintiff which requires notice is Nelson v. Long

Island Railroad, 7 Hun, 140. It was there held that a passenger put off the car for refusing to pay his fare cannot be taken back upon complying with the rule violated, unless he be at a regular station, and then and there obtain a ticket, or tender his fare. An examination of the case will show that the obtaining a ticket or tendering the fare referred to is a ticket or fare for the whole distance travelled and to be travelled, and not for the remainder of the proposed journey.

Judgment affirmed.

THE CHICAGO & NORTHWESTERN RAILWAY COMPANY v. ANNA WILLIAMS.

(55 Ill. 185.)

Appeal from the Circuit Court of Winnebago county; the Hon. Benjamin R. Sheldon, Judge, presiding.

This was an action on the case, brought in the court below by Anna Williams, a colored woman, against the Chicago & Northwestern Railway Company, to recover damages resulting to the plaintiff by reason of being excluded from the privileges of a car upon the defendants' road, which had been designated, under the rules of the company, for the exclusive use of ladies, and gentlemen accompanied by ladies, the only reason for such exclusion of the plaintiff being on account of her color.

Upon a trial, the plaintiff recovered a judgment for $200, from which the company appealed.

Mr. JUSTICE SCOTT delivered the opinion of the Court.

There is but one question of any considerable importance presented by the record in this case.

It is simply, whether a railroad company, which, by our statute, and the common law, is a common carrier of passengers, in a case where the company, by their rules and regulations, have designated a certain car in their passenger train for the exclusive use of ladies, and gentlemen accompanied by ladies, can exclude from the privileges of such car a colored woman, holding a first class ticket, for no other reason except her color.

The evidence in the case establishes these facts—that, as was the custom on appellants' road, they had set apart in their passenger trains a car for the exclusive use of ladies, and gentlemen accompanied by ladies, and that such a car, called the "ladies' car," was attached to the train in question. The appellee resided at Rockford, and being desirous of going from that station to Belvidere, on the road of appellants, for that purpose purchased of the agent of the appellants a ticket, which entitled the holder to a seat in a first class car on their road. On the arrival of the train at the Rockford station, the appellee offered and endeavored to enter the ladies' car, but was refused permission so to do, and was directed to go forward to the car set apart for and occupied mostly by men. On the appellee persisting on entering the ladies' car, force enough was used by the brakeman to prevent her. At the time she attempted to obtain a seat in that car, on appellants' train, there were vacant and unoccupied seats in it, for one of the female witnesses states that she, with two other ladies, a few moments afterwards, entered the same car at that station, and found two vacant seats, and occupied the same. No objection whatever was made, nor is it insisted any other existed, to appellee taking a seat in the ladies' car, except her color. The appellee was clad in plain and decent apparel, and it is not suggested, in the evidence or otherwise, that she was not a woman of good character and proper behavior.

It does not appear that the company had ever set apart a car for the exclusive use, or provided any separate seats for the use of colored persons who might desire to pass over their line of road. The evidence discloses that colored women sometimes rode in the ladies' car, and sometimes in the other car, and there was, in fact, no rule or regulation of the company in regard to colored passengers.

The case turns somewhat on what are reasonable rules, and the power of railroad companies to establish and enforce them.

It is the undoubted right of railroad companies to make all reasonable rules and regulations for the safety and comfort of passengers traveling on their lines of road. It is not only their right, but it is their duty to make such rules and regulations. It is alike the interest of the companies and the public that such rules should be established and enforced, and ample authority is conferred by law on the agents and servants of the companies to enforce all reasonable regulations made for the safety and convenience of passengers.

It was held, in the case of the Ill. Cent. R. R. Co. v. Whittemore, 43 Ill. 423, that, for a non-compliance with a reasonable rule of the company, a party might be expelled from a train at a point other than a regular station.

If a person on a train becomes disorderly, profane or dangerous and offensive in his conduct, it is the duty of the conductor to expel such guilty party, or at least to assign him to a car where he will not endanger or annoy the other passengers. Whatever rules tend to the comfort, order and safety of the passengers, the company are fully authorized to make, and are amply empowered to enforce compliance therewith.

But such rules and regulations must always be reasonable, and uniform in respect to persons.

A railroad company can not capriciously discriminate between passengers on account of their nativity, color, race, social position, or their political or religious beliefs. Whatever discriminations are made, must be on some principle, or for some reason, that the law recognizes as just and equitable, and founded in good public policy. What are reasonable rules is a question of law, and is for the court to determine, under all the circumstances in each particular case.

In the present instance, the rule that set apart a car for the exclusive use of ladies, and gentlemen accompanied by ladies, is a reasonable one, and the power of the company to establish it has never been doubted.

If the appellee is to be denied the privilege of the "ladies' car," for which she was willing to pay, and had paid, full compensation to the company, a privilege which is accorded alike to all women, whether they are rich or poor, it must be on some principle or under some rule of the company that the law would recognize as reasonable and just. If she was denied that privilege by the mere caprice of the brakeman and conductor, and under no reasonable rule of the company, or, what is still worse, as the evidence would indicate, through mere wantonness on the part of the brakeman, then it was unreasonable, and therefore unlawful. It is not pretended that there was any rule that excluded her, or that the managing officers of the company had ever given any directions to exclude colored persons from that car. If, however, there was such a rule, it could not be justified on the ground of mere prejudice. Such a rule must have for its foundation a better and a sounder reason, and one more in consonance with the enlightened judgment of reasonable men. An unreasonable rule, that affects the convenience and comfort of passengers, is unlawful, simply because it is unreasonable. The State v. Overton, 4 Zab. 435.

In the case of the West Chester & Philadelphia R. R. Co. v. Miles, 55 Penn. 209, it was admitted, that no one could be excluded from a carriage by a public carrier on account of color, religious belief, political relations or prejudice, but it was held, not to be an unreasonable regulation to seat passengers so as to preserve order and decorum, and prevent contacts and collisions arising from well known repugnances, and therefore a rule that required a colored woman to occupy a separate seat in a car furnished by the company, equally as comfortable and safe as that furnished for other passengers, was not an unreasonable rule.

Under some circumstances, this might not be an unreasonable rule.

At all events, public carriers, until they do furnish separate seats equal in comfort and safety to those furnished for other travelers, must be held to have no right to discriminate between passengers on account of color, race or nativity, alone.

We do not understand that the appellee was bound to go forward to the car set apart for and occupied mostly by men, when she was directed by the brakeman. It is a sufficient answer to say, that that car was not provided by any rule of the company for the use of women, and that another one was. This fact was known to the appellee at the time. She may have undertaken the journey alone, in view of that very fact, as women often do.

The above views dispose of all the objections taken to the instructions given by the court on behalf of the appellee, and the refusal of the court to give those asked on the part of the appellants, except the one which tells the jury that they may give damages above the actual damages sustained, for the delay, vexation and indignity to which the appellee was exposed, if she was wrongfully excluded from the car. If the party in such case is confined to the actual pecuniary damages sustained, it would, most often, be no compensation at all, above nominal damages, and no salutary effect would be produced on the wrong doer by such a verdict. But we apprehend, that if the act is wrongfully and wantonly committed, the party may recover, in addition to the actual damages, something for the indignity, vexation and disgrace to which the party has been subjected.

It is insisted, that the damages are excessive, in view of the slight injury sustained.

There is evidence from which the jury could find that the brakeman treated the appellee very rudely, and placed his hand on her and pushed her away from the car. The act was committed in a public place, and whatever disgrace was inflicted on her was in the presence of strangers and friends. The act was, in itself, wrongful, and without the shadow of a reasonable excuse, and the damages are not too high. The jury saw the witnesses, and heard their testimony, and with their findings we are fully satisfied.

Perceiving no error in the record, the judgment is affirmed.

Judgment affirmed.

Mr. JUSTICE SHELDON, having heard this cause in the court below, took no part in this decision.

BREESE, J. I am not prepared to assent to all the reasoning and conclusions of the above opinion, and I am further of opinion the damages are excessive.

D. C. TARBELL v. THE CENTRAL PACIFIC RAILROAD COMPANY OF CALIFORNIA.

(34 Cal. 616.)

Appeal from the District Court, Fourteenth Judicial District, Placer County.

The charging portion of plaintiff's complaint was as follows:

"Plaintiff avers that on the 29th day of January, A. D. 1867, plaintiff was at the Town of Auburn, and was desirous of going thence to the Town of Colfax, on the line of defendant's said road, and did then and there, to-wit: at the Town of Auburn, in said County of Placer, enter upon and into the regular passenger train of defendant, then and there passing between said Auburn and said Colfax, intending and contracting with defendant to be carried and conveyed by defendant as a passenger, for hire, from the Town of Auburn to the Town of Colfax, in said county. Plaintiff avers that he entered upon defendant's said train and car at the time and place set down in defendant's schedules and calls, and was a fit and proper person to be received thereon, and was received upon defendant's said car without hindrance or exception by defendant.

Plaintiff further avers, that after having been so received at Auburn, as aforesaid, by defendant, on its said regular train and cars as a passenger aforesaid, defendant proceeded and did carry and convey plaintiff on said cars and train from Auburn aforesaid, on said road, and toward said Colfax, a distance of about five miles.

"Plaintiff further avers, that after receiving and conveying plaintiff as aforesaid for said distance of five miles, and having thereby, by receiving and conveying him, contracted to carry him to Colfax, defendant, by its agents, servants, and employés, forcibly and scandalously, willfully and contemptuously, and to the great shame, scandal, and damage of plaintiff, disregarding its duty as a common carrier for hire, took hold of, wrongfully assaulted, and ejected plaintiff from its said train then and there passing over said road from Auburn to Colfax, and refused to carry him according to its said contract. Plaintiff avers that before the said acts of defendant in ejecting him from said train and cars, and before the wrongful acts of defendant's servants as aforesaid, he offered and tendered to defendant's servants and employés payment in full for said passage and carriage from said Auburn to Colfax. Plaintiff avers that defendant had full room and accommodations to carry plaintiff from said point at said time. Plaintiff avers that he was at said time proceeding from Auburn to Colfax in and about important business, and by reason of defendant's said acts he was unable to complete said journey, and was put to great loss, inconvenience and expense. Plaintiff further avers, that by reason of the wrongful acts of defendant, its servants, agents, and employés, as aforesaid, in assaulting and ejecting him from said train and cars as aforesaid, that he was greatly injured and wounded in his feelings, was scandalized and injured in his name, and was greatly wronged and injured. Plaintiff avers that by reason of the premises aforesaid he has been greatly wronged, injured, and damaged by defendant, to wit: in the sum of five thousand dollars, wherefore," etc.

The defendant demurred to the complaint on the ground among others, that it did not state facts sufficient to constitute a cause of action, which was overruled. The defendant's answer was a general traverse of the foregoing averments.

On the trial, which was by the Court with a jury, plaintiff proved (the defendant objecting and excepting thereto for irrelevancy and incompetency) that while on the defendant's moving train of passenger cars, at a point about five miles from Auburn, towards Colfax, he having entered the train at Auburn, he tendered to the Conductor of the train, upon the usual demand being made of him for his ticket or fare, the legal passenger fare chargeable between the Auburn and Colfax Railroad Stations, in the legal tender notes of the United States. The Conductor refused to accept the payment so tendered, and demanded that it be made in the gold or silver coin of the United States, and on the failure and refusal of plaintiff to make the payment as required, caused the train to be stopped and plaintiff to be ejected therefrom. Plaintiff had a verdict and judgment for five hundred dollars damages. The defendant moved for a new trial upon a settled statement of the evidence and rulings of the Court on demurrer and the admission of evidence, on grounds of alleged error in law occurring at the trial, that the verdict and judgment were against law, and that the verdict was excessive. The motion was denied, and defendant appealed from the judgment and the order of the Court denying a new trial.

By the Court, SANDERSON, J.:

In actions of this character it is not necessary that the plaintiff should allege a strictly legal tender of his fare. It was so held in the case of Pickford v. The Grand Junction Railway Company, 8 M. & Wels. 372. It is sufficient to allege that he was ready and willing and offered to pay the defendant such sum of money as it was legally entitled to charge. The transportation and payment of the fare are contemporaneous acts. If the plaintiff was ready and willing and offered to pay the legal fare when demanded by the Conductor of the train, the defendant was bound to carry him, provided there was room in the cars and the plaintiff was a fit person to be admitted. This results from the nature of the defendant's business, which makes it its duty to receive all persons as passengers who offer to become such, upon their offering to pay the legal fare. Whenever the performance of a duty or obligation is thus cast upon the one party in consequence of a contemporaneous act of payment by the other, it is sufficient if the latter is ready and willing to pay when the former is ready to undertake the duty. (Rawson v. Johnson, 1 East, 203.)

The complaint in this case might have been drawn with more directness and precision in this respect, but we are disposed to hold that the Court below did not err in overruling the demurrer. It would have been more certain had the amount of the fare been stated which the plaintiff offered to pay, and that the person to whom the offer was made was the Conductor in charge of the train; but we are not prepared to say that it is not sufficiently certain in its present form.

The point that the defendant was not bound to carry the plaintiff because the fare which he offered to pay was in legal tender notes, is not tenable. Conceding that a statute authorizing defendant to demand coin in payment of fare would be constitutional, no such statute exists, and there being no contract in writing stipulating for coin, we find nothing in the case which takes it out of the operation of the Act of Congress in relation to legal tender notes. Railroad fares are not taxes, and do not fall within the rule in Perry v. Washburn, 20 Cal. 318.

Whether the defendant could have legally

exacted payment in coin before the plaintiff was admitted into the cars and the journey commenced, is a question not involved in this case, and upon which we express no opinion. Having received the plaintiff and proceeded several miles upon the journey, the defendant must be held to have consented to receive in payment of the fare any good and lawful money which the plaintiff might tender when called upon for payment. The kind of money to be paid had then ceased to be an open question, for the contract was already made and in process of performance.

The verdict, however, was excessive. No special damages were alleged or proved. It was not pretended that this is a case for punitive damages, or that the business of the plaintiff suffered in any way by reason of his not being taken to Colfax. It does not appear whether the plaintiff proceeded on to Colfax or returned to Auburn after he was put out of the cars, or, whichever he did, if he did either, that he was put to any expense in doing it. Whether the plaintiff was going to Colfax upon urgent business or merely for pleasure, is not shown. In short, there is no evidence in the transcript which has any bearing upon the question of damages except the naked fact that he was put out of the cars at a point ten or twelve miles from the place of his destination, and about five from the place of his departure. Such being the only evidence bearing upon the question, we think the verdict greatly disproportionate to the injury proved, within the rule in Aldrich v. Palmer, 24 Cal. 513.

A new trial must be granted, unless the plaintiff elects, within fifteen days, to take a judgment for one hundred dollars, which sum we think amply sufficient compensation for the injury which he sustained.

So ordered.

EVERETT v. CHICAGO, R. I. & P. R. CO.

(69 Ia. 15, 28 N. W. 410.)

Appeal from Pottawattamie district court.

On the morning of August 18, 1881, the plaintiff took passage on defendant's railroad at a small station named Weston, intending to travel to Council Bluffs, a distance of 10 miles. He did not procure a passenger ticket, and the conductor of the train demanded 10 cents in addition to the ticket rate, which the plaintiff refused to pay. Thereupon the conductor caused the train to be stopped, and he forcibly ejected the plaintiff therefrom. This action was brought to recover damages for the alleged wrongful act of the conductor in removing the plaintiff from the train. A trial by jury resulted in a verdict and judgment for the defendant. Plaintiff appeals.

ROTHROCK, J. 1. It is provided by section 2 of chapter 68 of the Laws of 1874 (Miller's Code, 347) that "a charge of ten cents may be added to the fare of any passenger, where the same is paid upon the cars, if a ticket might have been procured within a reasonable time before the departure of the train." The ground upon which the plaintiff based his refusal to pay the 10 cents demanded by the conductor was that he was prevented from procuring a ticket because the ticket office was closed when he presented himself for the purpose of purchasing a ticket. The facts are that the plaintiff is the owner of a large farm some five miles from Weston. His residence is at Council Bluffs, and he made frequent visits to his farm, going by rail by the way of Weston. He knew that the defendant was authorized to collect 10 cents, in addition to the ticket rate, from passengers who neglected to purchase tickets at the station. Weston is a small and unimportant station at which an inconsiderable amount of business is done by the railroad company, either in freight or passenger traffic. As is usual at such places, the company keeps no assistant for the agent; and, when a train arrives, the agent leaves the ticket office, and goes upon the platform of the station to transact his business with the train; such as seeing to the loading of the mail on the train, the receipt and delivery of baggage and express packages, and the like. The plaintiff came in from his farm in the morning, and stopped at a store in the village until he heard the whistle of the train as it approached the station, when he went to the station, and arrived there just before the train came to a full stop. The ticket agent had the office open for a considerable time before the train arrived, and sold tickets to passengers, and he did not leave the office until the engine to which the train was attached had passed the office window, when he went on the platform to attend to his train duties. The train stops at that station only long enough to do the train business and allow passengers to get on and off the cars.

The court permitted all these facts to be shown to the jury, and charged the jury to the effect that if, under all these facts and circumstances, a reasonable time was given to passengers to purchase tickets before the departure of the train, the conductor was authorized to demand the extra 10 cents of the plaintiff. One of the instructions to the jury was as follows: "(6) The fact, if it is a fact, that the plaintiff applied at the defendant's ticket office at Weston to purchase a ticket at a time when it was closed, does not of itself alone necessarily show that opportunity was not given within a reasonable time before the departure of the train for the purchase of tickets; nor can it be said as matter of law, that the defendant had a right to close its ticket office as soon as the train arrived at the station. The question, what is a reasonable time for the procuring of tickets before the departure of trains from a station, depends principally on the requirements, convenience, and demands of the public at that particular station. It was the duty of the defendant to keep its ticket office open, and to keep a competent man there to sell tickets at such times as would reasonably, fairly, and fully accommodate the public in the matter of

procuring tickets. Regard should be had to the importance of the station, and the number of people who have occasion to purchase tickets there; and the ticket office should be kept open at such times as people in general who travel by rail are in the habit of repairing, and find it convenient to repair, to the station to purchase tickets and get aboard the train."

Counsel for appellant insist that this and other instructions given by the court to the jury are erroneous. They claim that, under a proper construction of the statute above cited, it was the duty of the railroad company to keep its ticket office open up to the time of the departure of the train; in other words, they claim that by the very terms of the statute the office must be kept open for the sale of tickets just so long as it is possible for passengers to purchase tickets, and board the train. Assuming this to be the meaning and intent of the statute, they contend that it was error for the court to submit to the jury the question whether, under the facts the office was kept open a reasonable time in which passengers might procure tickets. We do not think this position is sound. In our opinion, it was proper to allow the defendant to introduce evidence of the character of the station, and whether the facilities extended to the traveling public to purchase tickets were such as were required for the convenience of the public. It would be a most unreasonable requirement to impose upon the defendant the burden of employing two persons to attend to the station in order that the ticket office may be kept open for the one or two minutes which a train is required to stop at such a station, in order to accommodate the exceptional cases of passengers who may for any reason arrive at the station after the arrival of the train. Regard must be had to the orderly transactions of the business of the station, taking into consideration the necessary and proper facilities extended to persons having occasion to travel on the trains or transact other business with the company. It is absolutely necessary that the office should be open for business a sufficient time before the departure of the train, in order to enable passengers to procure their tickets, receive and count their change, if any, and prepare to board the train, without unnecessary interference with each other. But the language "before the departure of the train" does not require that the office shall remain open up to the instant the train moves off. The question is, might the passenger have procured a ticket within a reasonable time before the departure, and not up to the very moment when the wheels began to move?

2. Some complaint is made as to the place where the plaintiff was ejected from the cars. It appears that it was half a mile from a public crossing. It is not required in this state that, where a person may rightfully be ejected from a railroad train, it must be done at a station or public crossing. Brown v. Railroad Co., 51 Iowa, 235; S. C. 1 N. W. Rep. 487. In the case at bar all of the facts attending the removal of the plaintiff from the train, and the place where he was removed, were fairly submitted to the jury on what we regard as proper instructions; and the jury, in answer to a special interrogatory, found that the conductor did not act with malice, express or implied, towards plaintiff in ejecting him from the train. We think this finding was fully supported by the evidence.

3. The plaintiff offered to introduce evidence to the effect that the defendant's station was an unfit place for passengers to remain in waiting for trains because of the close proximity of a privy. The evidence was excluded, and plaintiff's counsel complain of this ruling of the court. We think it was correct. The plaintiff did not allege this as a reason why he did not go to the station and procure a ticket, and he made no such claim to the conductor. His sole ground of recovery was based upon the alleged fact that he could not procure a ticket because the office was closed.

We think the judgment of the district court should be affirmed.

THURSTON v. UNION PACIFIC RAILROAD COMPANY.

(4 Dillon 321, Fed. Cas. No. 14,019.)

Expulsion of Gamblers from Railway Trains.

It was alleged, and not denied, that plaintiff had purchased from the road, for fifty cents, a ticket for crossing the river on the transfer train, and that when the train was about starting he attempted to board it, but was prevented. He also purchased, for ninety cents, from the company, a ticket good on another road, but was forcibly ejected from the train, and obliged to remain in Omaha several days before he could safely get away, for which he asked $5,000 damages. The defendant admitted that the necessary force (but no more) was used to prevent his entering the train. It was claimed that he had been for years a notorious gambler—a "monte-man," so-called—and was then engaged in traveling on the defendant's road for the purpose of plying that calling, and was about to enter the train for that purpose. This the plaintiff denied. The question was, whether the defendant has the right to exclude gamblers from its trains? Upon this point the charge of the court is given below.

DUNDY, J. The railway company is bound, as a common carrier, when not overcrowded, to take all proper persons who may apply for transportation over its line, on their complying with all reasonable rules of the company. But it is not bound to carry all persons at all times, or it might be utterly unable to protect itself from ruin. It would not be obliged to carry one whose ostensible business might be to injure the line: one fleeing from justice; one going upon the train to assault a passenger, commit larceny or robbery, or for interfering with the proper regulations of the company, or for gambling in any form, or committing any crime; nor is it bound to carry persons infected with contagious diseases, to the danger of other

passengers. The person must be upon lawful and legitimate business. Hence defendant is not bound to carry persons who travel for the purpose of gambling. As gambling is a crime under the state laws, it is not even necessary for the company to have a rule against it. It is not bound to furnish facilities for carrying out an unlawful purpose. Necessary force may be used to prevent gamblers from entering trains, and if found on them engaged in gambling, and refusing to desist, they may be forcibly expelled.

Whether the plaintiff was going upon the train for gambling purposes, or whether, from his previous course, the defendant might reasonably infer that such was his purpose, is a question of fact for the jury. If they find such to have been the case, they cannot give judgment for any more than the actual damage sustained.

After the ticket is purchased and paid for, the railroad company can only avoid compliance with its part of the contract by the existence of some legal cause or condition which will excuse it. The company should, in the first case, refuse to sell tickets to persons whom it desires and has the right to exclude from the cars, and should exclude them if they attempt to enter the car without tickets. If the ticket has been inadvertently sold to such person and the company desires to rescind the contract for transportation, it should tender the return of the money paid for the ticket. If it does not do this, plaintiff may, under any circumstances, recover the amount of his actual damage, viz.: what he paid for the ticket, and, perhaps, necessary expenses of his detention.

In this case the jury rendered a verdict for actual damages ($1.74) and costs, the company not having tendered the money.

Judgment on verdict.

CHARLES FREDERICK v. THE MARQUETTE, HOUGHTON & ONTONAGON RAILROAD CO.

(37 Mich. 342.)

Error to Marquette. (Williams J.) June 15. —Oct. 16.

Case. Plaintiff brings error. Affirmed.

MARSTON, J. This is an action on the case brought to recover damages for being unlawfully ejected and put off a train of cars by the conductor of the train. The evidence on the part of the plaintiff tended to show that on the evening of January 29th, 1876, he went to the regular ticket office of the defendant at Ishpeming and asked for a ticket to Marquette, presenting to the agent in charge of the office one dollar from which to make payment therefor; that the agent received the money, handed plaintiff a ticket and some change, retaining sixty-five cents for the ticket, the regular fare to Marquette; that plaintiff did not attempt to read what was on his ticket, nor did he count the change received back until next morning or notice it until then; that he went on board the train bound for Marquette, and after the train left the station the conductor took up the ticket, giving him no check to indicate his destination, but at the time telling him his ticket was only for Morgan; that when the train reached Morgan the conductor told the plaintiff he must get off there or pay more fare; that if he wanted to go to Marquette he must pay thirty-five cents more. Plaintiff insisted he had paid his fare and purchased his ticket to Marquette and refused to pay the additional fare, whereupon he was ejected from the train, etc. On the part of the defendant evidence was given tending to show that the ticket purchased and presented to the conductor was in fact a ticket for Morgan and not for Marquette. Under the pleadings and charge of the court other evidence in the case and questions sought to be raised need not be referred to, and as the real gist of the action was for the expulsion from the cars by the conductor, the above statement is deemed sufficient to a proper understanding of the case.

An erroneous impression seems to prevail with many that where the conductor of a passenger train ejects therefrom a passenger who has paid his fare to a point beyond, but has lost or mislaid his ticket, or whose ticket does not entitle him to proceed farther, or upon that train, that the company is liable in an action at law for all damages which the party may in any way have sustained in consequence of the delay, mortification, injury to his health or otherwise, and that the passenger is under no obligation to prevent or lessen the damages by payment of the necessary additional fare to entitle him to complete his journey without interruption. Although such damages were claimed in this case, under our present view it will be unnecessary to discuss this question any farther at present.

What then is the duty of the conductor in a case like the present? and what are the passenger's rights? In considering these questions we cannot shut our eyes to the manner and method which railroad companies and common carriers generally have adopted in order to sucessfully carry on their business. The view to be taken of these questions must be a practical one, even although it may work, perhaps, injustice in some special and particular cases, resulting however in great part if not wholly from other causes. In Day v. Owen, 5 Mich., 521, Mr. Justice Manning in speaking of the rules and regulations of common carriers, said "all rules and regulations must be reasonable and, to be so, they should have for their object the accommodation of the passengers. Under this head we include everything calculated to render the transportation most comfortable and least annoying to passengers generally; not to one, or two, or any given number carried at a particular time, but to a large majority of the passsengers ordinarily carried. Such rules and regulations should also be of a permanent nature, and not be made for a particular occasion or emergency."

It is within the common knowledge or ex-

perience of all travelers that the uniform and perhaps the universal practice is for railroad companies to issue tickets to passengers with the places designated thereon from whence and to which the passenger is to be carried; that these tickets are presented to the conductor or person in charge of the train and that he accepts unhesitatingly of such tickets as evidence of the contract entered into between the passenger and his principal. It is equally well known that the conductor has but seldom if ever any other means of ascertaining, within time to be of any avail, the terms of the contract, unless he relies upon the statement of the passenger, contradicted as it would be by the ticket produced, and that even in a very large majority of cases, owing to the amount of business done, the agent in charge of the office, and who sold the ticket, could give but very little if any information upon the subject. That this system of issuing tickets, in a very large majority of cases works well, causing but very little, if any annoyance to passengers generally, must be admitted. There of course will be cases, where a passenger who has lost his ticket, or where through mistake the wrong ticket has been delivered to him, will be obliged to pay his fare a second time in order to pursue his journey without delay, and if unable to do this, as will sometimes be the case, very great delay and injury may result therefrom. Such delay and injury would not be the natural result of the loss of a ticket or breach of the contract, but would be, at least in part, in consequence of the pecuniary circumstances of the party. Such cases are exceptional, and however unfortunate the party may be who is so situate, yet we must remember that no human rule has ever yet been devised that would not at times injuriously affect those it was designated to accommodate. This method of purchasing tickets is also of decided advantage to the public in other respects; it enables them to purchase tickets at times and places deemed suitable, and to avoid thereby the crowds and delays they would otherwise be subject to. Were no tickets issued and each passenger compelled to pay his fare upon the cars, inconvenience and delay would result therefrom, or the officers in charge of the train to collect fares would be increased in numbers to an unreasonable extent, while at fairs and places of public amusement where tickets are issued and sold entitling the purchaser to admission and a seat, we can see and appreciate the confusion which would exist if no tickets were sold; or if the party presenting the ticket were not upon such occasions to be bound by its terms.

How, then, is the conductor to ascertain the contract entered into between the passenger and the railroad company where a ticket is purchased and presented to him? Practically there are but two ways,—one, the evidence afforded by the ticket; the other, the statement of the passenger contradicted by the ticket. Which should govern? In judicial investigations we appreciate the necessity of an obligation of some kind and the benefit of a cross-examination. At common law parties interested were not competent witnesses, and even under our statute the witness is not permitted, in certain cases, to testify as to facts which, if true, were equally within the knowledge of the opposite party, and he cannot be procured. Yet here would be an investigation as to the terms of a contract, where no such safeguards could be thrown around it, and where the conductor, at his peril, would have to accept of the mere statement of the interested party. I seriously doubt the practical workings of such a method, except for the purpose of encouraging and developing fraud and falsehood, and I doubt if any system could be devised that would so much tend to the disturbance and annoyance of the traveling public generally. There is but one rule which can safely be tolerated with any decent regard to the rights of railroad companies and passengers generally. As between the conductor and passenger, and the right of the latter to travel, the ticket produced must be conclusive evidence, and he must procure it when called upon, as the evidence of his right to the seat he claims. Where a passenger has purchased a ticket and the conductor does not carry him according to its terms, or, if the company through the mistake of its agent, has given him the wrong ticket, so that he has been compelled to relinquish his seat, or pay his fare a second time in order to retain it, he would have a remedy against the company for a breach of the contract, but he would have to adopt a declaration differing essentially from the one resorted to in this case.

We have not thus far referred to any authorities to sustain the views herein taken. If any are needed the following, we think, will be found amply sufficient, and we do not consider it necessary to analyze or review them. Townsend v. N. Y. C. & H. R. R. R. Co. 56 N. Y. 298; Hibbard v. N. Y. & E. R. R. 15 N. Y. 470; Bennett v. N. Y. C. & H. R. R. 5 Hun. 600; Downs v. N. Y. & N. H. R. R. 36 Conn. 287; C. B. & Q. R. R. v. Griffin 68 Ill. 499; Pullman P. C. Co. v. Reed 75 Ill. 125; Shelton v. Lake Shore etc. Ry. Co. 29 Ohio St. 214.

I am of opinion that the judgment should be affirmed, with costs.

COOLEY, C. J., concurred.

GRAVES, J. By mistake the company's ticket agent issued and plaintiff accepted a ticket covering a shorter distance than that bargained and paid for; and having ridden under it the distance which it authorized and refusing to repay for the space beyond, the plaintiff was removed from the cars.

This removal may or may not have constituted a cause of action, but it is not the cause of action charged. The declaration sets up that plaintiff's ticket was a proper one for the whole distance and that he was removed in violation of the right which the ticket made known to the conductor.

There was no proof of the case alleged,

and I agree therefore in affirming the judgment.

CAMPBELL, J. The plaintiff's cause of action in this case was for the failure of the company to carry him to a destination to which he had paid the passage money, and the immediate occasion for his removal from the cars was that he was given a wrong ticket, and was not furnished with such a one as the conductor was instructed to recognize as entitling him to the complete carriage. His declaration should have been framed on this theory. Had it been so framed I am not prepared to say that he may not have had a right of action for more than the difference in the passage money.

But as he counted on a failure of the conductor to respect a correct ticket, and it appears that the conductor gave him all the rights which the ticket produced called for, there was no cause of action made out under the declaration, and the rule of damages need not be considered. I concur in affirming the judgment.

ROBERT RAMSDEN & WIFE v. BOSTON & ALBANY RAILROAD COMPANY.

(104 Mass. 117.)

Tort for an assault and battery. The declaration was as follows: "And the plaintiffs say that Ellen Ramsden, the female plaintiff, on August 7, 1868, got on the cars belonging to the defendants, at Newton Corner in the county of Middlesex, to go to West Newton, between the hours of nine and ten in the evening; that on demand of one Twitchell, conductor of the train, a servant of the defendants, in their employ, she paid him fifteen cents for her fare to West Newton; that soon thereafter said Twitchell again called upon her for her fare, and she declined to pay him, as she had once paid him, when said Twitchell, using gross, insulting and abusive language, attempted to extort said fare from her and then grossly, wantonly and publicly assaulted her person, to force said fare from her, and pulled, wrenched and twisted her parasol from her hands, against her will and efforts to retain it, to hold as security for the payment of said fare; that said plaintiff Ellen was thereby put in great fear both in body and mind, and was made sick, and thereby, being with child, a miscarriage was caused, and she was imprisoned for the space of seven weeks, and was compelled to pay fifty dollars for medical attendance, and said plaintiff Robert thereby lost the services of his said wife Ellen for said seven weeks, of the value of fifty dollars; to the damage of the plaintiffs, as they say, in the sum of one thousand dollars." The answer denied each and every allegation of the declaration, and alleged that "if any person did the acts complained of, it was not as the defendants' servant or agent, or under such instructions that they are in any manner responsible for his acts or omissions." Trial in the superior court, before Reed, J., who made the following report to this court:

"This is an action of tort. The pleadings make a part hereof. The plaintiffs introduced evidence tending to show that the female plaintiff got on board the defendants' cars at Newton Corner, for the purpose of going to West Newton in an evening train; that she paid the fare to the conductor; that afterwards the conductor demanded the fare again; that she said she had before paid it; that the conductor told her she lied; that the conversation between them was in a loud tone; that the attention of people in the cars was attracted by it; that she was confused and shamed and excited by it; that the conductor demanded of her that she should give him her parasol to keep as security, or as payment for the fare; that she refused; that he took hold of it, and after somewhat of a struggle took it away from her; and that, by reason of this, the said plaintiff, a few days afterwards, was prematurely delivered of a child, and had suffered much in health.

"After the testimony for the plaintiffs was concluded, the judge announced to the counsel that at the conclusion of the case, whenever that should be, the rulings would be as follows; and that, after hearing them, the counsel upon the one side or the other might proceed or not with the case to the jury, as they might elect. These are the rulings: 'Upon the pleadings, the action is tort in the nature of trespass for an assault. In order to maintain the action, the plaintiffs must show that an assault was committed upon the female plaintiff. A conductor, by virtue of his implied authority as such, that being the only authority shown in this case, has no right to seize articles of property belonging to a passenger for the purpose of thus enforcing the payment of fare. And if a conductor does this, or attempts to do this, and, in so doing, and for the sole purpose of seizing such property, commits an assault on a passenger, the corporation is not responsible in trespass for such acts.' Upon the announcement of these rulings, with the foregoing statement made by the judge to the counsel, the plaintiffs' counsel consented to a verdict for the defendants."

GRAY, J. A railroad corporation is liable, to the same extent as an individual would be, for an injury done by its servant in the course of his employment. Moore v. Fitchburg Railroad Co. 4 Gray, 465. Hewitt v. Swift, 3 Allen, 420. Holmes v. Wakefield, 12 Allen, 580. If the act of the servant is within the general scope of his employment, the master is equally liable, whether the act is wilful or merely negligent; Howe v. Newmarch, 12 Allen, 49; or even if it is contrary to an express order of the master. Philadelphia & Reading Railroad Co. v. Derby, 14 How. 468.

The conductor of a railroad train, from the necessity of the case, represents the corporation in the control of the engine and cars, the regulation of the conduct of the passengers as well as of the subordinate servants of the corporation, and the collection of fares. He may even eject a passenger

for not paying fare. O'Brien v. Boston & Worcester Railroad Co. 15 Gray, 20. It has been adjudged by this court that if, in the exercise of his general discretionary authority, he wrongfully ejects a passenger who has in fact paid his fare; or uses excessive and unjustifiable force in ejecting a passenger who has not paid his fare, and injures him by a blow or kick, or by compelling him to jump off while the train is in motion; in either case, the corporation is liable. Moore v. Fitchburg Railroad Co., Hewitt v. Swift, and Holmes v. Wakefield, above cited.

We are all of opinion that this case cannot be distinguished in principle from those just mentioned. The use of unwarrantable violence in attempting to collect fare of the plaintiff was as much within the scope of the conductor's employment as the exercise or threat of unjustifiable force in ejecting a passenger from the cars. Neither the corporation nor the conductor has any more lawful authority to needlessly kick a passenger or make him jump from the cars when in motion, than to wrest from the hands of a passenger an article of apparel or personal use, for the purpose of compelling the payment of fare. Either is an unlawful assault; but if committed in the exercise of the general power vested by the corporation in the conductor, the corporation, as well as the conductor, is liable to the party injured. In Monument National Bank v. Globe Works, 101 Mass. 59, Mr. Justice Hoar said, "No corporation is empowered by its charter to commit an assault and battery; yet it has ferquently been held accountable in this Commonwealth for one committed by its servants."

The ruling of the learned judge who presided at the trial, that if the conductor, in seizing, or attempting to seize, articles of property belonging to a passenger, for the purpose of thus enforcing the payment of fare, committed an assault upon the passenger, the corporation was not responsible for such acts, was therefore eroneous.

Verdict set aside.

STANTON BRADSHAW vs. SOUTH BOSTON RAILROAD COMPANY.

(135 Mass. 407.)

Suffolk, March 24.—Sept. 7, 1883. DEVENS and W. ALLEN, JJ., absent.

Tort for being expelled from one of the defendant's cars. Trial in Superior Court, without a jury, before Colburn, J., who reported the case for the determination of this court, in substance as follows:

The defendant is a common carrier of passengers, for hire, owning lines of street cars between South Boston and Boston proper, and, among others, one running over the Federal Street Bridge, between Boston and City Point in South Boston by what is called the Bay View route, and another running over Dover Street Bridge between Boston and said City Point by way of Broadway. None of the Dover Street cars run over the Bay View route, and none of the Bay View cars run over Dover Street. When a passenger on the Bay View line wishes to enter the city by way of Dover Street, it is the practice of the defendant, after he has paid his fare and arrived at the proper place for changing cars, to give him a check, which states that it is good, only on the day of its date, for one continuous ride, for Bay View passengers, from Dorchester Avenue to the Providence Depot. When a passenger on the Dover Street line wishes to go to some place in South Boston on the Bay View line, it is the practice, after he has paid his fare and arrived at the proper place for changing cars, for the defendant to give him a check, which states that it is good, only on the day of its date, for one continuous ride from Dorchester Avenue to City Point via Bay View. The upper left quarter and the lower right quarter of the first mentioned checks are colored red, and the corresponding quarters of the other checks are colored yellow. The plaintiff was familiar with the practice above mentioned, and had received and used such checks, but had never read them, though able to read, and had never noticed the difference in the color of the checks.

In the afternoon of May 15, 1881, the plaintiff entered one of the Bay View cars of the defendant at the corner of Eighth Street and Dorchester Street in South Boston, intending to go to the Corner of Dover Street and Washington Street in Boston, and thence over the Metropolitan Horse Railroad to some point on that line. He paid his fare on the defendant road, and also sufficient to pay for a transfer check to the Metropolitan road which he received in due form. He told the conductor that he wished for a check to take him over the Dover Street line, which the conductor promised to give him when they arrived at the proper place for changing cars. At the corner of Dorchester Avenue and Broadway he left said car, and, as he left, the conductor handed him the last-named check, by mistake, in place of the first-named. After waiting a short time, a Dover Street car came along, which he entered, and rode as far as the bridge, when the conductor of the car came for his fare, and he tendered him said check. The conductor refused to accept it, (though the plaintiff informed him of the circumstances under which he received it, as above stated,) and required him to pay a fare, or leave the car. The plaintiff refused to pay a fare, and was forced by said conductor to leave the car. No unnecessary force was used.

Upon these facts, the judge ruled that the plaintiff was not entitled to maintain his action, and found for the defendant.

C. ALLEN, J. It may be assumed, as the view most favorable to the plaintiff, that the defendant was bound by an implied contract to give him a check showing that he was entitled to travel in the second car, and that it failed to do so; in consequence

of which he was forced to leave the second car. It does not appear that the defendant had any rule requiring conductors to eject passengers under such circumstances. We may, however, take notice of the fact that it is usual for passengers to provide themselves with tickets or checks, showing their right to transportation, or else to pay their fare in money. It was the practice for passengers on the defendant's road to receive and use such checks; and the plaintiff intended to conform to this practice.

The conductor of a street railway car cannot reasonably be required to take the mere word of a passenger that he is entitled to be carried by reason of having paid a fare to the conductor of another car; or even to receive and decide upon the verbal statements of others as to the fact. The conductor has other duties to perform, and it would often be impossible for him to ascertain and decide upon the right of the passenger, except in the usual, simple and direct way. The checks used upon the defendant's road were transferable, and a proper check, when given, might be lost or stolen, or delivered to some other person. It is no great hardship upon the passenger to put upon him the duty of seeing to it, in the first instance, that he receives and presents to the conductor the proper ticket or check; or, if he fails to do this, to leave him to his remedy against the company for a breach of its contract. Otherwise, the conductor must investigate and determine the question, as best he can, while the car is on its passage. The circumstances would not be favorable for a correct decision in a doubtful case. A wrong decision in favor of the passenger would usually leave the company without remedy for the fare. The passenger disappears at the end of the trip; and, even if it should be ascertained by subsequent inquiry that he had obtained his passage fraudulently, the legal remedy against him would be futile. A railroad company is not expected to give credit for the payment of a single fare. A wrong decision against the passenger, on the other hand, would subject the company to liability in an action at law, and perhaps with substantial damages. The practical result would be, either that the railroad company would find itself obliged in common prudence to carry every passenger who should claim a right to ride in its cars, and thus to submit to frequent frauds, or else, in order to avoid this wrong, to make such stringent rules as greatly to incommode the public, and deprive them of the facilities of transfer from one line to another, which they now enjoy.

It is a reasonable practice to require a passenger to pay his fare, or to show a ticket, check, or pass; and, in view of the difficulties above alluded to, it would be unreasonable to hold that a passenger, without such evidence of his right to be carried, might forcibly retain his seat in a car, upon his mere statement that he is entitled to a passage. If the company has agreed to furnish him with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract; but he is bound to yield, for the time being, to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way. It is easy to perceive that, in a moment of irritation or excitement, it may be unpleasant for the passenger who has once paid to submit to an additional exaction. But, unless the law holds him to do this, there arises at once a conflict of rights. His right to transportation is no greater than the right and duty of the conductor to enforce reasonable rules, and to conform to reasonable and settled customs and practices, in order to prevent the company from being defrauded; and a forcible collision might ensue. The two supposed rights are in fact inconsistent with each other. If the passenger has an absolute right to be carried, the conductor can have no right to require the production of a ticket or the payment of fare. It is more reasonable to hold that, for the time being, the passenger must bear the burden which results from his failure to have a proper ticket. It follows that the plaintiff was where he had no right to be, after his refusal to pay a fare, and that he might properly be ejected from the car.

This decision is in accordance with the principle of the decisions in several other States, as shown by the cases cited for the defendant; and no case has been brought to our attention holding the contrary.

Judgment for the defendant.

WILLIAM TOWNSEND, Respondent, vs. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

(56 N. Y. 295.)

Appeal from judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment in favor of plaintiff entered upon a verdict, and affirming an order denying a motion for a new trial.

The nature of the action and the material facts are stated in the opinion.

GROVER, J. This action was brought by the plaintiff to recover damages for an assault upon and forcibly ejecting him from its car, at Staatsburg, a station on defendant's road between Poughkeepsie and Rhinebeck.

The jury by their verdict have found that the plaintiff purchased a ticket at the station at Sing Sing, for Rhinebeck; that with this ticket he went on board a train from New York, going no farther north than Poughkeepsie; that after this train passed Peekskill the conductor called for tickets and the plaintiff handed his to him, which he took and retained, giving to the plaintiff no check or other evidence showing any right to a passage upon any train of the defendant; nor did the plaintiff ask for a return of his ticket or for any such

evidence. Upon the arrival of the train at Poughkeepsie, where it stopped, the plaintiff got out and waited at the station until another train arrived from New York, which was going to Albany, stopping at Rhinebeck. The plaintiff got into and seated himself in this train; and after it started the conductor called upon him for his ticket; in reply to which the plaintiff told him that he had purchased a ticket from Sing Sing to Rhinebeck, which the conductor of the other train had taken and had not given back to him; some of the passengers told the conductor that the plaintiff had had such a ticket. The conductor told the plaintiff that it was his duty in case he had no ticket to collect the fare, and that the other conductor would make it right with him. The plaintiff refused to pay fare, and the conductor told him he must leave the train. This the plaintiff refused to do, insisting upon his right to a passage to Rhinebeck upon the ticket which the conductor of the other train had taken. Upon the arrival of the train at Staatsburg, a regular station, the plaintiff still refusing to pay fare or leave the train upon request, was taken hold of and such force used as was necessary to overcome his resistance, and ejected from the car. This was the injury for which the recovery was had.

The court, among other things, charged the jury that tne conductor seemed to have done no more than his duty to the company as between him and the company; but at the same time that did not excuse the company for the wrongful act of the other conductor—for which act they were responsible. The defendant's counsel requested the court to charge the jury that this was not a case for punitive or exemplary damages. The court declined so to charge, and in reply said: "I am inclined to think it is a case where the jury are not restricted to actual injuries—in other words, to compensatory damages." To this the counsel for the defendant excepted. This exception was well taken. It must be kept in mind that the injury for which a recovery was sought was the forcible ejection of the plaintiff from the car by the conductor of the train, not the wrongful taking from the plaintiff of his ticket by the conductor of the other train. The latter was regarded as material, only as making the former act wrongful as against the plaintiff. The court, in substance, charged that in putting the plaintiff off the car the conductor acted in what he believed was the performance of his duty to the company. This being so, it is clear that no punitory damages could have been recovered against him had he been sued instead of the company. In Hamilton v. The Third Avenue Railroad Co. (53 N. Y., 25) it was held by this court that a master was not liable for punitory damages for the act of his servant, done under circumstances which would give no such right to the plaintiff as against the servant had the suit been against him instead of the master. Caldwell v. The New Jersey Steamboat Co. (47 N. Y., 282) is not at all in conflict with this; nor does it hold that a master is liable to punitory damages for the wrongful act of his servant if free from any wrong of his own. It does hold that a corporation is liable for punitory damages for its own torts and breaches of duty. This error requires a reversal of the judgment and a new trial.

But there is another important question in the case which will necessarily arise upon a retrial, and which was raised by an exception taken upon the trial already had: that is whether the plaintiff had a right to go upon another train and use force to retain a seat there; refusing to pay fare, having no evidence of any right to a passage, by reason of the conductor of the other train having wrongfully taken and retained his ticket.

It is insisted by the counsel for the plaintiff that this question was decided in favor of the plaintiff in Hamilton v. Third Avenue Railroad Company (supra). This question was not involved or decided in that case. There the plaintiff testified that when the car upon which he had paid his fare to the City Hall stopped at an intermediate station, its conductor told the passengers to change cars; that before going on board the car from which he was ejected, he inquired of its conductor whether any transfer ticket was necessary; that the conductor told him it was not; that if he came from the other car he could go on board of the one from which he was ejected. This was equivalent to an assurance by that conductor that he could ride upon the car under his control, without further payment of fare or evidence of a right so to do. It was in reference to this testimony that it was said that the company would be liable for his wrongful ejection from the car by the conductor who had given this assurance. But testimony was given by the defendant in direct conflict with this. The judge erroneously charged the jury that, assuming the truth of the latter testimony, and that the conductor acted in good faith in putting the plaintiff off the car, still he was entitled to recover of the company punitory damages if he had paid fare to the City Hall upon the other car. For this error the judgment was reversed and a new trial ordered by this court.

In Hibbard v. The New York and Erie Railroad Co. (15 N. Y., 455) it was held by this court that a railroad company had the right to establish reasonable regulations for the government of passengers upon its trains, and forcibly eject therefrom those who refused to comply with such regulations. Surely, a regulation requiring passengers either to present evidence to the conductor of a right to a seat, when reasonably required so to do, or to pay fare, is reasonable; and for non-compliance therewith such passenger may be excluded from the car. The question in this case is whether a wrongful taking of a ticket from a passenger by the conductor of one train, exonerates him from compliance with the regulation in another train, on which he

wishes to proceed upon his journey. I am unable to see how the wrongful act of the previous conductor can at all justify the passenger in violating the lawful regulations upon another train. For the wrongful act in taking his ticket he has a complete remedy against the company. The conductor of the train upon which he was was not bound to take his word that he had had a ticket showing his right to a passage to Rhinebeck, which had been taken up by the conductor of the other train. His statement to that effect was wholly immaterial, and it was the duty of the conductor to the company to enforce the regulation, as was rightly held by the trial judge, by putting the plaintiff off, in case he persistently refused to pay fare. The question is, whether under the facts found by the jury, resistance in the performance of this duty was lawful on the part of the plaintiff. If so, the singular case is presented, where the regulation of the company was lawful, where the conductor owed a duty to the company to execute it, and at the same time the plaintiff had the right to repel force by force and use all that was necessary to retain his seat in the car. Thus, a desperate struggle might ensue, attended by very serious consequences, when both sides were entirely in the right, so far as either could ascertain. All this is claimed to result from the wrongful act of the conductor of another train, in taking a ticket from the plaintiff, for which wrong the plaintiff had a perfect remedy, without inviting the commission of an assault and battery by persisting in retaining a seat upon another train in violation of the lawful regulations by which those in charge were bound to govern themselves. It was conceded by the counsel, upon the argument, that one buying a ticket, say from Albany for Buffalo, which was wrongfully taken from him by a servant of the company, and who had once been put off for a refusal to pay fare, would not have the right to go upon other trains going to Buffalo, and if forcibly ejected therefrom maintain actions against the company for the injuries so inflicted. The reason why he could not, given by the counsel, was, that being once ejected was notice that he could not have a seat upon the ticket which he claimed had been taken from him. But when the conductor in charge of the train explicitly tells him that he cannot retain his seat upon that ticket, that he must pay fare or leave the car, does it not amount to the same thing? He then knows that he cannot proceed upon the ticket taken, but must resort to his remedy the same as though he had been ejected. If, after this notice, he waits for the application of force to remove him, he does so in his own wrong; he invites the use of the force necessary to remove him; and if no more is applied than is necessary to effect the object, he can neither recover against the conductor or the company therefor. This is the rule deducible from the analogies of the law. No one has a right to resort to force to compel the performance of a contract made with him by another. He must avail himself of the remedies the law provides in such case. This rule will prevent breaches of the peace instead of producing them; it will leave the company responsible for the wrong done by its servant without aggravating it by a liability to pay thousands of dollars for injuries received by an assault and battery, caused by the faithful efforts of its servants to enforce its lawful regulations.

The judgment appealed from must be reversed and a new trial ordered, costs to abide event.

All concur; FOLGER and ANDREWS, JJ., concurring on the first ground; CHURCH, Ch. J., concurring on last ground stated in opinion.

Judgment reversed.

IRA WEYMOUTH, Surviving Partner, vs. PENOBSCOT LOG DRIVING COMPANY.

(71 Me. 29.)

Penobscot. Opinion Februrary 13, 1880.

On exceptions and motion to set aside the verdict.

An action on the case to recover damages of the defendant corporation for carelessly and negligently preventing the plaintiffs from seasonably delivering 751,290 feet of spruce logs, and 48,780 feet of pine logs, cut and hauled by them in the winter of 1872-3, on landings on the stream between Caribou lake, and Chesuncook lake, at the outlet of Chesuncook lake, in consequence of which 600,000 feet of the plaintiff's logs were not driven to market in the year 1873, but were left behind in an exposed position, where many were lost, and there was a great shrinkage in quantity and quality.

The writ is dated December 8, 1877.

Plea, general issue.

The verdict was for plaintiff for $1496.51, and the defendants move to set the same aside, as against law, and against evidence and the weight of evidence. The defendants also allege exceptions to refusals of the presiding judge to give certain requested instructions.

The following are the provisions of the charter of the defendant corporation referred to in the argument of counsel and opinion of the court.

"An act to incorporate the Penobscot Log Driving Company: Section 1. That Ira Wadleigh, Samuel P. Strickland, Hastings Strickland, Isaac Farrar, William Emerson, Amos M. Roberts, Leonard Jones, Franklin Adams, James Jenkins, Aaron Babb and Cyrus S. Clark, their associates and successors, be, and they are hereby made and constituted a body politic and corporate, by the name and style of the Penobscot Log Driving Company, and by that name may sue and be sued, prosecute and defend, to final judgment and execution, both in law and in equity; and may make and adopt all necessary regulations and by-laws not repugnant to the constitution and

laws of this State and may adopt a common seal, and the same may alter, break and renew at pleasure; and may hold real and personal estate not exceeding the sum of fifty thousand dollars at any one time and may grant and vote money; (and said company may drive all logs and other timber that may be in the west branch of Penobscot river between the Chesuncook dam and the east branch to any place at or above the Penobscot boom, where logs are usually rafted, at as early a period as practicable. And said company may for the purpose aforesaid clear out and improve the navigation of the river between the points aforesaid, remove obstructions, break jams and erect booms where the same may be lawfully done, and shall have all the powers and privileges and be subject to all the liabilities incident to corporations of a similar nature."

"Section 3. Every owner of logs or other timber which may be in said west branch between said Chesuncook dam and said east branch or which may come therein during the season of driving and intended to be driven down said west branch, shall on or before the fifteenth day of May in that year, file with the clerk a statement in writing, signed by such owner or owners, his or their authorized agent, of all such logs or timber, the number of feet, board measure, of all such logs or timber, and the marks thereon, and the directors or one of them shall require such owner or owners or agents presenting such statement to make oath that the same is, in his or their judgment and belief, true, which oath the directors or either of them are hereby empowered to administer, And if any owner shall neglect or refuse to file a statement in the manner herein prescribed, the directors may assess such delinquent or delinquents for his or their porportion of such expenses, such sum or sums, as may be by the directors considered just and equitable. And the directors shall give public notice of the time and place of making such assessments by publishing the same in some newspaper printed in Bangor, two weeks in succession, the last publication to be before making such assessments. And any assessment or assessments when the owner or owners of any mark of logs or other timber is unknown to the directors, may be set to the mark upon such logs or other timber. And the clerk shall keep a record of all assessments and of all expenses upon which such assessments are based, which shall at all times be open to all persons interested."

"Section 4. Said directors are hereby authorized to make the assessment contemplated in the last preceding section, in anticipation of the actual cost and expenses of driving, and in any sum not exceeding for each thousand feet. board measure, the sum of sixty-two and one half cents, and so in proportion to the distance which any logs or other timber is to be or may be driven between said Chesuncook dam and the places of destination, to be determined by said directors. And if after said logs or other timber shall have been driven as aforesaid and all expenses actually ascertained, it shall be found that said assessment shall be more than sufficient to pay said expenses, then the balance so remaining shall be refunded to the said owner or owners in proportion to the said sum to them respectively assessed." Approved August 10, 1846.

An act additional, approved July 31, 1849: "Section 1. The Penobscot Log Driving Company may drive all logs and lumber between the head of Chesuncook lake and the east branch, instead of between the Chesuncook dam and the east branch, and with all the powers, rights and privileges, and under the same conditions, limitations and restrictions, as is provided in the act to which this is additional; and may assess according to the provisions of said act, a sum not exceeding twenty-five cents for each thousand feet, board measure, in addition to the sum of sixty-two and one-half cents, as provided for in the fourth section of said act, for the purpose of paying the expenses of driving said logs and lumber across said lake."

An act to amend, approved April 20, 1854: "Section 1. The Penobscot Log Driving Company, are hereby authorized to make an assessment for the purposes required in said charter of the sum of eighty cents for every thousand feet of lumber driven by said company, instead of sixty-two and a half cents as is provided in said charter."

An act additional, approved April 9, 1856: "Section 1. The powers granted to said company are hereby enlarged and extended so as to include within the chartered limits thereof the boom and piers, now in process of being erected at the head of Chesuncook lake, which are to become the property of said company, and all the expenses of erecting and completing the same, are to be assumed and borne by said company."

"Section 2. The company may assess a toll pursuant to the provisions of their charter, not exceeding one dollar, for every thousand feet, board measure, of logs driven under the provisions of said act; and all acts and parts of acts providing for any different rate of toll are hereby repealed, except that they shall remain in force as to all tolls heretofore assessed and remaining uncollected."

"Section 3. The directors may authorize the treasurer to give the company notes for the amount necessary to be raised to pay the expenses of erecting said boom and piers for such sums and payable at such times as they direct. Provided, this act shall be accepted by the said company at a meeting called for that purpose."

An act additional, approved March 21, 1864: "Section 2. Said company shall be under no obligation to drive any logs coming into the Chesuncook lake at any other point than from the main west branch un-

less seasonably delivered to them at the head or outlet of said lake."

An act additional, approved February 24, 1865: "Section 1. The Penobscot Log Driving Company may assess a toll not exceeding two dollars per thousand feet, board measure, on all logs and lumber of the respective owners, which may be driven by them, sufficient to cover all expenses, and such other sums as may be necessary for the purposes of the company, and all acts and parts of acts inconsistent with this act are hereby repealed."

A copy of votes passed at the annual meeting of the Penobscot Log Driving Company, held February 11, 1873:

"Voted. That the directors be authorized and directed to employ a suitable person for agent on the drive."

"Voted. That it shall be the duty of the person employed as agent on the drive, to determine when and where logs may be left on said drive; and whoever drives the logs in said drive the ensuing season shall be under the direction of said agent; and for all logs left without the consent of said agent, a reasonable damage therefor the directors shall collect of the party making said drive, said agent to keep an account of all logs left."

Contract of Henry Davis to drive the West Branch in 1873:

Bangor, February 18th, 1873.

Memorandum of agreement between the Penobscot Log Driving Company, of the one part, and Henry Davis, as principal, and George W. Pickering and George C. Pickering, as sureties, on the other."

* * * * *

"Said Weed, [A. B. Weed] or other person satisfactory to Davis, to be selected by the directors, is to accompany the drive and may act as clerk of the drive; he shall decide when the drive shall leave Chesuncook dam, and he is to follow the drive and see that it is faithfully performed. He shall also decide what logs may be left in the drive, and his decision shall be binding, he to keep account thereof, and all others shall be driven. His wages to be paid one-half by each party, but to be boarded by Davis."

That contract was on the day of its date transferred by Henry Davis to John Ross.

There was evidence tending to show that A. B. Weed was the person agreed upon as agent and clerk as provided by the vote and contract, and that he acted as such.

Defendant's counsel requested the presiding justice to instruct the jury as follows:

"1. The corporation is not by their charter under any legal obligation to drive the logs; but the charter gives them the power to drive, and for all such logs as they do drive the corporation is to be paid."

"2. If the plaintiff did not file with the clerk the notice required by section three of their charter he cannot maintain this suit."

"3. If the parties having charge of the drive under the company, acted with integrity and good faith in what they did in making the drive, and in concluding upon the best and proper time for starting, the company is justified in what they did, and would not in that case be liable to plaintiff."

"4. The decision of Mr. Weed, as the party agreed upon for starting the drive, under the contract and vote, (one or both,) if honestly made, was binding on the plaintiff, and justified the company in leaving as they did."

DANFORTH, J. It is contended that this action is not maintainable, and the court was requested to instruct the jury that, "The corporation is not by their charter under any legal obligation to drive the logs; but the charter gives them the power to drive, and for all such logs as they do drive, the corporation is to be paid."

It is claimed that this instruction is required by a fair construction of the terms of the charter.

It is unquestionably true, that when any doubt exists as to the meaning of any language used, it is to be interpreted in the light afforded by the connection in which it is used, the several provisions bearing upon the same subject matter, the general purpose to be accomplished, as well as the manner in which it is to be accomplished.

It is also true that when the terms of an act are free from obscurity, leaving no doubt as to the meaning of the legislature, no construction is allowed to give the law a different meaning, whatever may be the reasons therefor.

The first ground taken in support of the request, is that the defendant company is a "mutual association combined together for mutual benefit to aid each other in the accomplishment of a given object in which all are equally interested," and the inference drawn is, that each is equally responsible for the doings of all. This view is endeavored to be sustained by the alleged facts that "it is not a stock company, has no capital, no power to do anything for others than its own members, no permanent stockholders, no stock, and no provision for raising money to pay any charges or expenses except the expense of driving."

If these suggestions are found to be apparent from the provisions of the charter, they, or a portion of them, will be entitled to great weight, and might perhaps be considered conclusive. The most important of them are not so found. It may be that the charter was obtained for the mutual benefit of the log owners. Nevertheless, by its express terms it constitutes its members a corporation with all the rights, liabilities and individuality attached to corporations of a similar nature. The first section provides that certain persons named, with their associates and successors, "are hereby made and constituted a body politic and corporate," and as such it may sue and be sued, prosecute and defend, may

hold real and personal estate, not exceeding fifty thousand dollars at any one time, and may grant and vote money. Thus the charter gives all the attributes of a corporation and none of a simple association. It may not have stock, and if not, it can have no stockholders. But that is not necessary to a corporation and does not constitute an element in any approved definition of it. If it has no stock, it may have a capital, and though it may assess only a certain amount upon the logs driven, the charter does not preclude money from being raised in other ways. Nor is the amount which may be assessed upon the logs driven, limited to the expense of driving. The amendment of 1865 provides for a toll, not exceeding a certain amount, upon the logs driven "sufficient to cover all expenses, and such other sums as may be necessary for the purposes of the company."

Nor do we find any provision "that it may not do anything for others than its own members." By the charter it may drive all the logs and other timber to be driven down the west branch of the Penobscot river, while all owners of such logs may not be members of the company. It does not appear whether the first corporators were such owners or otherwise. In the charter we find no provision prescribing the qualification of the members. The by-laws provide, not that the member shall be an owner of logs to be driven, but he must be an "owner of timber lands or engaged in a particular lumbering operation on the west branch of the Penobscot river, or its tributaries," and can then be a member only on application and receiving a majority of the votes of the members present. Hence the company may be acting for others, not members, while its members may not own a single log in the drive.

There is then no ground upon which this defendant can be held to be a mutual association, acting as a partnership for the benefit of its own members only, each bound by tne acts of the others, but it must be held as a corporation acting as such, for the benefit of its own members, perhaps, but also for such other owners of logs as may not choose to become members, or may not possess the required qualification of "being a land owner, or a practical operator," or may not be able to get the requisite number of votes to make them such. It is a significant fact that in this case it does not appear that the plaintiff is a member of the defendant company, and until that does appear he cannot be subjected to the liabilities of one.

The fact that there is no specific provision for raising money to meet such a liability, as is here claimed, is immaterial. It cannot affect the plaintiff's right to a judgment. The liability of the log owners to be assessed, and its limits, are fixed by law, as also the purposes to which such assessments may be applied. Any recovery against the defendant will not change that law in the slightest degree. No assessment hereafter made can be increased to meet any contingency not contemplated by the charter, and if the plaintiff, after having obtained judgment, is unable to find means wherewith to satisfy it in accordance with the law, he will simply be in the condition of many other judgment creditors before him who have paid largely for that which affords them no benefit.

It is further contended that the action cannot be maintained, because, while the defendant under its charter has the right to drive all the logs to be driven, the obligation to do so is not imposed upon it. In other words, by the provision of the charter, it is left optional with the company to drive such as it may choose to do.

The language is, "and said company may drive all logs and other timber that may be in the west branch of the Penobscot river," &c., and it is contended that the word "may" must be construed as permissive and not as imperative. If any argument were needed to show that such is its proper construction, it would seem that the able and exhaustive discussion of this point by the counsel, would leave no room for doubt. The charter was granted as a privilege and not for the purpose of imposing an obligation, and when granted it has no binding effect until accepted by those for whom it was intended. But when accepted it becomes of binding force and must be taken with all its conditions and burdens, as well as its privileges. It cannot be accepted in part, and must be taken as a whole.

In this case the charter conferred the privilege of driving, not a part, not such a portion as the company might choose, but "all" the logs to be driven. This right having been accepted by the company, it became a vested and also an exclusive right. It is therefore taken not only from all other corporations, but excludes the owner as well. If this exclusion was beyond the power of the legislature, it is not for this defendant to complain, for the right has been given to and accepted by it. By its acceptance and exclusion of the owner from the privilege, in justice and in law it is assumed an obligation corresponding to, and commensurate with its privilege. It accepted the right to drive all the logs, and that acceptance was an undertaking to drive them all, or to use reasonable skill and diligence to accomplish that object. This duty is not one imposed by the charter, certainly not by that alone, but is the result of the defendant's own act; it is its own undertaking; virtually a contract on its part, to accomplish that which it was authorized to do.

R. S., c. 42, § 6, referred to by the defendant's counsel, is certainly a very good illustration of the law applicable to this case. There the person whose logs become so intermixed with those of another, as not conveniently to be separated for the purpose of being floated to the market,

"may drive all the timber with which his own is so intermixed," and "shall be entitled to a reasonable compensation therefor." This clearly is a privilege conferred, a permission given and not an obligation imposed. Hence it is optional with the owner, whether to drive the logs so intermixed or otherwise. But having elected to drive them, he, as the defendant in the case at bar, becomes a bailee for him, and is clearly subject to such care and skill as legally attaches to such a position. True the defendant does not become the bailee unless the logs were seasonably delivered, as requested by the amended charter, and hence the principal question tried by the jury was, whether they were so delivered. Upon such delivery, the defendant in this case, as the owner in the case referred to, becomes liable to the duties of bailee, not by virtue of the statute alone, but by the assumption of rights conferred.

2. The court was requested to instruct the jury that, "If the plaintiff did not file with the clerk the notice required by section three of the charter, he cannot maintain this suit." This was refused and hence no question of waiver arises. Whether there was a waiver would be a question for the jury and not for the court. The instruction given, held this notice unnecessary, and thereby took this question from the jury; if, therefore, the notice referred to, is a condition precedent to the obligation of the defendant to drive, the exception must be sustained, otherwise not. The notice referred to, was required by the act, unconditionally, and was to contain a description of the logs with the quantity. There is no declaration distinctly stating the purpose for which it was to be filed, but it is found in the section providing for the assessments necessary to pay the expenses, and such assessments were to be laid upon the quantity so returned. It is also provided in the same section, that if the notice, or "statement" as it is called in the charter, is not filed, the directors may assess such delinquent in such sum as they may deem "just and equitable." This is the only penalty prescribed for a neglect in this respect, and this provision seems to contemplate very clearly that the lumber is still to be driven, and that the object of the written statement is rather for the protection of the log owner in the matter of assessments.

Nor does the priority of time assist the defendant's construction.. It is true that mutual acts are to be done by the parties to a contract, and the one is a consideration of the other, and one is to be performed first, that fact is often of great assistance in ascertaining whether it is not a condition precedent. Here the time of filing the statement is fixed, the time of starting is not, but it is to be at as early a period as practicable. Thus in the charter the two periods are independent of each other, and we find in it nothing whatever, to show one was necessarily to be earlier than the other. The one is certain and definite, the other uncertain and indefinite, depending largely upon the state of the season, and the contingencies of the weather, as bearing upon the practicability of collecting the lumber together and getting it down the river.

The result is, we find nothing in the charter which tends to show that the filing of the statement was intended to be a condition precedent to the obligation to drive, but rather that it was inserted for the sole purpose of regulating the assessment, and since that has been changed by the amendment of 1864, the provision is of little or no practical benefit, if not in fact repealed.

3. This request is substantially, that if those having charge of the drive, acted with integrity and good faith in what they did in making the drive, and in concluding upon the time of starting, the company would not be liable to the plaintiff.

This is undoubtedly correct as far as it goes. It correctly contemplates that in making the drive, the defendant acted as an agent for the log owners. As the corporation must necessarily do its work through agents, it would be responsible for such agents. Integrity and good faith are indispensable requisites for an agent, but skill and diligence are equally so.. The testimony in this case shows that a considerable amount of skill, as well as experience, was necessary to a successful drive where these logs were to be driven. This skill and experience, it appears, were equally necessary in determining when to start, as in managing the drive after it was started. The skill required according to the authorities cited by the counsel, is reasonable skill, "which is such as is ordinarily possessed, and exercised by persons of common capacity, engaged in the same business or employment; and ordinary diligence, which is that degree of diligence, which persons of common prudence are accustomed to use about their own affairs." Mechanics v. Merchants Bank, 6 Met. 26. Both these elements were ignored in the request and supplied, so far as necessary, by the instructions. The defendant, therefore, has no cause of complaint.

4. "The decision of Mr. Weed, as the party agreed upon for starting the drive, under the contract and vote, (one or both,) if honestly made, was binding on the plaintiff, and justified the company in leaving as they did." Such was the fourth request for instructions, and if the case shew the facts to be as assumed in the request, it might have been proper to have given it But such is not the case. The contract referred to is that made by the defendant with Ross, for driving the logs, and under that contract, the parties to it would undoubtedly be bound by the judgment of Weed, as to the time of starting, "if honestly made." But the plaintiff is no party to that contract, and therefore is not bound by its terms. So, too, as to the vote. If

that can be fairly construed as authorizing Weed to decide upon the proper time for starting, as perhaps it may be, possibly it may be binding upon all the members of the company. But as before stated, the case nowhere shows that the plaintiff is a member, and therefore he cannot be holden by its votes. On the other hand, both by the vote and contract, Weed is made the agent of the company, and it must therefore be held responsible for the discharge of his duties, not only with honesty, but with ordinary skill and diligence, as before stated.

5. Upon this point the instruction was, "that if the judgment of Weed was passed —if it was an honest judgment— if he was a competent person to judge, and judged in view of what appeared, and what might be probable from past experience, in relation to the subject matter, the testimony is, of course, important testimony; how far it would affect you, to bind these parties, is entirely for your decision, in view of all the testimony and circumstances in the case." The important question presented to the jury was, whether the logs had been seasonably delivered, and this was treated as depending upon the fact as to whether the starting of the drive had been delayed as long as it should have been. The presiding justice had before instructed the jury that "the delivery must be seasonable, not only in view of the situation of things as they actually existed, but seasonable considering the exigencies and liabilities, as they would at the time appear to exist to the mind of a prudent and competent person acting reasonably." Bearing in mind the fact that the allegation in the writ, upon which the action is founded, is that of negligence in starting the drive too soon, and thus preventing a seasonable delivery of the plaintiff's logs, the latter instruction would seem to be not only correct law, but peculiarly applicable to the case, and is that contended for in the argument. The other instruction which is excepted to, is not inconsistent with this. It does not, as claimed, substitute the after judgment of the jury to the prior judgment of those in charge as to the time of starting. This would be objectionable. Those in charge had the responsibility. They must judge as "competent and prudent men" acting reasonably, aided only by the knowledge gained from past experience, as to the probable future, and without that knowledge gained from subsequent developments which a jury might have, and this in fact was all that was required. But whether this judgment was exercised, or whether in failing to do so, the agents were guilty of negligence, was, as it always must be, a question of fact for the jury, and this was precisely the question submitted. Weed might have been an honest and competent man, and yet might have been negligent in the exercise of his judgment. If in such case his judgment, even honestly made up, is to be conclusive, then he is the judge in his own case. Such law shuts out from the jury the very question to be submitted to them.

The instruction does not take from the jury the evidence to be derived from the agent's judgment, but permits them to consider it and hold it conclusive if they please, but requires them to take with it all the testimony and circumstances of the case. Surely it is not for the defendant to complain of this.

In examining the testimony under the motion, we find it somewhat conflicting. The witnesses were before the jury and they were the judges of the credibility and weight to be given to each. We are not able to say that the jury were biased or acted corruptly.

Motion and exceptions overruled.

APPLETON, C. J., BARROWS, PETERS and SYMONDS, JJ., concurred.

IVER S. HAUGEN v. ALBINA LIGHT AND WATER COMPANY.

(21 Ore. 411; 28 P. 244.)

Multnomah county: E. D. Shattuck, Judge.

Defendant appeals. Affirmed.

This is an action for a writ of mandamus to require the defendant to supply the plaintiff with water by tapping a certain water-main on Tillamook street, and allowing him to connect a service-pipe therewith, etc. The facts alleged in substance are these: That the defendant is a corporation, the business of which, among other things, is to furnish the city of Albina, and the inhabitants thereof, with water; that it is operating under a franchise granted to said company by the council of the said city of Albina, by virtue of an ordinance, as follows: "An ordinance granting the right of way through the streets for laying pipes for the purpose of conveying water through the city. The city of Albina does ordain as follows: Section 1. That the Albina Water Company, its successors and assigns, be and are hereby granted the right and privilege of laying pipes through the streets of the city of Albina, for the purpose of conducting water through the city. Section 2. That the ditches for laying pipes shall be sunk two feet, and the pipes for conducting the water shall be under the surface or level of the established grade eighteen to twenty inches on all improved streets, and no pipe shall be laid so as to interfere with the construction of sewers; provided, that nothing in this ordinance shall be construed so as to grant any exclusive right or privilege of conducting water into the city; provided further, that said water company shall in no case charge more than one dollar per month for the first faucet and fifty cents for each additional faucet in the same building, for family use or at a private dwelling house," etc. That the purpose and object of granting to said company the right to lay water-mains in the streets of said city, was that

the citizens of said city might be furnished with a supply of pure and wholesome water; that by virtue of the authority conferred by said ordinance, the defendant laid down a four-inch water-main in and through Tillamook street in the then city of Albina, from the east line of the original townsite of the city of Albina, to the west line of Twenty-fourth street in Irvington, and connected the said main with the main on Margaretta avenue in said city, and for nearly a year past has been pumping water and conducting it through said main on Tillamook street to supply the citizens of Irvington residing east of Fourteenth street; that the defendant utterly refuses to allow persons residing on Tillamook street between the east line of the original townsite of Albina and Fourteenth street in Irvington, to tap said main, and refuses to supply them with water therefrom; that the plaintiff resided on Tillamook street between the points above named, and is the owner of lot 2, block 126, of Irvington; that said lot abuts on said Tillamook street, and the plaintiff is constructing a dwelling thereon, and is desirous of securing a supply of water from the water-mains of said street, that being the only source of water supply for said premises; that the plaintiff has repeatedly requested the defendant to supply him with water from said main, but has always been refused; that on the eleventh day of July the plaintiff tendered said defendant two dollars and fifty cents, the regular fee charged by the defendant for tapping a water-main with a service pipe, and demanded from the defendant to be connected with said water-main in Tillamook street, and to be supplied therefrom with water, and that said defendant refused to accept said tender, and refused to connect the plaintiff's premises with said main, and refused to supply him with water therefrom; that said refusal is willful, and is done for the avowed purpose of debarring the residents on said Tillamook street, between the original townsite of Albina and Fourteenth street, and particularly the plaintiff, from the use of water from said main; that the plaintiff is without any legal remedy in the premises except the writ of mandamus, etc.

The defendant denies that under the authority conferred by said ordinance, it laid down a four-inch or any water-main, in or through Tillamook street, in said city as alleged, or connected the said alleged main with the main on Margaretta avenue in said city, or for nearly a year past, or for any time, has been pumping water through said alleged main; but the defendant alleges the fact to be that Ellis G. Hughes and C. H. Prescott are owners of the tract of land known as Irvington and John Irving's First Addition, east of Fourteenth street in Albina, and that in pursuance of an agreement entered into between the said Hughes and Prescott, for the purpose of supplying water to their property in Irvington and said John Irving's First Addition, the defendant laid down in said Tillamook street a supply pipe for said Hughes and Prescott, for which pipe the said Hughes and Prescott paid, for the sole purpose of supplying said lands with water; that said pipe is owned by said Hughes and Prescott, and is under their absolute control; that the defendant has no right to tap the same except with the consent of Hughes and Prescott without paying the said Hughes and Prescott the sum of thirty-six hundred dollars, the cost of laying the same; that the business along the line will not justify the defendant in incurring the expense of purchasing said service-pipe and converting it into a main; that defendant has repeatedly applied to said Hughes and Prescott for leave to tap said service-pipe, without having to pay the price charged therefor, but they wholly refuse to give consent for the defendant to do so. Denies that the defendant's refusal to tap said main, or refusal to supply the plaintiff with water, is willful or without lawful cause, or that the same is done with the avowed or any purpose of depriving the residents of Tillamook street or the plaintiff from the use of water from the alleged main but alleges that the reason for not supplying the plaintiff with water from said service-pipe of said Hughes and Prescott is that it cannot do so without becoming liable to pay said Hughes and Prescott for said pipe the sum of thirty-six hundred dollars, which sum the defendant is not now prepared or able to pay, and for the further reason that the water which would be used along said street will not justify the expenditure, etc.

The plaintiff demurred to the new matter stated in the answer; and when the cause was heard, the court sustained the demurrer and gave judgment making the writ peremptory, from which this appeal is taken.

LORD, J. From this statement of the case, as presented by the pleadings, the court below held that when the defendant entered upon, and laid down its water-mains in the street, in pursuance of the privilege granted by the ordinance, it became bound to supply every abutter upon the street with water.

The contention for the defendant is, that the ordinance does not impose the duty upon it to furnish water, but only if it shall furnish water, that the charge thereof shall not exceed a certain sum therein specified; that the grant is to lay pipes through the streets, for the purpose of conducting water through the city in the mode prescribed, and so as not to interfere with the construction of sewers, but that it contains no provision requiring it to supply the city or its inhabitants with water, hence the ordinance imposes no duty upon the company to furnish water to any one.

In whatever form the argument is presented, it rests essentially upon this contention. While admitting that it is a corporation organized to supply the city and

its inhabitants with water, and that the city by its ordinance granted it the right to lay water-mains through its streets for the purpose of carrying into effect the objects of its incorporation, it insists that the ordinance is the measure of the rights conferred and the obligation imposed, which, by its terms, only grants "the right and privilege of laying pipes through the streets of the city of Albina for the purpose of conducting water through the city," under the conditions imposed without "a word in the language of the grant from which it could be inferred that the company is placed under any obligation whatever to supply any inhabitants of the city with water."

Counsel say: "If the ordinance had imposed upon the company the duty of supplying the inhabitants with water as a part of the conditions of the grant, such a conclusion might be supported; but where no such duty is imposed, and nothing is said except that when the company furnishes water, it shall charge no more than a certain rate per month, they fail to see the soundness of the reasoning which makes it the duty of the company to furnish water."

It is thus seen that it is the absence of any express provision in the ordinance, imposing the duty upon the defendant to supply water, upon which the argument and the case for the defendant is predicated. The effect to be given to the fact that the defendant company was incorporated under the law to furnish water to the city and its inhabitants, and the implied obligation which the defendant assumed by accepting the grant or franchise under the ordinance, is entirely overlooked. The defendant is treated as a private corporation, the business of which is private and not of a public nature, and to meet a public necessity, and as a consequence, that it should not be subjected to duties or obligations that are not binding upon other private corporations. In support of this view, the only authority cited and relied upon by the defendant is Patterson Gas Light Co. v. Brady, 27 N. J. L. 245; 72 Am. Dec. 360.

In that case the court was urged to assert the doctrine that gas companies, like common carriers and innkeepers, were bound to accommodate the public, but refused on the ground that the lack of precedents upon the subject could only be based upon the strong presumption that there was no principle of law upon which such a view could be supported. The court says: "The company may organize, they may make and sell gas or not at their pleasure; and I see no more reason to hold that the duty of doing so is meant to be imperative than to hold that other companies incorporated to carry on manufactories, or to do any other business, are bound to serve the public any further than they find it to be their interest to do so. It was earnestly insisted on the argument that the community has a great interest in the use of gas, and that the companies set up to furnish it ought to be treated like innkeepers and common carriers, and that if no precedent can be found for such a decision, this court ought to make one. But that there is no authority for so holding in England or America, where companies have been so long incorporated for supplying water and gas to the inhabitants of numerous towns and cities, affords a strong presumption that there is no principle of law upon which it can be supported."

But this case and its reasoning was directly disapproved and overruled in the subsequent case of Olmstead v. Proprietors of Morris Aqueduct, 47 N. J. L. 333, in which the court says: "In that case,—Paterson Gas Light Co. v. Brady,—Mr. Justice Elmer declared that the company was under no legal obligation to supply gas to all persons having buildings on the line of their pipes, upon tender of reasonable compensation. He rested this view on the absence of any express provision in the charter imposing such duty upon the company. This decision fails, however, to give due effect to the purpose of the legislature, in creating the company and to the implied obligation assumed by the company in accepting the grant. If it were a grant for mere private uses empowering the corporate body to withhold service at pleasure from all persons, the company would be without the right to occupy the public streets for the laying of its pipes, and of course the grant of eminent domain for such private purposes would be void. In this respect, in my judgment, the conclusion in the Paterson case was erroneous, and in conflict with the views expressed in Tide Water Co. v. Coster, 3 C. E. Green, 518; 90 Am. Dec. 634, and in Nat. Docks Ry. Co. v. Cent. R. Co. 5 Stew. Eq. 755."

This view is certainly more in accord with recent decisions establishing the doctrine that it is mandatory upon corporations of this sort to supply one and all without distinction. The defendant by incorporating, under the statute for the purpose of supplying water to the city and its inhabitants, undertook a business which it could not have carried on without the grant of eminent domain over the streets in which to lay its pipes. It was by incorporating for this purpose, and in accepting the grant, it became invested with a franchise, belonging to the public and not enjoyed of common right, for the accomplishment of public objects and the promotion of the public convenience and comfort. Its business was not of a private, but of a public nature, and designed under the conditions of the grant as well for the benefit of the public as the company.

"Such a business," says Mr. Justice Harlan, "is not like that of an ordinary corporation engaged in the manufacture of articles that may be quite as indispensable to some persons as are gas lights. The former articles may be supplied by individual effort, and with their supply the gov-

ernment has no such concern that it can grant an exclusive right to engage in their manufacture and sale, but as the distribution of gas in thickly populated districts is, for the reason stated in other cases, a matter of which the public may assume control, services rendered in supplying it for public and private use, constitute, in our opinion, such public services as, under the constitution of Kentucky, authorized the legislature to grant to the defendant the exclusive privileges in question." (Louisville Gas Co. v. Citizens Gas Co. 115 U. S. 683.) And, in another case, the same eminent judge said: "The manufacture of gas and its distribution for public and private use, by means of pipes laid down, under legislative authority, in the streets and ways of a city, is not an ordinary business in which every one may engage, but is a franchise belonging to the government to be granted for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity, for which the state may make provision." (New Orleans Gas Co. v. Louisiana Light Co. 115 U. S. 650.)

It must then be conceded that the defendant is engaged in a business of a public and not of a private nature, like that of ordinary corporations engaged in the manufacture of articles for sale, and that the right to dig up the streets and place therein pipes or mains for the purpose of conducting water for the supply of the city and its inhabitants, according to the express purpose of its incorporation, and the business in which it is engaged, is a franchise, the exercise of which could only be granted by the state, or the municipality acting under legislative authority. In such case, how can the defendant, upon the tender of the proper compensation, refuse to supply water without distinction to one and all whose property abuts upon the street in which its pipes are laid? The defendant company was organized to supply water to the city and its inhabitants, and the franchise granted by the city authorities was the means necessary to enable it to effect that purpose. Without the franchise, the object for which the company was incorporated would fail and come to naught. It could not carry on the business of supplying the city and its inhabitants with water without authority from the city to dig its streets and lay pipes therein for conducting or distributing water for public and private use. It was not organized to lay pipes but to supply water, and the grant was to enable it to do so and thereby effect the public purpose contemplated.

When the defendant incorporated to carry on such a business, we may reasonably assume that it was with the expectation of receiving a franchise from the city, which, when conferred, it would undertake to carry on according to the purposes for which it was organized. By its acceptance of the grant, under the terms of its incorporation, it assumed the obligation of supplying the city and its inhabitants with water along the line of its mains. It could not dig up the streets and lay pipes therein for conducting water, except to furnish the city and its inhabitants with water. That was the purpose for which it became a corporation, and the grant of the city was to enable it to carry it into effect. And "if the supplying of a city or town with water," as Van Syckel, J., said, "is not a public purpose, it is difficult to conceive of any enterprise entrusted to a private corporation that could be classed under that head." (Olmstead v. Morris Aqueduct, supra.)

As the defendant could not carry on the business of supplying water without the franchise, the city must have intended, in granting such franchise, to charge it with the performance of the duty it undertook for the public by the terms of its incorporation, and the defendant, in accepting the benefits of the grant, must have assumed the performance of such duty. In a word, the acceptance of a franchise, under such conditions, carries with it the corresponding duty of supplying the public without discrimination with the particular commodity which the corporation was organized to supply. "It may be laid down as a general rule," says Mr. Morawetz, "that whenever the aid of the government is granted to a private company, in the form of a monopoly, or a donation of public property or funds, or a delegation of the power of eminent domain, the grant is subject to an implied condition that the company shall assume an obligation to fulfill the public purpose on account of which the grant was made. * * * The same rule applies to companies invested with special privileges at the expense of the public for the purpose of supplying cities with water." (2 Morawetz on Corp. § 1129.)

The books are replete with illustrations of this principle as applied to water companies, gas companies, telephone companies, and others in the performance of public duties. In Lumbard v. Stearns, 4 Cush. 61, it was held that if an aqueduct corporation, established for the purpose of supplying a village with pure water, should undertake capriciously and oppressively to enhance the value of certain estates by furnishing them with a supply of water and depreciate that of others by refusing it to them, such conduct would be a plain abuse of their franchise. SHAW, C. J., said: "We can preceive no ground on which to sustain the argument that this act does not declare a public use. The supply of a large number of inhabitants with pure water is a public purpose. But it is urged that there is no express provision therein requiring the corporation to supply all families and persons who should apply for water on reasonable terms; that they may act capriciously and oppressively, and that by furnishing some houses and lots and refusing to supply others, they may thus give a value to some lots, and deny it to others. This

would be a plain abuse of their franchise. By accepting the act of incorporation, they undertake to do all the public duties required by it." This case is cited with approval in Lowell v. Boston, 111 Mass. 464; 15 Am. Rep. 39, and in Olmstead v. Morris Aqueduct, supra, in which Paterson Gas Light Co. v. Brady, 3 Dutch. 245; 72 Am. Dec. 360, is distinctly disapproved and overruled. In Shepard v. Milwaukee Gas Light Co. 6 Wis. 539; 70 Am. Dec. 479, the company had the exclusive right of supplying the city of Milwaukee with gas. The plaintiff, a merchant doing business on a street containing one of the defendant's mains, fitted up his establishment with the necessary pipes and fixtures for lighting the same with gas. He then applied to the gas company for a supply, tendering at the same time five dollars in advance payment therefor. He was required as a condition precedent to sign the printed rules and regulations of the company. He declined to do so. The company refused to waive the point, and suit was brought to recover damages suffered by the plaintiff because of such refusal. After discussing the question at great length, the courts held that the company, upon compliance by the citizen with such reasonable terms as it may rightfully impose, was bound to furnish gas to the citizen who has made all necessary preparation to receive the same. But the court declares that the fact of an exclusive right to manufacture and sell gas in the city would imply an obligation on the part of the company to furnish the city and citizens with a reasonable supply upon reasonable terms; that when the nature and objects of the corporation are considered, namely, the exclusive right to manufacture and sell gas for the purpose of lighting the city and dwellings and business places of its inhabitants, how can it be urged that this is a mere private corporation for the manufacture and sale of a commercial commodity?

In Williams v. M. G. Co. 52 Mich. 499; 50 Am. R. 266, the action was for damages for the failure of the defendant to furnish the plaintiff with gas, as plaintiff claimed was the defendant's duty. The court says: "The questions presented and argued before the judge of the superior court by counsel for the defendant were, first, the plaintiff could not recover for the reason that the defendant was under no legal obligation or duty to supply any citizen of Detroit with gas. * * * The court below disagreed with the defendant's counsel upon this point. I agree with the judge of the superior court that it is the duty of the defendant, upon reasonable conditions, to supply the citizens of Detroit who have their residences and places of business east of the center of Woodward avenue with gas, wherever the defendant has connected its mains and service-pipes with the pipes and fixtures used at such residences and places of business and the owners or occupants shall desire the same. The defendant is a corporation in the enjoyment of certain rights and privileges under the statutes of the state and charter and by-laws of the city and derived therefrom These rights and privileges were granted that the corresponding duties and benefits might inure to the citizens when the rights and privileges conferred should be exercised. The benefits are the compensation for the rights conferred and privileges granted, and are more in the nature of convenience than necessity, and the duty of this corporation imposed cannot, therefore, be likened to that of an innkeeper or common carrier, but more nearly approximates that of the telegraph-, telephone-, or mill-owner." (Price v. Riverside, etc. Co. 56 Cal. 431; McCrary v. Beaudry, 67 Cal. 120; Lloyd v. Gas Light Co. 1 Mackay, 331; People v. Manhattan Gas Light Co. 45 Barb. 136; Gas L. Co. v. Colliday, 25 Md. 1; Gas L. Co. v. Paulding, 12 Rob. 378.)

The same principle applies to telephone companies, which are regarded so far common carriers in their relation to the public that they must serve all members thereof alike in the transmission of messages. In Cen. Tel. Co. v. State ex rel. etc. 118. Ind. 206; 10 Am. St. Rep. 114, the court says: "While it may not supply and take the place of the telegraph in many instances and for many purposes, yet in others it far surpasses it, and is and can be put to many uses for which the telegraph is unfitted and by persons wholly unable to operate and use the telegraph. It has been held universally by the courts considering its use and purpose, to be an instrument of commerce and a common carrier of news, the same as the telegraph, and by reason of being a common carrier, it is subject to proper obligations, and to conduct its business in a manner conducive to the public benefit, and to be controlled by law. * * * It is by reason of the fact that business men can have them in their offices and residences, and, without leaving their homes or their places of business, call up another at a great distance, with whom they have important business, and converse without loss of valuable time on the part of either, that the telephone is particularly valuable as an instrument of commerce. It being an instrument of commerce, and persons or corporations engaged in the general telephone business being common carriers of news, what are the rights of the public, independent of the statute, as regards discrimination? Any person or corporation engaged in the telephone business, operating telephone lines, furnishing telephonic connections, facilities and services to business houses, persons and companies, and discriminating against any person or company, can be compelled by mandate, on the petition of such person or company, discriminated against, to furnish to the petitioner a like service as furnished to others." (State v. Neb. Tel. Co. 17 Neb. 126; 52 Am. Rep. 404; Com. U. Tel. Co. v. N. E. Tel. & T. Co. 61 Vt. 241; 15 Am. St. Rep. 893;

State v. Bell Tel. Co. 36 Ohio, 296; 38 Am. Rep. 583.)

A corporation, undertaking by its acceptance of a public franchise to perform a certain service, can be by mandamus compelled to perform that service. (People v. N. Y. etc. R. R. Co. 104 N. Y. 58; 58 Am. Rep. 484; Vincent v. Chicago, etc. R. R. Co. 49 Ill. 33; Farm. L. & T. Co. v. Henning, 17 Am. L. R. 266.)

The pipe which was laid by the defendant in Tillamook street was laid in pursuance of the franchise granted by the city, as it had no authority to lay any other kind of pipe or main than prescribed by the ordinance, or for any other purpose than conducting water to supply the city and its inhabitants without discrimination, to all persons having buildings or lots on the lines of their pipes, upon tender of the proper compensation. There is no claim that Hughes and Prescott had any right to dig up the street or to lay such pipe. It could only be done by the defendant so far as disclosed by this record, under the grant, in the mode prescribed, and for the purposes already stated. It is true, it is alleged in effect that the pipe was laid along the street and in front of the property of the plaintiff for the exclusive benefit of Hughes and Prescott's property, and for the sole purpose of supplying their lands with water. The street in front of the plaintiff's property was subjected to this public use for the special benefit of aiding in the sale of their property. Their object was to induce purchasers to buy land from them for homes in place of others whose property along the street abutted on the main. To favor them, the defendant, by virtue of the franchise granted, laid the pipe, but refused to supply the plaintiff with water from it, upon the tender of the amount usually charged for such service. As Hughes and Prescott are not parties to this record, what rights or contractual relations they may bear to the defendant we neither know nor decide. We attach no significance to the words supply pipe used in the answer. The pipe was laid along the street and in front of the lot of the plaintiff under the franchise granted by the city, and by the terms of its incorporation, to supply water to the city and its inhabitants. This being a public purpose and the business of a public nature, the defendant must serve all alike, and for any discrimination, mandamus is the appropriate remedy.

We discover no error, and the judgment must be affirmed.

STATE EX REL. GWYNN v. CITIZENS' TELEPHONE CO.

(61 S. C. 83.)

Before Buchanan, J., Spartanburg, March, 1900. Reversed.

Petition by J. B. Gwynn for mandamus against Citizens' Telephone Co., requiring it to place a telephone in his store and in his residence. From order refusing the writ, petitioner appeals.

July 12, 1901. The opinion of the Court was delivered by

Mr. CHIEF JUSTICE McIVER. This was an application, addressed to the Circuit Court, for a writ of mandamus, requiring the respondent to place a telephone in the relator's grocery store and one in his residence, in the city of Spartanburg, and to connect them properly with its exchange and its subscribers, and to do all acts necessary to afford the relator the like service and telephonic communication afforded to its other subscribers. The application was refused by the Circuit Judge and the relator appealed to this Court on the several grounds set out in the record, which it is not necessary to state here, as it will be sufficient to consider the several questions, as stated by counsel for respondent, in his argument here, which are presented by this appeal.

As is said by the Circuit Judge in his decree, "there is practically no dispute as to the facts," which may be stated, substantially, as follows: The relator is now and has been since the 28th of June, 1898, engaged in the mercantile business, carrying on a retail grocery store in the city of Spartanburg, and occupies a residence in said city; that the respondent, on 16th day of August, 1898, became a corporation under the laws of this State, for the purpose of owning, constructing, using and maintaining electric telephone lines and exchange within the city of Spartanburg, and as such is now and was at the time of the commencement of this proceeding engaged in the said business, having established an exchange in said city, from which connections were made to telephone instruments in offices, places of business and residences of its subscribers; that the city council of Spartanburg has authorized the respondent to erect poles in the streets of the city for the purpose of transporting news over its wires to its subscribers, having a system of wires throughout the city, connected with telephone instruments furnished by it to its subscribers; that whenever a person desires a telephone, it is placed in the office, residence or place of business of the applicant, at the expense of the respondent, with authority to the subscriber to use the same, upon certain rates and terms, for the purpose of telephonic communication with others; that some time in the year 1899, the respondent placed telephones in relator's residence and grocery store, giving proper connections with respondent's exchange and its subscribers or customers throughout the city of Spartanburg and elsewhere; that this was done under an agreement with the relator that he would use respondent's telephones exclusively, and not the telephone of the Bell Telephone Company, and that certain of respondent's subscribers in the said city of Spartanburg, including most of the grocerymen, were furnished with telephones by the respondent, under a similar agreement, but some of respondent's subscribers, including some merchants, physicians and others and

one groceryman, whose place of business was on the same street of said city as the grocery store of relator, were supplied with telephones by respondent under agreements which contained no such stipulation as to the exclusive use of respondent's telephones, and they were using both telephones; that on or about the 6th of February, 1900, the respondent learning that the relator had purchased Holland's market, in which there was a telephone placed there by the Southern Bell Telephone Company, a corporation duly chartered under the laws of this State, and that said market immediately adjoined relator's grocery store, and that relator had cut a door through the wall separating his grocery store from said market, thus opening a means of communication between the two structures, immediately removed, against the protest of the relator, the telephones which the respondent had previously placed in relator's grocery store and residence, for the avowed purpose of preventing the relator from using respondent's telephones while he was using the Bell Telephone—respondent claiming that under its agreement with relator he was bound to confine himself to the use of respondent's telephones; that on or about the 8th of February, 1900, the relator tendered to respondent the amount due for the past use of respondent's telephones, which was accepted, and that relator thereupon demanded that respondent place one of their telephones in his grocery store and one in his residence, with proper connections with respondent's exchange and its subscribers; but the respondent refused to comply with such demand unless the relator would agree to use respondent's telephones exclusively, and not use the telephone which had been placed in said market by the Bell Telephone Company.

The respondent, in its answer, alleges: "that its supply of telephone instruments is limited, and that it is with difficulty that this respondent can furnish such instruments to all applicants therefor. That even if the respondent was legally bound to furnish such instruments now, it would be impossible for it to do so within less than sixty days, for the reason of its inability to enlarge the switch-board." But as this allegation is not responsive to any allegation contained in relator's petition, and was not sustained by any evidence, so far as the "Case" shows it cannot now be considered. Besides, this Court, having reached the conclusion, as will presently appear, that the relator is entitled to the mandamus for which purpose the case will be remanded to the Circuit Court, with instructions to carry out the views herein announced, that Court can, in its order directing the writ of mandamus to be issued, make such provision, by giving a reasonable time within which the duty sought to be enforced shall be performed, provided the fact be as alleged in the foregoing quotation from respondent's answer.

We will next proceed to consider the several questions of law, growing out of the facts above stated, and presented by this appeal. These questions are thus stated in the argument here, on the part of the respondent, and we propose to adopt that statement. 1st. Is the defendant telephone company, in any sense a common carrier? 2. Can the defendant telephone company be required, in any case, against its will, to supply one of its instruments to petitioner? 3. Can the defendant telephone company be required by mandamus, under the circumstances of this case, to so furnish its instruments to petitioner?

The first and, as it seems to us, the controlling question in the case, is, we think, conclusively determined by the provisions of sec. 3, of art. IX., of the present Constitution, which reads as follows: "All railroad, express, canal and other corporations engaged in the transportation for hire and all telegraph and other corporations engaged in the business of transmitting intelligence for hire, are common carriers in their respective lines of business, and are subject to liability and taxation as such," the balance of the section not being pertinent to the present inquiry. Now, if the respondent, "Citizens' Telephone Company," is a corporation, and is "engaged in the business of transmitting intelligence for hire," then it is expressly declared by the highest authority to be a common carrier. That it is a corporation, is not and cannot be denied; and, as we think, it is equally undeniable that it is "engaged in the business of transmitting intelligence for hire." Indeed, that, so far as appears in this case, is the only business in which it is engaged. The distinction sought to be drawn by counsel for respondent in his argument here, between the mode of transmitting intelligence or a message, as it is usually called by telegraph and by telephone, is a distinction without a difference, so far as the question with which we are concerned is involved. While it is true that a person desiring to send a message by telegraph to another usually writes out his message and delivers it to the agent of the telegraph company (though we see no reason why it may not be delivered by word of mouth, or over a telephone, as no doubt is frequently the case) and the agent transmits such message, through the agency of instrumentalities provided by the telegraph company, to another agent of such company at its destination, who writes it out, or delivers it by word of mouth or over a telephone, to the person for whom such message is intended, whereas a person desiring to send a message by telephone simply goes to the instrument provided for the purpose by the company at the central office and expresses his desire to be connected with the person to whom he wishes to speak, which being done by the agent of the company at the central office, the message is delivered directly to the person for whom it is intended, through the instrument and over the wires provided by the telephone company for the purpose. In both instances the intelligence or message is actually transmitted by the use of agencies and instrumentalities furnished either by the telegraph or the telephone company, for which they are entitled to receive

proper compensation; and one is just as much engaged in the business of transmitting intelligence for hire as the other. Both are devices by which one person is enabled to communicate with another beyond the reach of the human voice, unaided by some artificial appliance; and although there are some differences in the mode of transmititng intelligence, yet the end sought and attained by each is substantially the same. Again, it is argued that there is another difference between the telegraph and the telephone which differentiates the former from the latter, and prevents legislative or constitutional provisions expressly applying to the former from being applied to the latter, and that is in the one case the purport of the message or intelligence to be transmitted must be known to the agent of the company, while in the other it need not be. In the first place, this difference does not always exist, as a matter of fact, for in many cases the purport of messages sent by telegraph are just as effectually concealed from the agent of the telegraph company as a message sent by telephone—in fact, more so—for in the case of a telegram in cipher, which is quite common, the purport of the message is entirely concealed, and is intended to be concealed from the knowledge of the telegraph operator and from every one else, except a person holding the key to the cipher; while, on the other hand, messages sent by telephone are not, as matter of fact, always concealed from the knowledge of the agent of the telephone company, nor from third persons who may choose to listen. But even if such differences did exist, it is difficult to conceive how that would affect the substantial identity of the business in which the two companies are engaged.

Again, it is argued that the framers of the Constitution being, as they were, familiar with the use of the telephone, would, if they had intended to include telephone companies within the provisions of the section of the Constitution above quoted, have mentioned such companies by name. This argument is based upon a misconception of the fundamental idea of the Constitution, which is that such an instrument is the organic law, and deals with general principles, and does not and should not descend into details. But the conclusive answer to such argument is that the framers of the Constitution certainly did not intend to limit its operation to telegraph companies, as, otherwise, the additional words—"and other corporations engaged in the business of transmitting intelligence for hire"—would become wholly unmeaning and useless. These additional words were manifestly inserted for some purpose, and it is impossible to conceive of any other purpose except to include every other corporation, by whatever name it may be called, and by whatever means it conducts its business, which may be "engaged in the business of transmitting intelligence for hire;" and as we have shown that a telephone company is engaged in that business, telephone companies must be regarded as included within the terms of the constitutional provision.

The reference to sec. 3 (manifestly a misprint for sec. 4), of art. VIII., of the Constitution, and to the act of 1898, 22 Stat., 779, and also act of 1898, 22 Stat., 780, to support respondent's contention, will next be considered. This constitutional provision simply forbids the General Assembly from passing any law "granting the right to construct and operate a street or other railway, telegraph, te ephone or electric plant, or to erect water or gas works for public use, or to lay mains for any purpose, without first obtaining the consent of the local authorities in control of the streets or public places proposed to be occupied for any such or like purposes." What possible bearing this provision can have upon the question we are considering, to wit: whether a telephone company can be regarded as, in any sense, a common carrier, it is impossible to conceive. Indeed, if it has any bearing at all, it would seem to be adverse to the contention of respondent; for it seems to recognize the idea that when a telephone company establishes its plant in a town or city, it devotes its property to public uses, and thus brings it under legislative control. Nor do we see the relevancy of the two acts above referred to. The former forbids telephone companies from making unreasonable discrimination in the rates at which they furnish telephonic service to its patrons; and this necessarily implies that its business is subject to legislative control. The other act simply invests the railroad commission with power to regulate the charges of express companies for transportation and the charges of telegraph companies for the transmission of messages. But until it is shown, as it has not and cannot be shown, that the power to regulate charges by law, is a feature essential to the business of a common carrier, the provisions of this act do not even tend to show that a telephone company is not a common carrier. Indeed, as matter of fact, the rates of charges by all classes of common carriers, for example, steamboat companies, are not regulated by law.

But even if there were no constitutional provision and no legislation upon the subject, we are of opinion that this question is settled by the principles of the common law, which being elastic in their nature, may be applied to subjects and conditions which have but recently become known and used in the business of the country. In this State, we have no case, so far as we are informed, upon the question whether a telephone company is, in any sense, a common carrier; and we have only two cases relating to the somewhat analogous question as to whether a telegraph company is a common carrier, viz: Aiken v. Telegraph Company, 5 S. C., 358, and Pinckney v. Telegraph Company, 19 S. C., 71; but neither of these cases decides that a telegraph company is, in no sense, a common carrier, though the contrary seems to be supposed (erroneously, as we think), by some. Both of these actions were brought to recover damages for errors in the transmission of messages sent over the lines of

the telegraph company occasioned by the alleged negligence of the defendant companies. In neither of these cases was the question made or decided as to whether a telegraph company was a common carrier. On the contrary, in the Aiken case, Willard, J., in delivering the opinion of the Court, uses language implying that a telegraph company is a common carrier, for on page 370 he says: "It is a contract with one exercising a public employment under express statute powers created for that purpose. The nature of the occupation of that class of persons and the tender of their services to the community make them common agents for the transmission of messages for all persons who may desire and pay for such services to any person, either as the final receiver of such message or as a means or agent for its further transmission. The object of the contract is to modify and limit the contract which, by operation of law, would arise between the common carrier of messages and any person employing such carrier, in the absence of any stipulation of terms between them. The foundation of the contract is the nature of the carrier's occupation and the fact of employment. The legal consequences flowing from such employment are what the special contract seeks to modify or limit." It is true that on the next page the learned Justice does say: "The regulation of the defendants in conformity with which the terms of the contract limiting their liability was made was a reasonable regulation, and such as the defendants were authorized to make. In examining the proposition just stated, it must be borne in mind that the analogy between common carriers of goods and common carriers of messages is not perfect. The nature of the services performed differs materially in the two cases, and the real responsibility differs in a corresponding manner." That case, therefore, as we understand it, simply decides that where a telegraph company agrees to send a night message, which it is not bound to send under certain stipulations as to its liability in case of errors in the transmission of such message, such stipulations are reasonable and may be enforced, but the case throughout recognizes the doctrine that a telegraph company is a common carrier; though the analogy between common carriers of goods and common carriers of messages is not perfect, owing to the fact that the nature of the services rendered differs materially in the two cases, and hence the measure of responsibility for any default in rendering the services must likewise differ. So in the Pinckney case, supra, the Court while not undertaking to decide whether a telegraph company could in any sense be regarded as a common carrier, as no such question was presented in that case, simply decided that a telegraph company was not held to the stringent rule of the common law whereby common carriers of goods were held liable for all such losses and damages as they could not show resulted from the act of God or the public enemy, but were only liable for all such losses and damages as they could not show were not due to the fraud or negligence of their agents or servants; and the reason for such a limitation of the rule was found in the peculiar nature of the business in which a telegraph company is engaged, differing in material respects from that of common carrier of goods. While it is true that the late Chief Justice Simpson, in delivering the opinion of the Court, does use some expressions which may possibly seem to indicate that he thought a telegraph company was not a common carrier, yet that was not a question in the case, and, therefore, such expressions, even if amounting to what is claimed for them, are not authoritative. For, as the learned Chief Justice himself says on page 82, there is but a single question in the case, and he thus states that question: "the question to be considered, therefore, is whether telegraph companies are liable for all mistakes made in the transmission of messages except such as occur from any act of God or irresistible force, the onus of showing which is upon them."

In other jurisdictions, however, the question has been made and distinctly decided. Amongst the various cases which we have consulted we cite first the case of The State v. Nebraska Telephone Company, 17 Neb., 126, reported, also, in 52 Am. Rep. 404. In that case the facts were in substance very similar to the facts in the case which we are now called upon to decide, and it was there held that a telephone company cannot arbitrarily or capriciously refuse its facilities to any person desiring them and offering compliance with its reasonable regulations, and that mandamus will issue to compel the company to do its duty. The facts of that case were substantially as follows: The relator made an arrangement with the defendant company to place an instrument in his office, but for some reason failed to furnish the relator with a directory or list of its subscribers, with their numbers, which relator claimed was essential to the profitable use of the telephone, and which it was the custom of the company to furnish to its subscribers. After a time such list was furnished to the relator by the company, but when called upon by the company to pay for the use of the telephone in his office, the relator refused to pay for the use of the telephone during the time the company was in default in furnishing the directory or list of subscribers. Thereupon the defendant company removed the telephone from the office of the relator. Subsequently, the relator applied to the company to become a subscriber and to have an instrument placed in his office, which the company refused to do; whereupon the relator applied for a writ of mandamus to compel the company to comply with his demand. In that case the Court proceeded upon the fundamental doctrine that when a person or company, especially one who is exercising its franchises under its charter, devotes its property to a public use by undertaking to supply a demand which "is affected with a public interest," it must supply all alike, who are alike situated, and cannot discriminate.

in favor of or against any one. In the course of the opinion, the Court uses the following language: "That the telephone, by the necessities of commerce and public use, has become a public servant, a factor in the commerce of the nation, and of a great part of the civilized world, cannot be questioned. It is, to all intents and purposes, a part of the telegraphic system of the country, and in so far as it has been introduced for public use and has been undertaken by the respondent, so far should the respondent be held to the same obligation as the telegraph and other public servants. It has assumed the responsibilities of a common carrier of news. Its wires and poles line our public streets and thoroughfares. It has, and must be held to have, taken its place by the side of the telegraph as such common carrier."

So in Chesapeake and Potomac Telephone Company v. Baltimore and Ohio Telegraph Company, 66 Md., 399, reported, also, in 59 Am. Rep., 167, Alvey, C. J., in delivering the opinion of the Court, uses this language: "The appellant (the telephone company) is in the exercise of a public employment, and has assumed the duty of serving the public while in that employment * * * The telegraph and telephone are important instruments of commerce, and their services as such have become indispensable to the commercial and business public. They are public vehicles of intelligence, and they who own and control them can no more refuse to perform impartially the functions that they have assumed to discharge than a railroad company, as a common carrier, can rightfully refuse to perform its duty to the public. They may make and establish all reasonable and proper rules and regulations for the government of their offices and those who deal with them, but they have no power to discriminate, and while offering (themselves as) ready to serve some, refuse to serve others. The law requires them to be impartial and to serve all alike, upon compliance with their reasonable rules and regulations."

Again, in The State of Missouri ex rel. Baltimore and Ohio Telegraph Company v. Bell Telephone Company of Missouri, 23 Fed. Rep., 539, decided in 1885, Judge Brewer, now one of the Associate Justices of the Supreme Court of the United States, after laying down the general principle that a corporation deriving its franchises from its charter, which devotes its property to public uses, puts its property into the channel of commerce, and thereby becomes subject to the control of the law regulating such commerce, uses this language: "A telephonic system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense and yet in a strict sense, a common carrier. It must be equal in its dealings with all." That case seems to have been carried by writ of error to the Supreme Court of the United States, but was never considered by that Court, for in 127 U. S., 780, we find this simple statement: "Dismissed with costs on the authority of the plaintiff in error," 18 April, 1888. In 25 Am. & Eng. Ency. of Law, at page 750, we find the following: "Telephone companies like telegraph companies are to some extent common carriers, and are bound to afford equal facilities to all. They can be compelled by mandamus to furnish facilities to one offering to comply with their regulations, even though such a party is a rival company." To same effect, see page 775 of same volume, and on page 776 it is said: "In many of the States statutes exist which provide for the enforcement of these obligations; but it seems that the rule would be the same whether the obligation was declared by statute or considered as arising from the common law." For, as was said in State v. Nebraska Telephone Company, supra, in commenting on State v. Bell Telephone Company, 36 Ohio St., 296, where there was a statute upon the subject: "So far as the obligations of the telegraph companies are defined by the act (except the payment of the penalty), they are simply declarative of the common law. These obligations are imposed by the demands of commerce and trade, and it would be idle to say they existed only by force of the statute, and the same is true of the clause of the act making its provisions applicable to telephones." Again, it is said in the same case: "Similar questions have arisen in and have been frequently discussed and decided by the Courts, and no statute has been deemed necessary to aid the Courts in holding that where a person or company undertakes to supply a demand which is 'affected with a public interest,' it must supply all alike who are like situated, and not discriminate in favor of nor against any." It is true, that in the more recent edition of the Encyclopaedia above referred to, the rule is stated in a more modified form, see 6 Ency. of Law (2d ed.), at page 261, where the following language is used: "It was at one time attempted to class telegraph companies as common carriers, but the view universally adopted now is that they can in no sense be regarded as common carriers; they are like common carriers in that they are bound to serve impartially all those applying to them, but they are liable for improper transmission of messages only upon proof of negligence." So that it is apparent from the language which we have italicized in the foregoing quotation, that the rule, even when stated in its modified form, supports the contention of the relator, assuming, as we are authorized to do by the authorities, that the rule applicable to telegraph companies is also applicable to telephone companies—at least, so far as the obligation to serve all alike who apply for the use of the facilities which it offers to the public for the transmission of news is concerned.

We are satisfied, therefore, that while a telephone company may not be, in every sense of the terms, a common carrier of goods, and as such subject to the same stringent rules which govern in ascertaining the liability of such carriers, yet, in one sense at least, it is a common carrier of news, and as such bound to supply all alike, who are in

like circumstances, with similar facilities, under reasonable limitations, for the transmission of news, without any discrimination whatsoever in favor of nor against any one; and this is so under the well settled principles of the common law, without the aid of any constitutional or statutory provisions imposing such an obligation. The answer to the second question, under what has already been said, must necessarily be in the affirmative.

To dispose of the third question, it will be necessary to recur somewhat to "the circumstances of this case." The undisputed facts are that the respondent, in the exercise of its franchise conferred by its charter, had established a telephone business in the city of Spartanburg, and had erected its poles and strung its wires in and along the streets of said city, and thus had become, at least, a quasi common carrier of news, and as such was under an obligation to serve all alike who applied to it within reasonable limitations, without any discrimination whatsoever. When, therefore, the relator applied to the respondent to replace the telephone instruments in his grocery store and in his residence, from whence they had been removed by the defendant company but a few days before, the respondent was, in our opinion, bound to comply with such demand, under the obligations to the public which it had assumed. The reason given for its refusal—that the relator refused to agree that he would use respondent's telephone system exclusively—was not sufficient to relieve it from its obligation to serve the public, of which the relator was one, without any discrimination whatsoever; and especially is this so when it was admitted that the respondent was, at the time, affording to one person, at least, who was engaged in the same business as that of the relator, whose place of business was on the same street of the same city, the same facilities which the relator demanded, without requiring any such stipulation as that required of the relator, but who was, in fact, using both telephone systems. It seems to us that the respondent, after offering to the public its telephone system for the transmission of news, would have no more right to refuse to furnish the relator its facilities for the transmission of news unless he would agree not to use the Bell Telephone system in operation in the same city, but use exclusively respondent's system, than a railway company would have to refuse to transport the goods of a shipper, unless such shipper would agree to patronize its line exclusively and not give any of its business to any competing railway line. Nor does the fact (if fact it be) that the relator had committed a breach of its previous contract with respondent, when he purchased Holland's market, in which an instrument of the Bell Telephone Company had been placed, and had thereby acquired the right to use the Bell Telephone, afford any reason why the respondent should decline to comply with relator's demand to furnish his grocery store and residence with its telephone instruments. If the relator had committed any breach of its previous contract with the respondent of which the latter had any legal right to complain, its remedy, as was said in one of the cases which we have consulted, was by an action to recover damages for such breach of contract, but not by refusing to perform its obligation to the public, of which the relator was one. As to the other reason suggested why the mandamus prayed for should not issue under the circumstances of this case, to wit: that respondent did not have the means to comply with the demand of the relator within less than sixty days, it is only necessary to repeat what we have said above: that there does not appear to be any evidence in the "Case" to sustain the fact upon which this suggestion is based, and, therefore, it cannot now be considered. Besides, as is said above, that is a matter which may be considered when the case goes back to the Circuit Court, which can, in ordering the mandamus to issue, as herein directed, make suitable provision for allowing respondent reasonable time, if such shall be shown to be necessary, to comply with relator's demand.

As to the position taken in the argument—that mandamus is not the proper remedy—we think it entirely clear, both upon principle and authority, that mandamus is the appropriate remedy in a case of this kind.

The judgment of this Court is, that the judgment of the Circuit Court be reversed and that the case be remanded to that Court, with instructions to carry out the views herein announced.

THE INTER-OCEAN PUBLISHING COMPANY v. THE ASSOCIATED PRESS.

(184 Ill. 438, 56 N. E. 822.)

Opinion filed February 19, 1900—Rehearing denied April 6, 1900.

Appeal from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. A. N. Waterman, Judge, presiding.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

The Inter-Ocean Publishing Company, a corporation organized under the laws of the State of Illinois, is engaged in publishing two newspapers in the city of Chicago, known as "The Daily Inter-Ocean" and "The Weekly Inter-Ocean," which have a wide circulation in the States and Territories of the United States. The Associated Press is a corporation organized under the laws of the State of Illinois in 1892. The object of its creation was, "to buy, gather and accumulate information and news; to vend, supply, distribute and publish the same; to purchase, erect, lease, operate and sell telegraph and telephone lines and other means of transmitting news; to publish periodicals; to make and deal in periodicals and other goods, wares and merchandise." It has about eighteen by-laws with about seventy-five subdivisions thereof. The stockholders of the Associated Press are the proprietors of newspapers, and the only business of the corporation is that

enunciated in its charter, and is mainly buying, gathering and accumulating news and furnishing the same to persons and corporations who have entered into contract therefor. It may furnish news to persons and corporations other than those who are its stockholders, and the term "members," used in its by-laws, applies to proprietors of newspapers other than its stockholders, who have entered into contracts with it for procuring news. It does not appear that it has availed itself of any of the powers conferred by its charter other than that of gathering news and distributing the same to its members. Under the by-laws of appellee the Inter-Ocean Publishing Company became a stockholder. Among the by-laws having reference to stockholders are the following:

"Article 11.—Sec. 8. Sale or purchase of specials.—No member shall furnish, or permit any one to furnish, its special or other news to, or shall receive news from, any person, firm or corporation which shall have been declared by the board of directors or the stockholders to be antagonistic to the association; and no member shall furnish news to any other person, firm or corporation engaged in the business of collecting or transmitting news, except with the written consent of the board of directors."

"Article 14.—Sec. 1. Board may suspend. —The board of directors shall have the power, by a two-thirds vote of the whole board, to suspend a member or impose upon him a fine of not exceeding $1,000 for furnishing news to any person or association antagonistic or in opposition to the Associated Press, or for purchasing news from any person or organization formally declared by the board of directors or by the stockholders of the association, at any annual or special meeting, to be in such antagonism or opposition, or for any other violation of the by-laws or his contract: Provided, always, that ten days' notice, in writing, of a complaint be first served upon the offending member; and said member shall have an opportunity to be heard in his own defense, and if said member shows that the offense was unintentional and shall have discontinued the same, he shall not be suspended."

On March 2, 1893, the Associated Press entered into an agreement with the Inter-Ocean Publishing Company, by which it sold to the latter its night news report for publication in the two newspapers for the term of ninety-two years, which the Inter-Ocean company agreed to receive and pay for at the rate of $102 per week, which sum was liable to be increased fifty per cent. The Associated Press agreed to furnish to the Inter-Ocean company local and telegraphic news within a radius of sixty miles of Chicago, in accordance with its by-laws. The contract between the Inter-Ocean company and the Associated Press, among other provisions, contained the following:

"Sixth—Said party of the second part covenants and agrees that it will not furnish, before publication, any news to any person or corporation engaged in the business of collecting or transmitting news, except upon the written consent of the board of directors of the party of the first part first had and obtained; and that it will not furnish to any person any of the news received by it under this contract before publication by it; and that it will not furnish its special or other news to or receive news from any person or corporation which shall have been declared by the board of directors of said party of the first part antagonistic to said party of the first part, after having received notice of such declaration.

"Seventh—It is further mutually agreed between the parties hereto, that the rights, duties and obligations of the respective parties hereto, except as hereinbefore specifically provided for, shall be controlled and governed by the by-laws of said party of the first part now or hereafter in force, during the life of this contract; and that the right to receive news under this contract may be suspended or terminated in the manner and for the causes specified in said by-laws.

"Ninth—Said party of the first part promises and agrees not to furnish any news report to any newspaper published in the said territory described in this contract not now entitled to receive the same under the by-laws of said party of the first part, without the written consent of the said party of the second part or its assigns.

"Tenth—Said party of the second part has assigned and transferred its stock in the said party of the first part to the said party of the first part, which stock is to be held by said party of the first part as security for the performance by said party of the second part of this contract on its part. Said party of the second part, in consideration of the making of this contract by said party of the first part, hereby covenants and agrees that it will not sell or part with any interest in said stock to any party who shall not be the proprietor of a newspaper which shall at the time be on the membership roll of said party of the first part, and that it will keep and observe and perform all the requirements of the by-laws of said party of the first part now or hereafter in force during the life of this contract."

Contracts of substantially the same character have been entered into from time to time between the Associated Press and most of the leading newspapers throughout the United States, to whom, under its charter and by-laws and under its contracts, it sells and vends its news. Similar associations for gathering and selling and vending news, to a limited extent, exist in other cities than Chicago, but none of them so widely extended. Among these are the Sun Printing and Publishing Association of New York City, the New York Sun of New York City, and the Laffan News Bureau of New York City. These three latter associations have been declared to be antagonistic to the Associated Press by the board of directors of the latter. News of an important character not gathered by the Associated Press was gathered by a certain alleged antagonistic

association, and the Inter-Ocean Publishing Company, for the purpose of furnishing its readers with information and news gathered from various points and sources, in addition to the news purchased by it from the Associated Press also purchased and published news obtained by it from the Sun Printing and Publishing Association of New York City, but did not furnish news to the latter association or to any of the associations antagonistic to the Associated Press. The Chicago Herald Company and the Chicago Daily News Company made complaint to the Associated Press that the Inter-Ocean Publishing Company was publishing news procured by it from the Sun Printing and Publishing Association of New York, the New York Sun of New York City and the Laffan News Bureau of New York City, and asked that the Inter-Ocean Publishing Company's contract and section 8 of article 11 of the by-laws should be enforced. The Associated Press gave notice to the Inter-Ocean Publishing Company that a meeting of its board of directors would be held at a time and place mentioned, to take action on the complaints of the Chicago Herald Company and the Chicago Daily News Company. Before the time set for hearing the Inter-Ocean Publishing Company filed its bill for an injunction against the Associated Press from suspending or expelling it from its membership and from refusing to furnish it news according to the terms of its contract, and from doing any act or thing tending to deprive it of the news gathered by appellee, and for such other relief, general and special, as might be just and equitable.

The bill set up the facts hereinbefore stated, and set out the by-laws of the appellee in full, and alleged that the appellee had been able to control the business of buying and accumulating news in Chicago and selling the same, and has thus created in itself an exclusive monopoly in that business, and to preserve such monopoly had declared the Sun Printing and Publishing Association a rival or competitor in business and antagonistic to it, and sought to prohibit its members from buying news therefrom under pain of suspension or expulsion; alleged that appellee had at various times, by threats of suspension and expulsion, compelled divers of its members to cease buying the special news of the Sun Printing and Publishing Association under its contracts with its members. The bill set out the contracts and names of such members, and alleged that the notice served on appellant for a hearing on the complaints against it is similar to the action of appellee against other members who were forced to cease buying special news from the Sun Printing and Publishing Association; that appellant is in duty bound, both to its patrons and to the public, to publish all the news it can gather, and if not able to obtain such news from one source, it must, in justice to its patrons and the public, resort to other sources; that the news which it obtained from appellee it was unable to obtain from any other source, and appellee would not furnish the same to appellant unless it executed the contract hereinbefore mentioned, because of which appellant was forced to and did execute such contract; that appellee does not furnish all the news obtainable and desired by appellant under that contract, and to obtain such other news appellant was forced to resort to the Sun Printing and Publishing Association of New York; that the right to receive the news gathered by appellee and publish the same in its newspaper is a valuable property and property right, and appellant is forced to obtain the news not obtainable from appellee, and which is absolutely needed in publishing its newspapers, from the Sun Printing and Publishing Association; that the appellee is attempting to force appellant to cease taking news from the latter association, but to do so would work irreparable damage and injury to appellant, and would prevent it from furnishing needed, important and necessary news to the public, and would tend to create in favor of appellee a monopoly.

The appellee filed an answer to the bill. A hearing was had upon the bill and answer, both of which were sworn to, and certain affidavits which were read and used as depositions, and a decree was rendered dismissing the bill for want of equity. On appeal to the Appellate Court for the First District the decree was affirmed, and this appeal is prosecuted.

It has been uniformly held that a telegraph or telephone company is bound to treat all persons and corporations alike, and without discrimination in its business of receiving and transmitting messages. The business of such a company is public in its nature, and a public interest is impressed thereon to such an extent that no discrimination can be made against persons or corporations. (People v. Western Union Tel. Co. 166 Ill. 15.) Where one is the owner of property which is devoted to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public for the common good as long as such use is maintained. The manner in which it is devoted to a use in which the public has an interest may be very diverse and the public interest in such use may be of a widely variant character; but where the use is one in which the public is interested or has an interest, public control is necessary for the common good. (Munn v. People, 94 U. S. 113.) The appellee corporation voluntarily sought corporate existence to engage in an enterprise which invested it with, among others, the power of eminent domain. It was organized, among other things, to purchase, erect, lease, operate and sell telegraph and telephone lines,—a business which is essentially public in its nature and renders a corporation so engaged amenable to public control. Whilst, under the averments of the bill and answer and affidavits, the appellee corporation has only engaged in business to the extent of its power "to buy, gather and accumulate information

and news; to vend, supply, distribute and publish the same," and has not attempted to purchase, erect, lease or sell telegraph and telephone lines, it is important to determine the character of the corporation under its charter and under the business in which it is actually engaged.

The organization of such a method of gathering information and news from so wide an extent of territory as is done by the appellee corporation, and the dissemination of that news, requires the expenditure of vast sums of money. It reaches out to the various parts of the United States, where its agents gather news which is wired to it, and through it such news is received by the various important newspapers of the country. Scarcely any newspaper could organize and conduct the means of gathering the information that is centered in an association of the character of the appellee because of the enormous expense, and no paper could be regarded as a newspaper of the day unless it had access to and published the reports from such an association as appellee. For news gathered from all parts of the country the various newspapers are almost solely dependent on such an association, and if they are prohibited from publishing it or its use is refused to them, their character as newspapers is destroyed and they would soon become practically worthless publications. The Associated Press, from the time of its organization and establishment in business, sold its news reports to various newspapers who became members, and the publication of that news became of vast importance to the public, so that public interest is attached to the dissemination of that news. The manner in which that corporation has used its franchise has charged its business with a public interest. It has devoted its property to a public use, and has, in effect, granted to the public such an interest in its use that it must submit to be controlled by the public for the common good, to the extent of the interest it has thus created in the public in its private property. The sole purpose for which news was gathered was that the same should be sold, and all newspaper publishers desiring to purchase such news for publication are entitled to purchase the same without discrimination against them.

It was held in New York and Chicago Grain and Stock Exchange v. Board of Trade, 127 Ill. 153 (on p. 163): "Assuming these market quotations and reports are property and the private property of the board of trade, yet if they have been so used by the board, and by the telegraph company with the knowledge and consent of the board, as to become affected with a public interest, then they are subject to such public regulation by the legislature and the courts as is necessary to prevent injury to such public interest. The doctrine in question has application both to the property of individuals and of corporations, and it is therefore immaterial that any such corporation may be a mere private corporation. If the interest is public, then it is necessarily, to all alike, common to all and upon equal terms. The doctrine, as applied to the matter of these market quotations, would forbid that a monopoly should be made of them by furnishing them to some and refusing them to others who are equally willing to pay for them and be governed by all reasonable rules and regulations, and would prevent the board of trade or the telegraph companies from unjustly discriminating in respect to the parties who will be allowed to receive them." This principle is sustained in Friedman v. Telegraph Co. 32 Hun, 4, and Smith v. Telegraph Co. 42 id. 454. The appellee corporation being engaged in a business upon which a public interest is engrafted, upon principles of justice it can make no distinction with respect to persons who wish to purchase information and news, for purposes of publication, which it was created to furnish.

It is urged, however, that by the terms of the contract appellant cannot retain its membership and stock in the Associated Press, and have the right to purchase news accumulated by it at contract price, without complying with that part of the contract which requires appellant to refrain from receiving news from any person or corporation which has been declared by the board of directors of appellee to be antagonistic to the latter, and without appellant being controlled or governed by the by-law of appellee to the same effect. The character of appellee's business is not to be determined by the contract which it made respecting the liabilities which would attend it, but by the nature of the business, its fixed legal character, growing out of the manner in which that business is conducted, and the purpose of its creation. The legal character of the corporation and its duties cannot be disregarded because of any stipulation incorporated in a contract that it should not be liable to discharge a public duty. Its obligation to serve the public is not one resting on contract, but grows out of the fact that it is in the discharge of a public duty, or a private duty which has been so conducted that a public interest has attached thereto.

In Smith v. Telegraph Co. supra, an action was brought to restrain the defendant from removing from complainant's office a ticker, or from doing any act which would in any way interfere with the receipts of quotations from the stock exchange. By one of the clauses of the contract the plaintiff agreed that the company might forthwith discontinue its service without notice, whenever, in its judgment, any breach of the terms of the contract should be made by him. It was held: "But so long as collecting and supplying quotations is carried on by them, as it is conceded to be at present, they should render equal and impartial service to those who comply with reasonable regulations. What regulations are reasonable may not in all cases be easy to determine, but there need be no hesitation in saying that the clause of their contract permitting them to discontinue the service when, in their judgment, a breach of conditions has been had, is not a reasona-

ble regulation and affords no defense to this action. No man can be judge in his own case, and to justify defendants in refusing to perform service there must be a reason that the court can pronounce sufficient."

In Commercial Union Tel. Co. v. New England Tel. Co. 61 Vt. 241, a question arose as to compelling a telephone company to furnish telephone service. In defense it was sought to set up a contract between the Bell Telephone Company and the respondent restricting the right to the use of their instruments, but the court held there was no right to discriminate and that the restricting clause was invalid, and it was said: "On the ground of public policy, which controls all public carriers, that clause in the contract in question is held void, so that the license stands precisely as if the restricting clause was not contained in it."

The clause of the contract in this case which sought to restrict appellant from obtaining news from other sources than from appellee is an attempt at restriction upon the trade and business among the citizens of a common country. Competition can never be held hostile to public interests, and efforts to prevent competition by contract or otherwise can never be looked upon with favor by the courts. In People v. Live Stock Exchange, 170 Ill. 556, it was said (p. 566): "Efforts to prevent competition and to restrict individual efforts and freedom of action in trade and commerce are restrictions hostile to the public welfare, not consonant with the spirit of our institutions and in violation of law."

Section 8 of article 11 of the by-laws of the appellee sought to prevent any member of the appellee association from furnishing its special or other news to or receiving such news from any person declared by it hostile. In People v. Live Stock Exchange, supra, in speaking of the power to enact by-laws, and their effect, we said (p. 570): "When a corporation is created, there goes with it the power to enact by-laws for its government and guidance, as well as for the guidance and government of its members. This power is necessary to enable a corporation to accomplish the purpose of its creation. But by-laws must be reasonable and for a corporate purpose, and always within charter limits. They must always be strictly subordinate to the constitution and the general law of the land. They must not infringe the policy of the State nor be hostile to public welfare. * * * Attempts to place restrictions on trade and commerce, and to fetter individual liberty of action by preventing competition, are hostile to public welfare and affect the interests of the people. Such attempts by a corporation are an abuse of its corporate franchise. Public policy requires that corporations, in the exercise of powers, must be confined strictly within their charter limits and not be permitted to exercise powers beyond those expressly conferred. The State provides for the creation of corporations. The corporation is its creature and must always conform to its policy. This duty on the part of corporations to do no acts hostile to the policy of the State grows out of the fact that the legislature is presumed to have had in view the public interest when a charter was granted to the corporation, and no departure from its charter purposes will be allowed which would be hurtful to the public."

The by-law of the appellee corporation above referred to is not required for corporate purposes nor included within the purposes of the creation of that corporation. To enforce the provisions of the contract and this by-law would enable the appellee to designate the character of the news that should be published, and, whether true or false, there could be no check on it by publishing news from other sources. Appellee would be powerful in the creation of a monopoly in its favor, and could dictate the character of news it would furnish and could prejudice the interests of the public. Such a power was never contemplated in its creation and is hostile to public interests. That by-law tends to restrict competition, because it prevents its members from purchasing news from any other source than from itself. It seeks to exclude from publication, by any of its members, news procured from any other corporation or source than itself which it declares antagonistic to it. Its tendency, therefore, is to create a monopoly in its own favor and to prevent its members from procuring news from others engaged in the same effect is Fishburn v. City of Chivision is illegal and void. (Adams v. Brenan 177 Ill. 194.) In Holden v. City of Alton, 179 Ill. 318, it was held that equity would enjoin the city from carrying out a contract for city printing at the suit of a tax-payer who was the lowest bidder on a contract, and whose bid was rejected because he did not employ members of a certain labor organization and could not show the label declared by the ordinance making such qualification to be essential, and it was held that such a combination or agreement was in violation of common right and tended to create a monopoly, and that could not be tolerated. To the same effect is Fishburn v. City of Chicago, 171 Ill. 338. The clear effect of this by-law is to create a monopoly, which renders it void.

The provisions of the contract that the appellant should purchase news from no other source, and the restrictive clause of the by-law, are both null and void, and the contract is the same as if these provisions had not been incorporated therein. Rejecting entirely these illegal provisions, on which the right to suspend the appellant as a member and to refuse to furnish it news and information gathered by the Associated Press for publication rests, no reason is presented, under the pleadings and affidavits in this case, why the appellant is not entitled to an injunction, as prayed for in its bill. The bill alleges that the deprivation of such reports by the Associated Press would cause an irreparable injury and damage to the ap-

pellant, which is sought to be prevented by the injunction prayed for in this bill.

We hold that the circuit court of Cook county erred in entering a decree dismissing the bill for want of equity, and the Appellate Court for the First District erred in affirming the same. The judgment of the Appellate Court for the First District and the decree of the circuit court of Cook county are each reversed, and the cause is remanded to the circuit court of Cook county, with directions to enter a decree as prayed for in the bill.

Reversed and remanded.

MUNN vs. ILLINOIS.

(94 U. S. 113.)

Error to the Supreme Court of the State of Illinois.

The Constitution of Illinois, adopted in 1870, contains the following in reference to the inspection of grain, and the storage thereof in public warehouses:—

"Article XIII—Warehouses.

"Section 1. All elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses.

"Sect. 2. The owner, lessee, or manager of each and every public warehouse situated in any town or city of not less than one hundred thousand inhabitants, shall make weekly statements under oath before some officer designated by law, and keep the same posted in some conspicuous place in the office of such warehouse; and shall also file a copy for public examination in such place as shall be designated by law, which statement shall correctly set forth the amount and grade of each and every kind of grain in such warehouse, together with such other property as may be stored therein, and what warehouse receipts have been issued, and are, at the time of making such statement, outstanding therefor; and shall, on the copy posted in the warehouse, note daily such changes as may be made in the quantity and grade of grain in such warehouse; and the different grades of grain shipped in separate lots shall not be mixed with inferior or superior grades, without the consent of the owner or consignor thereof.

"Sect. 3. The owner of property stored in any warehouse, or holder of a receipt for the same, shall always be at liberty to examine such property stored, and all the books and records of the warehouse in regard to such property.

"Sect. 4. All railroad companies, and other common carriers on railroads, shall weigh or measure grain at points where it is shipped, and receipt for the full amount, and shall be responsible for the delivery of such amount to the owner or consignee thereof, at the place of destination.

"Sect. 5. All railroad companies receiving and transporting grain, in bulk or otherwise, shall deliver the same to any consignee thereof, or any elevator or public warehouse to which it may be consigned, provided such consignee, or the elevator, or public warehouse, can be reached by any track owned, leased, or used, or which can be used, by such railroad company; and all railroad companies shall permit connections to be made with their tracks, so that any such consignee, and any public warehouse, coal-bank, or coal-yard may be reached by the cars on said railroad.

"Sect. 6. It shall be the duty of the general assembly to pass all necessary laws to prevent the issue of false and fraudulent warehouse receipts, and to give full effect to this article of the Constitution, which shall be liberally construed, so as to protect producers and shippers. And the enumeration of the remedies herein named shall not be construed to deny to the general assembly the power to prescribe by law such other and further remedies as may be found expedient, or to deprive any person of existing common-law remedies.

"Sect. 7. The general assembly shall pass laws for the inspection of grain, for the protection of producers, shippers, and receivers of grain and produce."

The provisions of the act of the general assembly of Illinois, entitled "An Act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to art. 13 of the Constitution of this State," approved April 25, 1871, so far as the same have any direct bearing upon the questions involved in this case, are as follows:—

"Section 1. Be it enacted by the people of the State of Illinois, represented in the general assembly, that public warehouses, as defined in art. 13 of the Constitution of this State, shall be divided into three classes, to be designated as classes A, B, and C, respectively.

"Sect. 2. Public warehouses of class A shall embrace all warehouses, elevators, or granaries in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved, such warehouses, elevators, or granaries, being located in cities having not less than one hundred thousand inhabitants. Public warehouses of class B shall embrace all other warehouses, elevators, or granaries in which grain is stored in bulk, and in which the grain of different owners is mixed together. Public warehouses of class C shall embrace all other warehouses or places where property of any kind is stored for a consideration.

"Sect. 3. The proprietor, lessee, or manager of any public warehouse of class A shall be required, before transacting any business in such warehouse, to procure from the Circuit Court of the county a license, permitting such proprietor, lessee, or manager to transact business as a public warehouseman under the laws of this State, which license shall be issued by the clerk of said court upon a written application,

which shall set forth the location and name of such warehouse, and the individual name of each person interested as owner or principal in the management of the same, or, if the warehouse be owned or managed by a corporation, the names of the president, secretary, and treasurer of such corporation shall be stated; and the license shall give authority to carry on and conduct the business of a public warehouse of class A in accordance with the laws of this State, and shall be revocable by the said court upon a summary proceeding before the court, upon complaint of any person in writing setting forth the particular violation of law, and upon satisfactory proof to be taken in such manner as may be directed by the court.

"Sect. 4. The person receiving a license as herein provided shall file, with the clerk of the court granting the same, a bond to the people of the State of Illinois, with good and sufficient surety, to be approved by said court, in the penal sum of $10,000, conditioned for the faithful performance of his duty as a public warehouseman of class A, and the full and unreserved compliance with all laws of this State in relation thereto.

"Sect. 5. Any person who shall transact the business of a public warehouse of class A without first procuring a license as herein provided, or who shall continue to transact any such business after such license has been revoked (save only that he may be permitted to deliver property previously stored in such warehouse), shall, on conviction, be fined in a sum not less than $100 for each and every day such business is so carried on; and the court may refuse to renew any license, or grant a new one to any of the persons whose license has been revoked, within one year from the time the same was revoked."

"Sect. 15. Every warehouseman of public warehouses of class A shall be required, during the first week of January of each year, to publish in one or more of the newspapers (daily, if there be such) published in the city in which such warehouse is situated, a table or schedule of rates for the storage of grain in the warehouse during the ensuing year, which rates shall not be increased (except as provided for in sect. 16 of this act) during the year; and such published rates, or any published reduction of them, shall apply to all grain received into such warehouse from any person or source; and no discrimination shall be made, directly or indirectly, for or against any charges made by such warehouseman for the storage of grain.

"The maximum charge of storage and handling of grain, including the cost of receiving and delivering, shall be for the first thirty days or part thereof two cents per bushel, and for each fifteen days or part thereof, after the first thirty days, one-half of one cent per bushel; provided, however, that grain damp or liable to early damage, as indicated by its inspection when received, may be subject to two cents per bushel storage for the first ten days, and for each additional five days or part thereof, not exceeding one-half of one per cent per bushel."

On the twenty-ninth of June, 1872, an information was filed in the Criminal Court of Cook County, Ill., against Munn & Scott, alleging that they were, on the twenty-eighth day of June, 1872, in the city of Chicago, in said county, the managers and lessees of a public warehouse, known as the "North-western Elevator," in which they then and there stored grain in bulk, and mixed the grain of different owners together in said warehouse; that the warehouse was located in the city of Chicago, which contained more than one hundred thousand inhabitants; that they unlawfully transacted the business of public warehousemen, as aforesaid, without procuring a license from the Circuit Court of said county, permitting them to transact business as public warehousemen, under the laws of the State.

To this information a plea of not guilty was interposed.

From an agreed statement of acts, made a part of the record, it appears that Munn & Scott leased of the owner, in 1862, the ground occupied by the "North-western Elevator," and erected thereon the grain warehouse or elevator in that year, with their own capital and means; that they ever since carried on, in said elevator, the business of storing and handling grain for hire, for which they charged and received, as a compensation, the rates of storage which had been, from year to year, agreed upon and established by the different elevators and warehouses in the city of Chicago, and published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication. On the twenty-eighth day of June, 1872, Munn & Scott were the managers and proprietors of the grain warehouse known as "The North-western Elevator," in Chicago, Ill., wherein grain of different owners was stored in bulk and mixed together; and they then and there carried on the business of receiving, storing, and delivering grain for hire, without having taken a license from the Circuit Court of Cook County, permitting them, as managers, to transact business as public warehousemen, and without having filed with the clerk of the Circuit Court a bond to the people of the State of Illinois, as required by sects. 3 and 4 of the act of April 25, 1871. The city of Chicago then, and for more than two years before, had more than one hundred thousand inhabitants. Munn & Scott had stored and mixed grain of different owners together, only by and with the express consent and permission of such owners, or of the consignee of such grain, they having agreed that the compensation should be the published rates of storage.

Munn & Scott had complied in all respects with said act, except in two particulars: first, they had not taken out a li-

cense, nor given a bond, as required by sects. 3 and 4; and, second, they had charged for storage and handling grain the rates established and published in January, 1872, which were higher than those fixed by sect. 15.

The defendants were found guilty, and fined $100.

The judgment of the Criminal Court of Cook County having been affirmed by the Supreme Court of the State, Munn & Scott sued out this writ, and assign for error:—

1. Sects. 3, 4, 5, and 15 of the statute are unconstitutional and void.

2. Said sections are repugnant to the third clause of sect. 8 of art. 1, and the sixth clause of sect. 9, art. 1, of the Constitution of the United States, and to the Fifth and Fourteenth Amendments.

Mr. CHIEF JUSTICE WAITE delivered the opinion of the court.

The question to be determined in this case is whether the general assembly of Illinois can, under the limitations upon the legislative power of the States imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the State having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved."

It is claimed that such a law is repugnant—

1. To that part of sect. 8, art. 1, of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several States;"

2. To that part of sect. 9 of the same article which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another;" and

3. To that part of amendment 14 which ordains that no State shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

We will consider the last of these objections first.

Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.

The Constitution contains no definition of the word "deprive," as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the States.

When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions.

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private, Thorpe v. R. & B. Railroad Co., 27 Vt. 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unncessarily to injure another. This is the very essence of government, and has found expression in the maxim, sic utere tuo ut alienum non lædas. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How. 583, "are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things." Under these powers the government regulates the conduct of its citi-

zens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington "to regulate . . . the rates of wharfage at private wharves, . . . the sweeping of chimneys, and to fix the rates of fees therefor, . . . and the weight and quality of bread," 3 Stat. 587, sect. 7; and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers," 9 id. 224, sect. 2.

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such a deprivation.

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be juris privati only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise De Portibus Maris, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

Thus, as to ferries, Lord Hale says, in his treatise De Jure Maris, 1 Harg. Law Tracts, 6, the king has "a right of franchise or privilege, that no man may set up a common ferry for all passengers, without a prescription time out of mind, or a charter from the king. He may make a ferry for his own use or the use of his family, but not for the common use of all the king's subjects passing that way; because it doth in consequence tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under a public regulation, viz., that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he fail in these he is finable." So if one owns the soil and landing-places on both banks of a stream, he cannot use them for the purposes of a public ferry, except upon such terms and conditions as the body politic may from time to time impose; and this because the common good requires that all public ways shall be under the control of the public authorities. This privilege or prerogative of the king, who in this connection only represents and gives another name to the body politic, is not primarily for his profit, but for the protection of the people and the promotion of the general welfare.

And, again, as to wharves and wharfingers, Lord Hale, in his treatise De Portibus Maris, already cited, says:—

"A man, for his own private advantage, may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz., makes the most of his own. . . . If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the king, . . . or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, &c., neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be juris privati only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by a public interest."

This statement of the law by Lord Hale was cited with approbation and acted upon by Lord Kenyon at the beginning of the present century, in Bolt v. Stennett, 8 T. R. 606.

And the same has been held as to warehouses and warehousemen. In Aldnutt v. Inglis, 12 East, 527, decided in 1810, it ap-

peared that the London Dock Company had built warehouses in which wines were taken in store at such rates of charge as the company and the owners might agree upon. Afterwards the company obtained authority, under the general warehousing act, to receive wines from importers before the duties upon the importation were paid; and the question was, whether they could charge arbitrary rates for such storage, or must be content with a reasonable compensation. Upon this point Lord Ellenborough said (p. 537):—

"There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms. The question then is, whether, circumstanced as this company is, by the combination of the warehousing act with the act by which they were originally constituted, and with the actually existing state of things in the port of London, whereby they alone have the warehousing of these wines, they be not, according to the doctrine of Lord Hale, obliged to limit themselves to a reasonable compensation for such warehousing. And, according to him, whenever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port, as where he is the owner of the only wharf authorized to receive goods which happens to be built in a port newly erected, he is confined to take reasonable compensation only for the use of the wharf."

And further on (p. 539):—

"It is enough that there exists in the place and for the commodity in question a virtual monopoly of the warehousing for this purpose, on which the principle of law attaches, as laid down by Lord Hale in the passage referred to (that from De Portibus Maris already quoted), which includes the good sense as well as the law of the subject."

And in the same case Le Blanc, J., said (p. 541):—

"Then, admitting these warehouses to be private property, and that the company might discontinue this application of them, or that they might have made what terms they pleased in the first instance, yet having, as they now have, this monopoly, the question is, whether the warehouses be not private property clothed with a public right, and, if so, the principle of law attaches upon them. The privilege, then, of bonding these wines being at present confined by the act of Parliament to the company's warehouses, is it not the privilege of the public, and shall not that which is for the good of the public attach on the monopoly, that they shall not be bound to pay an arbitrary but a reasonable rent? But upon this record the company resist having their demand for warehouse rent confined within any limit; and, though it does not follow that the rent in fact fixed by them is unreasonable, they do not choose to insist on its being reasonable for the purpose of raising the question. For this purpose, therefore, the question may be taken to be whether they may claim an unreasonable rent. But though this be private property, yet the principle laid down by Lord Hale attaches upon it, that when private property is affected with a public interest it ceases to be juris privati only; and, in case of its dedication to such a purpose as this, the owners cannot take arbitrary and excessive duties, but the duties must be reasonable."

We have quoted thus largely the words of these eminent expounders of the common law, because, as we think, we find in them the principle which supports the legislation we are now examining. Of Lord Hale it was once said by a learned American judge,—

"In England, even on rights of prerogative, they scan his words with as much care as if they had been found in Magna Charta; and the meaning once ascertained, they do not trouble themselves to search any further." 6 Cow., (N. Y.) 536, note.

In later times, the same principle came under consideration in the Supreme Court of Alabama. That court was called upon, in 1841, to decide whether the power granted to the city of Mobile to regulate the weight and price of bread was unconstitutional, and it was contended that "it would interfer with the right of the citizen to pursue his lawful trade or calling in the mode his judgment might dictate;" but the court said, "there is no motive . . . for this interference on the part of the legislature with the lawful actions of individuals, or the mode in which private property shall be enjoyed, unless such calling affects the public interest, or private property is employed in a manner which directly affects the body of the people. Upon this principle, in this State, tavern-keepers are licensed; . . . and the County Court is required, at least once a year, to settle the rates of innkeepers. Upon the same principle is founded the control which the legislature has always exercised in the establishment and regulation of mills, ferries, bridges, turnpike roads, and other kindred subjects." Mobile v. Yuille, 3 Ala. n. s. 140.

From the same source comes the power to regulate the charges of common carriers, which was done in England as long ago as the third year of the reign of William and Mary, and continued until within a comparatively recent period. And in the first statute we find the following suggestive preamble, to wit:—

"And whereas divers wagoners and other carriers, by combination amongst themselves, have raised the prices of carriage of goods in many places to excessive rates,

to the great injury of the trade: Be it, therefore, enacted," &c. 3 W. & M. c. 12, § 24; 3 Stat. at Large (Great Britain), 481.

Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. New Jersey Nav. Co. v. Merchants' Bank, 6 How. 382. Their business is, therefore, "affected with a public interest," within the meaning of the doctrine which Lord Hale has so forcibly stated.

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiffs in error. From these it appears that "the great producing region of the West and North-west sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard by the Great Lakes, and some of it is forwarded by railway to the Eastern ports. . . . Vessels, to some extent, are loaded in the Chicago harbor, and sailed through the St. Lawrence directly to Europe. . . . The quantity (of grain) received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses which are commonly called elevators, because the grain is elevated from the boat or car, by machinery operated by steam, into the bins prepared for its reception, and elevated from the bins, by a like process, into the vessel or car which is to carry it on. . . . In this way the largest traffic between the citizens of the country north and west of Chicago and the citizens of the country lying on the Atlantic coast north of Washington is in grain which passes through the elevators of Chicago. In this way the trade in grain is carried on by the inhabitants of seven or eight of the great States of the West with four or five of the States lying on the sea-shore, and forms the largest part of inter-state commerce in these States. The grain warehouses or elevators in Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength. . . . They are located with the river harbor on one side and the railway tracks on the other; and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels which are negotiable, and redeemable in like kind, upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has, therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit."

In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great States of the West" must pass on the way "to four or five of the States on the sea-shore" may be a "virtual" monopoly.

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the inn-keeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very "gateway of commerce," and take toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and, therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation, viz., that he . . . take but reasonable toll." Certainly, if any business can be clothed "with a public interest, and cease to be juris privati only," this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts.

We also are not permitted to overlook the fact that, for some reason, the people of Illinois, when they revised their Constitution in 1870, saw fit to make it the duty of the general assembly to pass laws "for the protection of producers, shippers, and receivers of grain and produce," art. 13, sect. 7; and by sect. 5 of the same article, to require all railroad companies receiving and transporting grain in bulk or otherwise to deliver the same at any elevator to which it might be consigned, that could be reached by any track that was or could be used

by such company, and that all railroad companies should permit connections to be made with their tracks, so that any public warehouse, &c., might be reached by the cars on their railroads. This indicates very clearly that during the twenty years in which this peculiar business had been assuming its present "immense proportions," something had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here. For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge.

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.

It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted.

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will and compel the public to yield to his terms, or forego the use.

But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts.

After what has already been said, it is unnecessary to refer at length to the effect of the other provision of the Fourteenth Amendment which is relied upon, viz., that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Certainly, it cannot be claimed that this prevents the State from regulating the fares of hackmen or the charges of draymen in Chicago, unless it does the same thing in every other place within its jurisdiction. But, as has been

seen, the power to regulate the business of warehouses depends upon the same principle as the power to regulate hackmen and draymen, and what cannot be done in the one case in this particular cannot be done in the other.

We come now to consider the effect upon this statute of the power of Congress to regulate commerce.

It was very properly said in the case of the State Tax on Railway Gross Receipts, 15 Wall. 293, that "it is not every thing that affects commerce that amounts to a regulation of it, within the meaning of the Constitution." The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in inter-state commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with inter-state commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their inter-state relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a State, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress in respect to inter-state commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done.

The remaining objection, to wit, that the statute in its present form is repugnant to sect. 9, art. 1, of the Constitution of the United States, because it gives preference to the ports of one State over those of another, may be disposed of by the single remark that this provision operates only as a limitation of the powers of Congress, and in no respect affects the States in the regulation of their domestic affairs.

We conclude, therefore, that the statute in question is not repugnant to the Constitution of the United States, and that there is no error in the judgment. In passing upon this case we have not been unmindful of the vast importance of the questions involved. This and cases of a kindred character were argued before us more than a year ago by most eminent counsel, and in a manner worthy of their well-earned reputations. We have kept the cases long under advisement, in order that their decision might be the result of our mature deliberations.

Judgment affirmed.

Mr. JUSTICE FIELD and Mr. JUSTICE STRONG dissented.

Mr. JUSTICE FIELD. I am compelled to dissent from the decision of the court in this case, and from the reasons upon which that decision is founded. The principle upon which the opinion of the majority proceeds is, in my judgment, subversive of the rights of private property, heretofore believed to be protected by constitutional guaranties against legislative interference, and is in conflict with the authorities cited in its support.

The defendants had constructed their warehouse and elevator in 1862 with their own means, upon ground leased by them for that purpose, and from that time until the filing of the information against them had transacted the business of receiving and storing grain for hire. The rates of storage charged by them were annually established by arrangement with the owners of different elevators in Chicago, and were published in the month of January. In 1870, the State of Illinois adopted a new constitution, and by it "all elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses."

In April, 1871, the legislature of the State passed an act to regulate these warehouses, thus declared to be public, and the warehousing and inspection of grain, and to give effect to this article of the Constitution. By that act public warehouses, as defined in the Constitution, were divided into three classes, the first of which embraced all warehouses, elevators, or granaries located in cities having not less than one hundred thousand inhabitants, in which grain was stored in bulk, and the grain of different owners was mixed together, or stored in such manner that the identity of different lots or parcels could not be accurately preserved. To this class the elevator of the defendants belonged. The act prescribed the maximum of charges which the proprietor, lessee, or manager of the warehouse was allowed to make for storage and handling of grain, including the cost of receiving and delivering it, for the first thirty days or any part thereof, and for each succeeding fifteen days or any part thereof; and it required him to procure from the Circuit Court of the county a license to transact business as a public warehouseman, and to give a bond to the people of the State in the penal sum of $10,000 for the faithful performance of his duty as such warehouseman of the first class, and for his full and unreserved compliance with all laws of the State in relation thereto. The license was made revocable by the Circuit Court upon a summary proceeding for any violation of such laws. And a penalty was imposed upon every person transacting business as a public warehouseman of the first class, without first procuring a license, or continuing in such business after his license had been revoked, of not less than $100 or more than $500 for each day on which the business was thus carried on. The court was also authorized to refuse for one year to renew the license, or to grant a new

one to any person whose license had been revoked. The maximum of charges prescribed by the act for the receipt and storage of grain was different from that which the defendants had previously charged, and which had been agreed to by the owners of the grain. More extended periods of storage were required of them than they formerly gave for the same charges. What they formerly charged for the first twenty days of storage, the act allowed them to charge only for the first thirty days of storage; and what they formerly charged for each succeeding ten days after the first twenty, the act allowed them to charge only for each succeeding fifteen days after the first thirty. The defendants, deeming that they had a right to use their own property in such manner as they desired, not inconsistent with the equal right of others to a like use, and denying the power of the legislature to fix prices for the use of their property, and their services in connection with it, refused to comply with the act by taking out the license and giving the bond required, but continued to carry on the business and to charge for receiving and storing grain such prices as they had been accustomed to charge, and as had been agreed upon between them and the owners of the grain. For thus transacting their business without procuring a license, as required by the act, they were prosecuted and fined, and the judgment against them was affirmed by the Supreme Court of the State.

The question presented, therefore, is one of the greatest importance,—whether it is within the competency of a State to fix the compensation which an individual may receive for the use of his own property in his private business, and for his services in connection with it.

The declaration of the Constitution of 1870, that private buildings used for private purposes shall be deemed public institutions, does not make them so. The receipt and storage of grain in a building erected by private means for that purpose does not constitute the building of a public warehouse. There is no magic in the language, though used by a constitutional convention, which can change a private business into a public one, or alter the character of the building in which the business is transacted. A tailor's or a shoemaker's shop would still retain its private character, even though the assembled wisdom of the State should declare, by organic act or legislative ordinance, that such a place was a public workshop, and that the workmen were public tailors or public shoemakers. One might as well attempt to change the nature of colors, by giving them a new designation. The defendants were no more public warehousemen, as justly observed by counsel, than the merchant who sells his merchandise to the public is a public merchant, or the blacksmith who shoes horses for the public is a public blacksmith; and it was a strange notion that by calling them so they would be brought under legislative control.

The Supreme Court of the State—divided, it is true, by three to two of its members—has held that this legislation was a legitimate exercise of State authority over private business; and the Supreme Court of the United States, two only of its members dissenting, has decided that there is nothing in the Constitution of the United States, or its recent amendments, which impugns its validity. It is, therefore, with diffidence I presume to question the soundness of the decision.

The validity of the legislation was, among other grounds, assailed in the State court as being in conflict with that provision of the State Constitution which declares that no person shall be deprived of life, liberty, or property without due process of law, and with that provision of the Fourteenth Amendment of the Federal Constitution which imposes a similar restriction upon the action of the State. The State court held, in substance, that the constitutional provision was not violated so long as the owner was not deprived of the title and possession of his property; and that it did not deny to the legislature the power to make all needful rules and regulations respecting the use and enjoyment of the property, referring, in support of the position, to instances of its action in prescribing the interest on money, in establishing and regulating public ferries and public mills, and fixing the compensation in the shape of tolls, and in delegating power to municipal bodies to regulate the charges of hackmen and draymen, and the weight and price of bread. In this court the legislation was also assailed on the same ground, our jurisdiction arising upon the clause of the Fourteenth Amendment, ordaining that no State shall deprive any person of life, liberty, or property without due process of law. But it would seem from its opinion that the court holds that property loses something of its private character when employed in such a way as to be generally useful. The doctrine declared is that property "becomes clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large;" and from such clothing the right of the legislature is deduced to control the use of the property, and to determine the compensation which the owner may receive for it. When Sir Matthew Hale, and the sages of the law in his day, spoke of property as affected by a public interest, and ceasing from that cause to be juris privati solely, that is, ceasing to be held merely in private right, they referred to property dedicated by the owner to public uses, or to property the use of which was granted by the government, or in connection with which special privileges were conferred. Unless the property was thus dedicated, or some right bestowed by the government was held with the property, either by specific grant or by prescription of so long a time as to imply a grant originally, the property was not affected by any public interest so as to be taken out of the cate-

gory of property held in private right. But it is not in any such sense that the terms "clothing property with a public interest" are used in this case. From the nature of the business under consideration—the storage of grain—which, in any sense in which the words can be used, is a private business, in which the public are interested only as they are interested in the storage of other products of the soil, or in articles of manufacture, it is clear that the court intended to declare that, whenever one devotes his property to a business which is useful to the public,—"affects the community at large,"—the legislature can regulate the compensation which the owner may receive for its use, and for his own services in connection with it. "When, therefore," says the court, "one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." The building used by the defendants was for the storage of grain: in such storage, says the court, the public has an interest; therefore the defendants, by devoting the building to that storage, have granted the public an interest in that use, and must submit to have their compensation regulated by the legislature.

If this be sound law, if there be no protection, either in the principles upon which our republican government is founded, or in the prohibitions of the Constitution against such invasion of private rights, all property and all business in the State are held at the mercy of a majority of its legislature. The public has no greater interest in the use of buildings for the storage of grain than it has in the use of buildings for the residences of families, nor, indeed, anything like so great an interest; and, according to the doctrine announced, the legislature may fix the rent of all tenements used for residences, without reference to the cost of their erection. If the owner does not like the rates prescribed, he may cease renting his houses. He has granted to the public, says the court, an interest in the use of the buildings, and "he may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." The public is interested in the manufacture of cotton, woollen, and silken fabrics, in the construction of machinery, in the printing and publication of books and periodicals, and in the making of utensils of every variety, useful and ornamental; indeed, there is hardly an enterprise or business engaging the attention and labor of any considerable portion of the community, in which the public has not an interest in the sense in which that term is used by the court in its opinion; and the doctrine which allows the legislature to interfere with and regulate the charges which the owners of property thus employed shall make for its use, that is, the rates at which all these different kinds of business shall be carried on, has never before been asserted, so far as I am aware, by any judicial tribunal in the United States.

The doctrine of the State court, that no one is deprived of his property, within the meaning of the constitutional inhibition, so long as he retains its title and possession, and the doctrine of this court, that, whenever one's property is used in such a manner as to affect the community at large, it becomes by that fact clothed with a public interest, and ceases to be juris privati only, appear to me to destroy, for all useful purposes, the efficacy of the constitutional guaranty. All that is beneficial in property arises from its use, and the fruits of that use; and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. If the constitutional guaranty extends no further than to prevent a deprivation of title and possession, and allows a deprivation of use, and the fruits of that use, it does not merit the encomiums it has received. Unless I have misread the history of the provision now incorporated into all our State constitutions, and by the Fifth and Fourteenth Amendments into our Federal Constitution, and have misunderstood the interpretation it has received, it is not thus limited in its scope, and thus impotent for good. It has a much more extended operation than either court, State or Federal has given to it. The provision, it is to be observed, places property under the same protection as life and liberty. Except by due process of law, no State can deprive any person of either. The provision has been supposed to secure to every individual the essential conditions for the pursuit of happiness; and for that reason has not been heretofore, and should never be, construed in any narrow or restricted sense.

No State "shall deprive any person of life, liberty, or property without due process of law," says the Fourteenth Amendment to the Constitution. By the term "life," as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life, but of whatever God has given to every one with life, for its growth and enjoyment, is prohibited by the provision in question, if its efficacy be not frittered away by judicial decision.

By the term "liberty," as used in the provision, something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent with

the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and give to them their highest enjoyment.

The same moral construction which is required for the protection of life and liberty, in all particulars in which life and liberty are of any value, should be applied to the protection of private property. If the legislature of a State, under pretence of providing for the public good, or for any other reason, can determine, against the consent of the owner, the uses to which private property shall be devoted, or the prices which the owner shall receive for its uses, it can deprive him of the property as completely as by a special act for its confiscation or destruction. If, for instance, the owner is prohibited from using his building for the purposes for which it was designed, it is of little consequence that he is permitted to retain the title and possession; or, if he is compelled to take as compensation for its use less than the expenses to which he is subjected by its ownership, he is, for all practical purposes, deprived of the property, as effctually as if the legislature had ordered his forcible dispossession. If it be admitted that the legislature has any control over the compensation, the extent of that compensation becomes a mere matter legislative discretion. The amount fixed will operate as a partial destruction of the value of the property, if it fall below the amount which the owner would obtain by contract, and, practically, as a complete destruction, if it be less than the cost of retaining its possession. There is, indeed, no protection of any value under the constitutional provision, which does not extend to the use and income of the property, as well as to its title and possession.

This court has heretofore held in many instances that a constitutional provision intended for the protection of rights of private property should be liberally construed. It has so held in the numerous cases where it has been called upon to give effect to the provision prohibiting the States from legislation impairing the obligation of contracts; the provision being construed to secure from direct attack not only the contract itself, but all the essential incidents which give it value and enable its owner to enforce it. Thus, in Bronson v. Kinzie, reported in the 1st of Howard, it was held that an act of the legislature of Illinois, giving to a mortgagor twelve months within which to redeem his mortgaged property from a judicial sale, and prohibiting its sale for less than two-thirds of its appraised value, was void as applied to mortgages executed prior to its passage. It was contended, in support of the act, that it affected only the remedy of the mortgagee, and did not impair the contract; but the court replied that there was no substantial difference between a retrospective law declaring a particular contract to be abrogated and void, and one which took away all remedy to enforce it, or incumbered the remedy with conditions that rendered it useless or impracticable to pursue it. And, referring to the constitutional provision, the court said, speaking through Mr. Chief Justice Taney, that "it would be unjust to the memory of the distinguished men who framed it, to suppose that it was designed to protect a mere barren and abstract right, without any practical operation upon the business of life. It was undoubtedly adopted as a part of the Constitution for a great and useful purpose. It was to maintain the integrity of contracts, and to secure their faithful execution throughout this Union, by placing them under the protection of the Constitution of the United States. And it would but ill become this court, under any circumstances, to depart from the plain meaning of the words used, and to sanction a distinction between the right and the remedy, which would render this provision illusive and nugatory, mere words of form, affording no protection and producing no practical result."

And in Pumpelly v. Green Bay Company, 13 Wall. 177, the language of the court is equally emphatic. That case arose in Wisconsin, the constitution of which declares, like the constitutions of nearly all the States, that private property shall not be taken for public use without just compensation; and this court held that the flooding of one's land by a dam constructed across a river under a law of the State was a taking within the prohibition, and required compensation to be made to the owner of the land thus flooded. The court, speaking through Mr. Justice Miller, said:—

"It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators, as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that, if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction on the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

The views expressed in these citations, applied to this case, would render the con-

stitutional provision invoked by the defendants effectual to protect them in the uses, income, and revenues of their property, as well as in its title and possession. The construction actually given by the State court and by this court makes the provision, in the language of Taney, a protection to "a mere barren and abstract right, without any practical operation upon the business of life," and renders it "illusive and nugatory, mere words of form, affording no protection and producing no practical result."

The power of the State over the property of the citizen under the constitutional guaranty is well defined. The State may take his property for public uses, upon just compensation being made therefor. It may take a portion of his property by way of taxation for the support of the government. It may control the use and possession of his property, so far as may be necessary for the protection of the rights of others, and to secure to them the equal use and enjoyment of their property. The doctrine that each one must so use his own as not to injure his neighbor—sic utere tuo ut alienum non lædas—is the rule by which every member of society must possess and enjoy his property; and all legislation essential to secure this common and equal enjoyment is a legitimate exercise of State authority. Except in cases where property may be destroyed to arrest a conflagration or the ravages of pestilence, or be taken under the pressure of an immediate and overwhelming necessity to prevent a public calamity, the power of the State over the property of the citizen does not extend beyond such limits.

It is true that the legislation which secures to all protection in their rights, and the equal use and enjoyment of their property, embraces an almost infinite variety of subjects. Whatever affects the peace, good order, morals, and health of the community, comes within its scope; and every one must use and enjoy his property subject to the restrictions which such legislation imposes. What is termed the police power of the State, which, from the language often used respecting it, one would suppose to be an undefined and irresponsible element in government, can only interfere with the conduct of individuals in their intercourse with each other, and in the use of their property, so far as may be required to secure these objects. The compensation which the owners of property, not having any special rights or privileges from the government in connection with it, may demand for its use, or for their own services in union with it, forms no element of consideration in prescribing regulations for that purpose. If one construct a building in a city, the State or the municipality exercising a delegated power from the State, may require its walls to be of sufficient thickness for the uses intended; it may forbid the employment of inflamable materials in its construction, so as not to endanger the safety of his neighbors; if designed as a theatre, church, or public hall, it may prescribe ample means of egress, so as to afford facility for escape in case of accident; it may forbid the storage in it of powder, nitro-glycerine, or other explosive material; it may require its occupants daily to remove decayed vegetable and animal matter, which would otherwise accumulate and engender disease; it may exclude from it all occupations and business calculated to disturb the neighborhood or infect the air. Indeed, there is no end of regulations with respect to the use of property which may not be legitimately prescribed, having for their object the peace, good order, safety, and health of the community, thus securing to all the equal enjoyment of their property; but in establishing these regulations it is evident that compensation to the owner for the use of his property, or for his services in union with it, is not a matter of any importance: whether it be one sum or another does not affect the regulation, either in respect to its utility or mode of enforcement. One may go, in like manner, through the whole round of regulations authorized by legislation, State or municipal, under what is termed the police power, and in no instance will he find that the compensation of the owner for the use of his property has any influence in establishing them. It is only where some right or privilege is conferred by the government or municipality upon the owner, which he can use in connection with his propery, or by means of which the use of his property is rendered more valuable to him, or he thereby enjoys an advantage over others, that the compensation to be received by him becomes a legitimate matter of regulation. Submission to the regulation of compensation in such cases is an implied condition of the grant, and the State, in exercising its power of prescribing the compensation, only determines the conditions upon which its concession shall be enjoyed. When the privilege ends, the power of regulation ceases.

Jurists and writers on public law find authority for the exercise of this police power of the State and the numerous regulations which it prescribes in the doctrine already stated, that every one must use and enjoy his property consistently with the rights of others, and the equal use and enjoyment by them of their property. "The police power of the State," says the Supreme Court of Vermont, "extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property in the State. According to the maxim, sic utere tuo ut alienum non lædas, which, being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others." Thorpe v. Rutland & Burlington Railroad Co., 27 Vt. 149. "We think it a settled prin-

ciple growing out of the nature of well-ordered civil society," says the Supreme Court of Massachusetts, "that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community." Commonwealth v. Alger, 7 Cush. 84. In his Commentaries, after speaking of the protection afforded by the Constitution to private property, Chancellor Kent, says:—

"But though property be thus protected, it is still to be understood that the lawgiver has the right to prescribe the mode and manner of using it, [so far as may be necessary to prevent the abuse of the right, to the injury or annoyance of others, or of the public.] The government may, by general regulations, interdict such uses of property as would create nuisances and become dangerous to the lives, or health, or peace, or comfort of the citizens. Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam-power to propel cars, the building of combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, [on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community.] 2 Kent, 340.

The parts in brackets in these citations are mine. The citations show what I have already stated to be the case, that the regulations which the State, in the exercise of its police power, authorizes with respect to the use of property are entirely independent of any question of compensation for such use, or for the services of the owner in connection with it.

There is nothing in the character of the business of the defendants as warehousemen which caled for the interference complained of in this case. Their buildings are not nuisances; their occupation of receiving and storing grain infringes upon no rights of others, disturbs no neighborhood, infects not the air, and in no respect prevents others from using and enjoying their property as to them may seem best. The legislation in question is nothing less than a bold assertion of absolute power by the State to control at its discretion the property and business of the citizen, and fix the compensation he shall receive. The will of the legislature is made the condition upon which the owner shall receive the fruits of his property and the just reward of his labor, industry, and enterprise. "That government," says Story, "can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be left sacred." Wilkeson v. Leland, 2 Pet. 657. The decision of the court in this case gives unrestrained license to legislative will.

The several instances mentioned by counsel in the argument, and by the court in its opinion, in which legislation has fixed the compensation which parties may receive for the use of their property and services, do not militate against the views I have expressed of the power of the State over the property of the citizen. They were mostly cases of public ferries, bridges, and turnpikes, of wharfingers, hackmen, and draymen, and of interest on money. In all these cases, except that of interest on money, which I shall presently notice, there was some special privilege granted by the State or municipality; and no one, I suppose, has ever contended that the State had not a right to prescribe the conditions upon which such privilege should be enjoyed. The State in such cases exercises no greater right than an individual may exercise over the use of his own property when leased or loaned to others. The conditions upon which the privilege shall be enjoyed being stated or implied in the legislation authorizing its grant, no right is, of course, impaired by their enforcement. The recipient of the privilege, in effect, stipulates to comply with the conditions. It matters not how limited the privilege conferred, its acceptance implies an assent to the regulation of its use and the compensation for it. The privilege which the hackman and drayman have to the use of stands on the public streets, not allowed to the ordinary coachman or laborer with teams, constitutes a sufficient warrant for the regulation of their fares. In the case of the warehousemen of Chicago, no right or privilege is conferred by the government upon them; and hence no assent of theirs can be alleged to justify any interference with their charges for the use of their property.

The quotations from the writings of Sir Matthew Hale, so far from supporting the positions of the court, do not recognize the interference of the government, even to the extent which I have admitted to be legitimate. They state surely that the franchise of a public ferry belongs to the king, and cannot be used by the subject except by license from him, or prescription time out of mind; and that when the subject has a public wharf by license from the king, or from having dedicated his private wharf to the public, as in the case of a street opened by him through his own land, he must allow the use of the wharf for reasonable and moderate charges. Thus, in the first quotation which is taken from his treatise De Jurie Maris, Hale says that the king has "a right of franchise or privilege, that no man may set up a common ferry for all passengers without a prescription time out

of mind or a charter from the king. He may make a ferry for his own use or the use of his family, but not for the common use of all the king's subjects passing that way; because it doth in consequent tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under public regulation, viz., that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he fail in these he is finable." Of course, one who obtains a license from the king to establish a public ferry, at which "every man for his passage pays a toll," must take it on condition that he charge only reasonable toll, and, indeed, subject to such regulations as the king may prescribe.

In the second quotation, which is taken from his treatise De Portibus Maris, Hale says:—

"A man for his own private advantage, may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz., makes the most of his own. If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharves only licensed by the king, or because there is no other wharf in that port, as it may fall out where a port is newly erected, in that case there can not be taken arbitrary and excessive duties for cranage, wharfage, pesage, &c.; neither can they be enhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be juris privati only; as if a man set out a street in new buildings on his own land, it is now no longer bare private interest, but is affected by the public interest."

The purport of which is, that if one have a public wharf, by license from the government or his own dedication, he must exact only reasonable compensation for its use. By its dedication to public use, a wharf is as much brought under the common-law rule of subjection to reasonable charges as it would be if originally established or licensed by the crown. All property dedicated to public use by an individual owner, as in the case of land for a park or street, falls at once, by force of the dedication, under the law governing property appropriated by the government for similar purposes.

I do not doubt the justice of the encomiums passed upon Sir Matthew Hale as a learned jurist of his day; but I am unable to perceive the pertinency of his observations upon public ferries and public wharves, found in his treatises on "The Rights of the Sea" and on "The Ports of the Sea," to the questions presented by the warehousing law of Illinois, undertaking to regulate the compensation received by the owners of private property, when that property is used for private purposes.

The principal authority cited in support of the ruling of the court is that of Alnutt v. Inglis, decided by the King's Bench, and reported in 12 East. But that case, so far from sustaining the ruling, establishes, in my judgment, the doctrine that every one has a right to charge for his property, or for its use, whatever he pleases, unless he enjoys in connection with it some right or privilege from the government not accorded to others; and even then it only decides what is above stated in the quotations from Sir Matthew Hale, that he must submit, so long as he retains the right or privilege, to reasonable rates. In that case, the London Dock Company, under certain acts of Parliament, possessed the exclusive right of receiving imported goods into their warehouses before the duties were paid; and the question was whether the company was bound to receive them for a reasonable reward, or whether it could arbitrarily fix its compensation. In deciding the case, the Chief Justice, Lord Ellenborough, said:—

"There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent perform the duty attached to it on reasonable terms."

And, coming to the conclusion that the company's warehouses were invested with "the monopoly of a public privilege," he held that by law the company must confine itself to take reasonable rates; and added, that if the crown should thereafter think it advisable to extend the privilege more generally to other persons and places, so that the public would not be restrained from exercising a choice of warehouses for the purpose, the company might be enfranchised from the restriction which attached to a monopoly; but, so long as its warehouses were the only places which could be resorted to for that purpose, the company was bound to let the trade have the use of them for a reasonable hire and reward. The other judges of the court placed their concurrence in the decision upon the ground that the company possessed a legal monopoly of the business, having the only warehouses where goods imported could be lawfully received without previous payment of the duties. From this case it appears that it is only where some privilege in the bestowal of the government is enjoyed in connection with the property, that it is affected with a public interest in any proper sense of the terms. It is the public privilege conferred with

the use of the property which creates the public interest in it.

In the case decided by the Supreme Court of Alabama, where a power granted to the city of Mobile to license bakers, and to regulate the weight and price of bread, was sustained so far as regulating the weight of the bread was concerned, no question was made as to the right to regulate the price. 3 Ala. 137. There is no doubt of the competency of the State to prescribe the weight of a loaf of bread, as it may declare what weight shall constitute a pound or a ton. But I deny the power of any legislature under our government to fix the price which one shall receive for his property of any kind. If the power can be exercised as to one article, it may as to all articles, and the prices of every thing, from a calico gown to a city mansion, may be the subject of legislative direction.

Other instances of a similar character may, no doubt, be cited of attempted legislative interference with the rights of property. The act of Congress of 1820, mentioned by the court, is one of them. There Congress undertook to confer upon the city of Washington power to regulate the rates of wharfage at private wharves, and the fees for sweeping chimneys. Until some authoritative adjudication is had upon these and similar provisions, I must adhere, notwithstanding the legislation, to my opinion, that those who own property have the right to fix the compensation at which they will allow its use, and that those who control services have a right to fix the compensation at which they will be rendered. The chimney-sweeps may, I think, safely claim all the compensation which they can obtain by bargain for their work. In the absence of any contract for property or services, the law allows only a reasonable price or compensation; but what is a reasonable price in any case will depend upon a variety of considerations, and is not a matter for legislative determination.

The practice of regulating by legislation the interest receivable for the use of money, when considered with reference to its origin, is only the assertion of a right of the government to control the extent to which a privilege granted by it may be exercised and enjoyed. By the ancient common law it was unlawful to take any money for the use of money: all who did so were called usurers, a term of great reproach, and were exposed to the censure of the church; and if, after the death of a person, it was discovered that he had been a usurer whilst living, his chattels were forfeited to the king, and his lands escheated to the lord of the fee. No action could be maintained on any promise to pay for the use of money, because of the unlawfulness of the contract. Whilst the common law thus condemned all usury, Parliament interfered, and made it lawful to take a limited amount of interest. It was not upon the theory that the legislature could arbitrarily fix the compensation which one could receive for the use of property, which, by the general law, was the subject of hire for compensation, that Parliament acted, but in order to confer a privilege which the common law denied. The reasons which led to this legislation originally have long since ceased to exist; and if the legislation is still persisted in, it is because a long acquiescence in the exercise of a power, especially when it was rightfully assumed in the first instance, is generally received as sufficient evidence of its continued lawfulness. 10 Bac. Abr. 264.

There were also recognized in England, by the ancient common law, certain privileges as belonging to the lord of the manor, which grew out of the state of the country, the condition of the people, and the relation existing between him and his tenants under the feudal system. Among these was the right of the lord to compel all the tenants within his manor to grind their corn at his mill. No one, therefore, could set up a mill except by his license, or by the license of the crown, unless he claimed the right by prescription, which presupposed a grant from the lord or crown, and, of course, with such license went the right to regulate the tolls to be received. Woolrych on the Law of Waters, c. 6, of Mills. Hence originated the doctrine which at one time obtained generally in this country, that there could be no mill to grind corn for the public, without a grant or license from the public authorities. It is still, I believe, asserted in some States. This doctrine being recognized, all the rest followed. The right to control the toll accompanied the right to control the establishment of the mill.

It requires no comment to point out the radical differences between the cases of public mills and interest on money, and that of the warehouses in Chicago. No prerogative or privilege of the crown to establish warehouses was ever asserted at the common law. The business of a warehouseman was, at common law, a private business, and is so in its nature. It has no special privileges connected with it, nor did the law ever extend to it any greater protection than it extended to all other private business. No reason can be assigned to justify legislation interfering with the legitimate profits of that business, that would not equally justify an intermeddling with the business of every man in the community, so soon, at least, as his business became generally useful.

I am of opinion that the judgment of the Supreme Court of Illinois should be reversed.

Mr. JUSTICE STRONG. When the judgment in this case was announced by direction of a majority of the court, it was well known by all my brethren that I did not concur in it. It had been my purpose to prepare a dissenting opinion, but I found no time for the preparation, and I was reluctant to dissent in such a case without

stating my reasons. Mr. Justice Field has now stated them as fully as I can, and I concur in what he has said.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, v. J. TALLMAN BUDD, APPELLANT.

(117 N. Y. 1; 22 N. E. 670.)

Appeal from the judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made December 31, 1888, which affirmed a judgment of a criminal term of said court, entered upon a verdict, convicting defendant of a misdemeanor, in violating the provisions of the act (Chap. 581, Laws of 1888) known as the Elevator Act.

The material facts are stated in the prevailing opinion.

ANDREWS, J. The main question upon this record is, whether the legislation fixing the maximum charge for elevating grain, contained in the act, chapter 581 of the Laws of 1888, is valid and constitutional. The act, in its first section, fixes the maximum charge for receiving, weighing and discharging grain by means of floating and stationary elevators and warehouses in this state, at five-eighths of one cent a bushel, and for trimming and shoveling to the leg of the elevator in the process of handling grain by means of elevators, "lake vessels or propellers, the ocean vessels or steamships, and canal boats," shall, the section declares, only be required to pay the actual cost. The second section makes a violation of the act a misdemeanor, punishable by fine of not less than $250. The third section gives a civil remedy to a party injured by a violation of the act. The fourth section excludes from the operation of the act any village, town, or city having less than one hundred and thirty thousand population. The defendant, the manager of a stationary elevator in the city of Buffalo, on the 19th day of September, 1888, exacted from the Lehigh Valley Transportation Company for elevating, raising and discharging a cargo of corn from a lake propeller at his elevator, the sum of one cent a bushel, and for shoveling to the leg of the elevator, the carrier was charged and compelled to pay four dollars for each thousand bushels. The shoveling of grain to the leg of an elevator at the port of Buffalo is now performed pursuant to an arrangement made since the passage of the act of 1888, by a body of men known as the Shovelers' Union, who pay the elevator one dollar and seventy-five cents a thousand bushels, for the use of the steam shovel, a part of the machinery connected with the elevator, operated by steam, and who for their services and the expense of the steam-shovel charge the carrier for each thousand bushels of grain shoveled the sum of four dollars. The defendant was indicted for a violation of the act of 1888. The indictment contains a single count charging a violation of the first section in two particulars, viz.: In exacting more than the statute rate for elevating the cargo, and exacting more than the actual cost for shoveling the grain to the leg of the elevator. Before reaching the main question there is a subordinate question to be considered.

The defendant on the trial raised the question of the constitutionality of the act of 1888, and also insisted that, as to the alleged overcharge for shoveling, the facts did not show that the defendant had received anything for that service or that the cargo had been charged more than the actual cost, and excepted to the submission to the jury of that branch of the case. The trial judge overruled both points and submitted the case to the jury in both aspects, who found a general verdict of guilty, and thereupon the court imposed upon the defendant a fine of $250. It is now urged that, assuming the constitutionality of the act of 1888, the judgment should be reversed for the reason that no overcharge by the defendant for shoveling was proved, and also that the sum paid for shoveling was paid to the Shovelers' Union, the defendant only receiving thereout, from the union, the rent agreed for the use of the steam-shovel. There are two answers to this proposition. The words "actual cost," used in the statute, were manifestly intended to exclude any charge by the elevator beyond the sum specified for the use of its machinery in shoveling, and the ordinary expenses of operating it, and to confine the charge to the actual cost of the outside labor required for trimming and bringing the grain to the leg of the elevator. The purpose of the act could be easily evaded and defeated if the elevator owners were permitted to separate the services, and charge for the use of the steam-shovel any sum which might be agreed upon between themselves and the Shovelers' Union, and thereby, under color of charging for the use of the steam-shovel, exact of the carrier a sum for elevating beyond the rate fixed by the act. The second answer to the proposition is this: It was undisputed that the defendant exacted a greater charge for elevating than the sum allowed by the act. This was proven by testimony on the part both of the prosecution and the defendant. The verdict of guilty was followed by the infliction of the lowest penalty for a single offense. The verdict and sentence were justified without considering whether an offense was made out under the second allegation in the indictment. No question as to the form of the indictment was made. The joinder of several distinct misdemeanors in the same indictment is not a cause for the reversal of a judgment where there is a general verdict and the sentence is single and is appropriate to either of the counts upon which the conviction was had. (Polinsky v. People, 73 N. Y. 65.) Even if the alleged overcharge for shoveling was not made out, the verdict and sentence are supported by the findings of the jury on the other branch of the case, and the refusal of the judge to

withdraw from the jury the consideration of the question, whether there was an overcharge for shoveling, did not prejudice the defendant.

Passing this point, we come to the main question, whether legislative power under the state Constitution exists in the legislature to prescribe a maximum charge for elevating grain by stationary elevators owned by individuals or corporations, who have appropriated their property to this use and are engaged in this business. The ascertainment of the exact boundaries of legislative power under the rigid constitutional systems of the American states is in many cases attended with great perplexity and difficulty. The People have placed in the Constitution a variety of restrictions upon legislative power, and chief among them is that which ordains that no person shall be deprived of life, liberty or property without due process of law. There is but little difficulty in determining the validity of a statute under this constitutional principle in cases where the statute assumes to divest the owner of property of his title and possession, or to actually deprive him of his personal liberty. The state may lawfully take the property or life of the citizen without infringement of the constitutional guaranty. The cases where the right of property is set aside by positive laws are various. Distress, executions, forfeitures, taxes, are of this description, "wherein," said Lord Camden in Entick v. Carrington (19 How. St. Tr. 1066), "every man by common consent gives up that right for the sake of justice and the common good." The state may directly take private property for public use on the condition of making compensation, and the cases where it may be taken in satisfaction of public and private obligations or for the support of government, or as a return for governmental protection, are determined by general rules, well understood and easily applied. The difficulty in the application of the constitutional principle arises in the main in respect to that class of legislation, not infrequent, which, while it does not, in a strict sense, deprive an individual of his property or liberty, does, nevertheless, in many cases, by the imposition of burdens and restrictions upon the use and enjoyment of property, and by restraints put upon personal conduct, seriously impair the value of property and abridge freedom of action. The validity of legislation of this kind, to some extent, and within certain limits, is questioned by none. But such legislation may overpass the boundaries of legislative power and violate the constitutional guaranty, for it is now an established principle that this guaranty protects property and liberty, not merely from confiscation or destruction by legislative edicts, but also from any essential impairment or abridgment not justified by the principles of free government. This court has recently, in several notable instances, vindicated the rights of individuals against unjust and arbitrary legislation, restraining freedom of action or imposing conditions upon private business, not warranted by the Constitution. (In re Jacobs, 98 N. Y. 98; People v. Marx, 99 id. 377; Jeople v. Gillson, 109 id. 399.) But the very existence of government presupposes the right of the sovereign power to prescribe regulations demanded by the general welfare for the common protection of all. This principle inheres in the very nature of the social compact. The protection of private property is one of the main purposes of government, but no one holds his property by such an absolute tenure as to be freed from the power of the legislature to impose restraints and burdens required by the public good, or proper and necessary to secure the equal rights of all. This power of government, the power as expressed by Taney, Ch. J. (5 How. 583), "inherent in every sovereignty, the power to govern men and things," is not, however, an uncontrollable or despotic authority, subject to no limitation, exercisable with or without reason in the discretion or at the whim or caprice of the legislative body. But within its legitimate domain the power is original, absolute and indefeasible. It vested in the legislative department of the government at its creation, without affirmative grant or definition, as an essential political power and attribute of government, and personal rights and rights of property are subordinate to this supreme power acting within its appropriate sphere. It may be exercised so as to impair the value of property or limit or restrict the uses of property, yet in this there is no infringement of the constitutional guaranty, because that guaranty is not to be construed as liberating persons or property from the just control of the laws. It was designed for the protection of personal and private rights against encroachments by the legislative body not sanctioned by the principles of civil liberty as held and understood when the Constitution was adopted. The boundary of legislative power in the enactment of laws in the assumed exercise of this power of sovereignty, which injuriously affects persons or property, is indistinct, and no rule or definition can be formulated under which, in all cases, it can be readily determined whether a statute does or does not transgress the fundamental law. The power of the British parliament is not the test of legislative power under the written Constitution of the American States. But the great landmarks of civil liberty, embodied in our State Constitutions, were established by our English ancestors, and upon questions such as the one now before us we may study with profit the principles and practice of the law of England. When a statute is challenged as overstepping the boundaries of legislative power, the object sought to be obtained by the legislature, the nature and functions of government, the principles of the common law, the practice of legislation and legal adjudications are pertinent and im-

portant considerations and elements in the determination of the controversy.

The act in question regulates the price of elevating grain, and the regulation affects the compensation which may be lawfully demanded for labor and personal services, as well as for the use of property. It fixes a maximum charge for labor and the use of property when combined, as they of necessity are, in the business of elevating grain. The operation of the statute is by its terms limited to the business carried on in cities and towns having a population of not less than one hundred and thirty thousand, practically to the cities of Buffalo, New York and Brooklyn. The circumstances, also, substantially restrict the application of the act to grain brought to Buffalo from the upper lakes by water, and there, by means of elevators, transshipped into canal boats and transported through the Erie canal and Hudson river to the harbor of New York and there discharged by elevators into warehouses or ocean vessels. The business of transporting grain by the lakes, and thence by the Erie canal to New York, is one of great magnitude. The case shows that about one hundred and twenty millions of bushels of grain annually come to Buffalo from the west. The business of elevating grain at that point is mainly connected with lake and canal transportation. It is shown by official records that the receipts of grain at New York in the year 1887, by way of the Erie canal and Hudson river, during the season of canal navigation, exceeded forty-six million bushels, an amount very largely in excess of the amount received during the same period by rail and by river and coastwise vessels. The elevation of this grain from lake vessels to canal boats takes place at Buffalo, where the case shows there are thirty or forty elevators, stationary and floating. How many of these elevators are actually employed in the business does not appear. The record is silent as to many facts which might tend to explain the relation of this business as actually conducted, to the public interests. It is asserted that a combination exists, and has for several years existed, between the elevator owners to maintain excessive charges, by fixing a uniform tariff and pooling the earnings, and dividing them ratably among all the elevator owners, although but a part of the elevators are actually operated. (See report on foreign commerce of the Chamber of Commerce of New York, made in April, 1885.) There is no evidence in the record as to the locations in the port of Buffalo suitable and available for stationary elevators. It is evident that they must be placed where they can be reached by both lake vessels and canal boats, and it may reasonably be assumed that but a limited area (not devoted to other purposes of commerce) is available for the erection of stationary elevators.

The case of Munn v. Illinois (94 U. S. 113) is a direct authority upon the question now before us. That case was brought to the United States Supreme Court on a writ of error, to review a judgment of the Supreme Court of the State of Illinois, which affirmed the constitutionality of a statute of that state fixing a maximum charge for the elevation and storage of grain in warehouses in that state. The act was challenged as a violation of the constitutional guaranty in the Constitution of Illinois, protecting life, liberty and property expressed in substantially the same language as in the Constitution of this state. The Supreme Court of the United States affirmed the judgment of the state court on the ground that the legislation in question was a lawful exercise of legislative power, and did not infringe the clause in the fourteenth amendment of the Constitution of the United States, "nor shall any state deprive any person of life, liberty or property, without due process of law." The legislation in question in Munn v. Illinois was similar to, and is not distinguishable in principle from, the act (Chap. 581, Laws of 1888) now under review. The question in that case was raised by an individual owning an elevator and warehouse in Chicago, which had been erected for, and in connection with which he had carried on the business of elevating and storing grain for many years prior to the passage of the act in question, and prior, also, to the adoption of the amendment of the Constitution of Illinois in 1870, declaring all elevators and warehouses where grain or other property is stored for a compensation to be public warehouses. The case of Munn v. Illinois has been referred to by this court in several cases. (People ex rel. v. B. & A. R. R. Co., 70 N. Y. 569; Bertholf v. O'Reilly, 74 id. 509; B. E. S. R. R. Co., v. B. S. R. R. Co., 111 id. 132; People v. King, 110 id. 418.) In People ex rel. v. Boston & Albany Railroad Company, which related to the power of the legislature to compel the defendant to build a bridge at a point where the railroad of the defendant crossed a highway, the court, by Earl, J., said: "The whole subject of the legislative power over railroads and even private persons holding and using their property for public purposes, has been so fully discussed recently in the Supreme Court of the United States in the Granger cases and in the Chicago Elevator case as to make further discussion unnecessary here. Such legislation violates no contract, takes away no property and interferes with no vested right." In Bertholf v. O'Reilly, the case of Munn v. Illinois was cited as illustrating the scope of the police power in legislation. In Buffalo East Side Railroad Company v. Buffalo Street Railroad Company, which involved the validity of an act of the legislature to regulate and reduce the fare on street railways in the city of Buffalo, which it was claimed affected a contract entered into between two of the companies prior to the passage of the act, this court affirmed the validity of the law, and Ruger, Ch. J., in pronouncing the opin-

ion of the court, quoted the language of Waite, Ch. J., in the Munn Case, and also the language of Bradley, J., in the Sinking Fund Cases (99 U. S. 747), declaring the principle decided in the Munn Case, and these quotations were quite irrelevant unless the doctrine stated therein was intended to be approved. In People v. King the doctrine of the Munn case was applied by this court to uphold the validity of a statute which prohibited the exclusion of any citizen from theatres or other places of amusement, by reason of race, color or previous condition of servitude, and a conviction in that case was sustained, where the defendant, the proprietor of a skating-rink, erected on his own property, opened it to the public, but excluded therefrom, on the occasion of a public entertainment, on the ground of race and color, a colored person who sought admission. The court is not concluded by these cases, or any of them, from re-examining the principle on which the decision in Munn v Illinois proceeded, but we cannot overrule and disregard that case without, as I think, subverting the principle of our decision in the King case, and certainly not without disregarding many deliberate expressions of this court in approval of the principle of that decision.

It is an interesting question as to what consideration should be given by a state court to a decision of the Supreme Court of the United States upon a question of constitutional law, rendered in the exercise of its jurisdiction, where the point in judgment relates to the validity of a state statute, which is challenged on the ground that it deprives a party of life, liberty or property without due process of law, and the decision affirms the constitutionality of the statute. The jurisdiction of the Supreme Court of the United States to review the decision of a state court, sustaining a state statute which is alleged to be a violation of this constitutional principle, originated with the adoption of the fourteenth amendment of the Constitution of the United States, which, for the first time, introduced into the Federal Constitution the prohibition, "Nor shall any state deprive any person of life, liberty or property without due process of law." This was a new limitation in the Federal Constitution on the state governments. Prior to the adoption of the fourteenth amendment personal rights and rights of property were, as a rule, exclusively matters of state cognizance, and the state courts were the ultimate tribunals for the determination of questions arising under the constitutional guaranty of life, liberty and property, which was found only in the state Constitutions. Their decisions were not subject to review in the courts of the United States. (Slaughter-house Cases, 16 Wall. 36.) There were exceptions growing out of article 1, section 10 of the Federal Constitution, that "no state should pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts," not material here. Since the fourteenth amendment, the question whether a state statute infringes the constitutional guaranty protecting life, liberty and property, where it arises in a state court, involves the consideration of both the Federal and State Constitutions, although the ground of construction and decision is identical under either instrument. But whether the decision of the state court presents a federal question reviewable on appeal to the Supreme Court of the United States, depends on the nature of the decision of the state court; that is to say, whether it affirmed the validity of the statute, or held it to be unconstitutional and void. If the state court decides that the statute does violate the constitutional guaranty, its decision is now, as before the fourteenth amendment, final and conclusive, and no appeal can be taken to the federal court, as in that case no right under the Constitution and laws of the United States has been denied. If, on the other hand, the state court sustains the statute and denies the right asserted, the federal jurisdiction attaches, and an appeal may be taken to the United States Supreme Court. It cannot be maintained, we think, that a decision of the federal court sustaining a state statute is res adjudicata and binding upon a state court, when the same question subsequently arises there under a similar statute. It would still be the duty of the state court to examine the question and decide it according to its interpretation of the constitutional guaranty. But the respect due to the decision of that high tribunal, the fact that to it has been committed, by the consent of the states, the ultimate vindication of liberty and property against arbitrary and unconstitutional state legislation, and the fitness of things, emphasize and enforce, in the particular case. the settled rule that only when required by the most cogent reasons, nor, indeed, unless compelled by unanswerable grounds, will a court declare a statute to be unconstitutional. "On more than one occasion," said Chief Justice Marshall in Dartmouth College v. Woodward (4 Wheat. 625), "this court has expressed the cautious circumspection with which it approaches the consideration of such questions, and has declared that in no doubtful case would it pronounce a legislative act to be contrary to the Constitution."

The power of the legislature to regulate the charge for elevating grain, where the business is carried on by individuals upon their own premises, depends upon the question whether the regulation falls within the scope of what is called the police power, which is but another name for that authority which resides in every sovereignty to pass all laws for the internal regulation and government of the state, necessary for the public welfare. The existence of this power is universally recognized. All property, all business, every private interest may be affected by it and be brought within its in-

fluence. Under this power the legislature regulates the uses of property, prescribes rules of personal conduct, and in numberless ways, through its pervading and ever-present authority, supervises and controls the affairs of men in their relations to each other and to the community at large, to secure the mutual and equal rights of all, and promote the interests of society. It has limitations; it cannot be arbitrarily exercised so as to deprive the citizen of his liberty or property. But a statute does not work such a deprivation in the constitutional sense, simply because it imposes burdens or abridges freedom of action, or regulates occupations, or subjects individuals or property to restraints in matters indifferent, except as they affect public interests or the rights of others. Legislation under the police power infringes the constitutional guaranty only when it is extended to subjects not within its scope and purview, as that power was defined and understood when the Constitution was adopted. The generality of the terms employed by jurists and publicists in defining this power, while they show its breadth and the universality of its presence, nevertheless leave its boundaries and limitations indefinite, and impose upon the court the necessity and duty, as each case is presented, to determine whether the particular statute falls within or outside of its appropriate limits. "It is much easier," said Chief Justice Shaw, in Comm. v. Alger (7 Cush., 53), "to perceive and realize the existence of this power than to mark its boundaries or to prescribe limits to its exercise."

In determining whether the legislature can lawfully regulate and fix the charge for elevating grain by private elevators, it must be conceded that the uses to which a man may devote his property, the price which he may charge for such use, how much he shall demand or receive for his labor, and the methods of conducting his business are, as a general rule, not the subject of legislative regulation. These are a part of our liberty, of which, under the constitutional guaranty, we cannot be deprived. We have no hesitation in declaring that unless there are special conditions and circumstances which bring the business of elevating grain within principles which, by the common law and the practice of free governments, justify legislative control and regulation in the particular case, the statute of 1888 cannot be sustained. That no general power resides in the legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the price of commodities or services, or interfere with freedom of contract, we cannot doubt. The merchant and manufacturer, the artisan and laborer, under our system of government, are left to pursue and provide for their own interests in their own way, untrammeled by burdensome and restrictive regulations which, however common in rude and irregular times, are inconsistent with constitutional liberty.

The justification of the statute of Illinois regulating the charge for elevating and storing grain in the elevators of that state was placed in the Munn Case upon that principle of the common law stated by Lord Hale in his treatise De Portibus Maris (1 Harg. Law Tracts, 78), that when private property is "affected by a public interest it ceases to be juris privati only." The principle of the decision is stated with great perspicuity by Bradley, J., in his opinion in the Sinking Fund Cases (supra.) He says: "The inquiry there was as to the extent of the police power where the public interest is affected; and we held that where an employment becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen, in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power." The elevators in Chicago had no legal monopoly in the business of elevating grain. The business was open to all comers, but the location of the elevators, their connection with the railroads, on which most of the grain from the grain-producing states and territories of the west and north-west was brought to Chicago, the necessity of using them in the transfer, storing and transshipment of grain, created, as was held by the court, a virtual and practical monopoly which affected the business and property with a public interest and subjected them to regulation by law. The application of the language of Lord Hale and of the principle that private property may, by its uses, cease to be juris privati strictly, and become affected by a public interest, to the business of elevating grain in Chicago, was combatted and denied by Field, J., in his very able and forcible dissenting opinion. "It is," he declared, "only where some privilege in the bestowment of the government is enjoyed in connection with (private) property, that it is affected by a public interest in any proper sense of the terms. It is the public privilege connected with the use of the property which creates the public interest in it." There can be no doubt that where the government confers a special privilege upon a citizen, not of common right, it may annex such conditions upon its enjoyment as it sees fit. Nor can there be any question that where an individual has a legal monopoly to use his property for a public purpose, and the public have an interest in the use, he is subject to an obligation cast upon him by the common law to demand only a reasonable compensation for the use. This is stated with great clearness by Lord Ellenborough in Allnutt v. Inglis (12 East, 527). "There is," he said, "no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property or the use of it; but if, for a particular purpose, the public have a right to resort to his

premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms." But the question is whether the power of the legislature to regulate charges for the uses of property and the rendition of services connected with it, depends in every case upon the circumstance that the owner of the property has a legal monopoly or privilege to use the property for the particular purpose, or has some special protection, from the government, or some peculiar benefit in the prosecution of his business. Lord Hale in the treatises De Portibus Maris and De Jure Maris, so largely quoted from in the opinions in the Munn Case, used the language that when private property is "affected with a public interest, it ceases to be juris privati only," in assigning the reason why ferries and public wharves should be under public regulation and only reasonable tolls charged. The right to establish a ferry was a franchise, and no man could set up a ferry, although he owned the soil and landing-places on both sides of the stream, without a charter from the king or a prescription, time out of mind. The franchise to establish ferries was a royal prerogative, and the grant of the king was necessary to authorize a subject to establish a public ferry, even on his own premises. When we recur to the origin and purpose of this prerogative, it will be seen that it was vested in the king as a means by which a business, in which the whole community were interested, could be regulated. In other words, it was simply one mode of exercising a prerogative of government, that is to say, through the sovereign instead of through parliament, in a matter of public concern. This and similar prerogatives were vested in the king for public purposes, and not for his private advantage or emolument. Lord Kenyon, in Rorke v. Dayrell (4 T. R. 410), said: "The prerogatives of the crown are not given for the personal advantage of the king; but they are allowed to exist because they are beneficial to the subject." And it is said in Chitty on Prerogatives, page 4: "The splendor, rights and power of the crown were attached to it for the benefit of the people, and not for the private gratification of the subject." And Lord Hale, in one of the passages referred to, in stating the reason why a man may not set up a ferry without a charter from the king, says: "Because it doth in consequence tend to a common charge and is become a thing of public interest and use, and every man for his passage pays a toll which is a common charge, and every ferry ought to be under a public regulation." The right to take tolls for wharfage in a public port was also a franchise, and tolls, as Lord Hale says, could not be taken without lawful title by charter or prescription. (De Portibus Maris, 77.) But the king, if he maintained a public wharf, was under the same obligation as a subject to exact only reasonable tolls; nor could the king authorize unreasonable tolls to be taken by a subject. The language of Lord Hale is explicit upon both these points: "If the king or subject have a public wharf into which all persons that come to that port must come to unload their goods, as for the purpose, because they are the wharves only licensed by the queen, according to the statute of 1 Elizabeth, chapter 11, or because there is no other wharf in that port, as it may fall out when a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc. Neither can they be enhanced to an immoderate degree, but the duties must be reasonable and moderate, though settled by the king's license or charter." The contention that the right to regulate the charges of ferrymen or wharfingers was founded on the fact that tolls could not be taken without the king's license, does not seem to us to be sound. It rested on the broader basis of public interest, and the license was the method by which persons exercising these functions were subjected to governmental supervision. The king, in whom the franchise of wharfage was vested as a royal prerogative, was himself, as has been shown, subject to the same rule as the subject, and could only exact reasonable wharfage, nor could he, by express license, authorize the taking of more. The language of Lord Hale, that private property may be affected by a public interest, cannot justly, we think, be restricted as meaning only property clothed with a public character by special grant or charter of the sovereign.

The control which, by common law and by statute, is exercised over common carriers is conclusive upon the point that the right of the legislature to regulate the charges for services in connection with the use of property, does not in every case depend upon the question of legal monopoly. From the earliest period of the common law it has been held that common carriers were bound to carry for a reasonable compensation. They were not at liberty to charge whatever sum they pleased, and even where the price of carriage was fixed by the contract or convention of the parties, the contract was not enforceable beyond the point of reasonable compensation. From time to time statutes have been enacted in England and in this country, fixing the sum which should be charged by carriers for the transportation of passengers and property, and the validity of such legislation has not been questioned. But the business of common carriers, until recent times, was conducted almost exclusively by individuals for private emolument, and was open to everyone who chose to engage in it. The state conferred no franchise and extended to common carriers no benefit or protection, except that general protection which the law affords to all persons and property within its jurisdiction. The extraordinary obligations imposed upon carriers and the subjection of the business to

public regulation were based on the character of the business, or, in the language of Sir William Jones, upon the consideration "that the calling is a public employment." (Jones on Bailments, Appendix.) It is only a public employment in the sense of the language of Lord Hale, that it was "affected with a public interest," and the imposition of the character of a public business upon the business of a common carrier was made because public policy was deemed to require that it should be under public regulation. The principle of the common law that common carriers must serve the public for a reasonable compensation became a part of the law of this State, and from the adoption of the Constitution has been part of our municipal law. It is competent for the legislature to change the rule of reasonable compensation, as the matter was left by the common law, and prescribe a fixed and definite compensation for the services of common carriers. This principle was declared in the Munn Case, which was cited with approval on this point in Sawyer v. Davis (136 Mass. 239). It accords with the language of Chief Justice Shaw in Comm. v. Alger (supra): "Whenever there is a general right on the part of the public, and a general duty of the landowner, or any other person to respect such right, we think it is competent for the legislature by a specific enactment to prescribe a precise, practical rule for declaring, establishing and securing such right and enforcing respect for it." The practice of the legislature in this and other states to prescribe a maximum rate for the transportation of persons or property on railroads is justified upon this principle. Where the right of the legislature to regulate the fares or charges on railroads is reserved by the charter of incorporation, or the charter was granted subject to the general right of alteration or repeal by the legislature, the power of the legislature in such cases to prescribe the rate of compensation is a part of the contract, and the exercise of the power does not depend upon any general legislative authority to regulate the charges of common carriers. But the cases are uniform that where there is no reservation in the charter the legislature may, nevertheless, interfere and prescribe or limit the charges of railroad corporations. (Granger Cases, supra; Dow v. Beidelman, 125 U. S. 680; Earl, J., in People ex rel. v. B. & A. R. R. Co., supra; Ruger, Ch. J., in B. E. S. R. R. Co. v. B. St. R. R, Co., supra.) The power of regulation in these cases does not turn upon the fact that the entities affected by the legislation are corporations deriving their existence from the state, but upon the fact that the corporations are common carriers, and therefore subject to legislative control. The state in constituting a corporation may prescribe or limit its powers and reserve such control as it sees fit, and the body accepting the charter takes it subject to such limitations and reservations, and is bound by them. The considerations upon which a corporation holds its franchises are the duties and obligations imposed by the act of incorporation. But when a corporation is created it has the same rights and the same duties, within the scope marked out for its action, that a natural person has. Its property is secured to it by the same constitutional guaranties, and in the management of its property and business is subject to regulation by the legislature to the same extent only as natural persons, except as the power may be extended by its charter. The mere fact of a corporate character does not extend the power of legislative regulation. For illustration, it could not justly be contended that the act of 1888 would be a valid exercise of legislative power as to corporations organized for the purpose of elevating grain, although invalid as to private persons conducting the same business. The conceded power of legislation over common carriers is adverse to the claim that the police power does not in any case include the power to fix the price of the use of private property, and of services connected with such use, unless there is a legal monopoly, or special governmental privileges or protection has been bestowed.

It is said that the control which the legislature is permitted to exercise over the business of common carriers is a survival of that class of legislation which in former times extended to the details of personal conduct and assumed to regulate the private affairs and business of men in the minutest particulars. This is true. But it has survived because it was entitled to survive. By reason of the changed conditions of society and a truer appreciation of the proper functions of government, many things have fallen out of the range of the police power as formerly recognized, the regulation of which, by legislation, would now be regarded as invading personal liberty. But society could not safely surrender the power to regulate by law the business of common carriers. Its value has been infinitely increased by the conditions of modern commerce, under which the carrying trade of the country is, to a great extent, absorbed by corporations, and, as a check upon the greed of these consolidated interests, the legislative power of regulation is demanded by imperative public interests. The same principle upon which the control of common carriers rests has enabled the state to regulate in the public interest the charges of telephone and telegraph companies, and to make the telephone and telegraph, those important agencies of commerce, subservient to the wants and necessities of society. These regulations in no way interfere with a rational liberty—liberty regulated by law.

There are elements of publicity in the business of elevating grain which peculiarly affect it with a public interest. They are found in the nature and extent of the business, its relation to the commerce of the state and country, and the practical monopoly enjoyed by those engaged in it.

The extent of the business is shown by the facts to which we have referred. A large proportion of the surplus cereals of the country passes through the elevators at Buffalo and finds its way through the Erie canal and Hudson river to the seaboard at New York, from whence they are distributed to the markets of the world. The business of elevating grain is an incident to the business of transportation. The elevators are indispensable instrumentalities in the business of the common carrier. It is scarcely too much to say that, in a broad sense, the elevators perform the work of carriers. They are located upon or adjacent to the waters of the state, and transfer from the lake vessels to the canal boats, or from the canal boats to the ocean vessels, the cargoes of grain, and thereby perform an essential service in transportation. It is by means of the elevators that transportation of grain by water from the upper lakes to the seaboard is rendered possible. It needs no argument to show that the business of elevating grain has a vital relation to commerce in one of its most important aspects. Every excessive charge made in the course of the transportation of grain is a tax on commerce, and the public have a deep interest that no exorbitant charges shall be exacted at any point upon the business of transportation. The state of New York, in the construction of the Erie canal, exhibited its profound appreciation of the public interest involved in the encouragement of commerce. The legislature of the state, in entering upon the work of constructing a waterway between Lake Erie and the Atlantic ocean, set forth in the preamble of the originating act of 1817 its reasons for that great undertaking. "It will," the preamble says, "promote agriculture, manufactures and commerce, mitigate the calamities of war and enhance the blessings of peace, consolidate the Union and advance the prosperity and elevate the character of the United States." In the construction and enlargement of the canal the state has expended vast sums of money raised by taxation, and, finally, to still further promote the interests of commerce, it has made the canal a free highway, and maintains it by a direct tax upon the people of the state. The wise forecast and statesmanship of the projectors of this work have been amply demonstrated by experience. It has largely contributed to the power and influence of the state, promoted the prosperity of the people, and to it more, perhaps, than to any other single cause, is it owing that the city of New York has become the commercial metropolis of the Union. Whatever impairs the usefulness of the canal as a highway of commerce involves the public interest. The people of New York are greatly interested to prevent any undue exactions in the business of transportation which shall enhance the cost of the necessaries of life or force the trade in grain into channels outside of our state. In Hooker v. Vandewater (4 Den. 349) the court was called upon to consider the validity of an agreement between certain transportation lines on the canals to keep up the price of freights. The court held the agreement to be illegal, and Jewett, J., in pronouncing the judgment of the court, said: "That the raising of the price of freights for the transportation of merchandise or passengers upon our canals is a matter of public concern and in which the public have a deep interest does not admit of doubt. It is a familiar maxim that competition is the life of trade. It follows that whatever destroys or even relaxes competition in trade is injurious if not fatal to it." The same question came up a second time in Stanton v. Allen (5 Den. 434) and was decided the same way. In the course of its opinion the court said: "As these canals are the property of the state, constructed at great expense as facilities to trade and commerce and to foster and encourage agriculture, and are, at the same time, a magnificent source of revenue, whatever concerns their employment and usefulness deeply involves the interest of the whole state." The fostering and protection of commerce was, even in ancient times, a favorite object of English law (Chitty on Prerogatives, 162); and this author states that the "superintendence and care of commerce, on the success of which so materially depends the wealth and prosperity of the nation, are in various cases allotted to the king by the Constitution," and many governmental powers vested in the sovereign in England have, since our Revolution, devolved on the legislatures of the states, The statutes of England in earlier times were full of oppressive commercial regulations, now, happily, in great part, abrogated; but that the interests of commerce are matters of public concern all states and governments have fully recognized. The third element of publicity which tends to distinguish the business of elevating grain from general commercial pursuits, is the practical monopoly which is or may be connected with its prosecution. In the city of Buffalo the elevators are located at the junction of the canal with Lake Erie. The owners of grain are compelled to use them in transferring cargoes. The area upon which it is practicable to erect them is limited. The structures are expensive and the circumstances afford great facility for combination among the owners of elevators to fix and maintain an exorbitant tariff of charges and to bring into the combination any new elevator which may be erected and employ it or leave it unemployed, but in either case permit it to share in the aggregate earnings. It is evident that if such a combination, in fact, exists, the principle of free competition in trade is excluded. The precise object of the combination would be to prevent competition. The result of such a combination would necessarily be to subject the lake vessels and canal boats to any exaction which the elevator owners

might see fit to impose for the service of the elevator, and the elevator owners would be able to levy a tribute on the community, the extent of which would be limited only by their discretion.

It is upon these various circumstances that the court is called upon to determine whether the legislature may interfere and regulate the charges of elevators. It is purely a question of legislative power. If the power to legislate exists, the court has nothing to do with the policy or wisdom of the interference in the particular case, or with the question of the adequacy or inadequacy of the compensation authorized. "This court," said Chase, Ch. J., in the License Tax Cases (5 Wall. 469), "can know nothing of public policy, except from the Constitution and the laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative act. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must be addressed to the legislature. Questions of policy there are concluded here."

Can it be said, in view of the exceptional circumstances, that the business of elevating grain is not "affected with a public interest," within the language of Lord Hale, or that the case does not fall within the principle which permits the legislature to regulate the business of common carriers, ferrymen, innkeepers, hackmen and interest on the use of money? It seems to us that speculative, if not fanciful, reasons have been assigned to account for the right of legislative regulation in these and other cases. It is said that the right to regulate the charges of hackmen springs from the fact that they are assigned stands in the public streets; that the legislature may regulate the toll on ferries, because the right to establish a ferry is a franchise, and, therefore, the business is subject to regulation; that the right to regulate wharfage rested upon the permission of the sovereign to extend wharves into the bed of navigable streams, the title to which was in the sovereign; that the right to regulate the interest on the use of money sprung from the fact that taking interest was originally illegal at common law, and that where the right was granted by statute, it was taken subject to regulation by law. The plain reason, we think, why the charges of hackmen and ferrymen were made subject to public regulation is, that they were common carriers. The reason assigned for the right to regulate wharfage in England overlooks the fact that the title to the bed of navigable streams was frequently vested in a subject, and was his private property, subject to certain public rights, as the right of navigation, and no distinction as to the power of public regulation is suggested in the ancient books between the wharves built upon the bed of navigable waters, the title to which was in the sovereign, and wharves erected upon navigable streams, the bed of which belonged to a subject. The obligation of the owner of the only wharf in a newly erected port to charge only reasonable wharfage is placed by Lord Hale on the ground of a virtual as distinguished from a legal monopoly. The reason assigned for the right to regulate interest takes no account of the fact that the prohibition by the ancient common law to take interest at all was a regulation, and this manifestly did not rest upon any benefit conferred on the lenders of money. It was a regulation springing from a supposed public interest, and was peculiarly oppressive on a certain class. A law prohibiting the taking of interest on the use of money would now be deemed a violation of a right of property. But the material point is, that the prohibition, as well as the regulation of interest, was based upon public policy, and the present conceded right of regulation does not have its foundation in any grant or privilege conferred by the sovereign. The attempts made to place the right of public regulation in these cases upon the ground of special privilege conferred by the public on those affected cannot, we think, be supported. The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation. We rest the power of the legislature to control and regulate elevator charges on the nature and extent of the business, the existence of a virtual monopoly, the benefit derived from the canal, creating the business and making it possible, the interest to trade and commerce, the relation of the business to the prosperity and welfare of the state, and the practice of legislation in analogous cases. These circumstances, collectively, create an exceptional case and justify legislative regulation.

The case of Munn v. Illinois has been frequently cited with approval by courts in other states. (Nash v. Page, 80 Ky. 539; Hockett v. State, 105 Ind. 250; C. and P. Tel. Co. v B. and O. Tel. Co., 66 Md. 399; Davis v. State, 68 Ala. 58.) In Nash v. Page it was held, upon the doctrine of the Munn Case, that warehousemen for the public sale and purchase of tobacco in Louisville, exercised a public business and assumed obligations to serve the entire public, and could not exclude persons from buying or selling tobacco in their warehouses who were not members of the board of trade. In Hackett v. State, it was held that the relations which telephone companies have assumed towards the public imposed public obligations, and that all the instruments and appliances used by telephone companies in the prosecution of the business were in legal contemplation devoted to public use. In Chesapeake, etc., Telephone Company v. Baltimore and Ohio Telegraph Company, legislation prohibiting discrimination in the business of telegraphing was upheld on the doctrine of the Munn Case.

The criticism to which the Munn Case has been subjected has proceeded mainly on a limited and strict construction and definition of the police power. The ordinary subjects upon which it operates are well understood. It is most frequently exerted in the maintenance of public order, the protection of the public health and public morals, and in regulating mutual rights of property, and the use of property, so as to prevent uses by one of his property to the injury of the property of another. These are instances of its exercise, but they do not bound the sphere of its operation. In the case of People v. King (110 N. Y. 418) it was given a much broader scope and was held to be efficient to prevent discrimination on the ground of race and color in places opened for public entertainments. In that case the owner of the skating rink derived no special privilege or protection from the state. The public had no right in any legal sense to resort to his premises. His permission, except for the public interest involved, was revocable as to the whole community or any individual citizen. But it was held that so long as he devoted his place to purposes of public entertainment, he subjected it to public regulation. There is little reason, under our system of government, for placing a close and narrow interpretation on the police power, or in restricting its scope so as to hamper the legislative power in dealing with the varying necessities of society, and the new circumstances as they arise, calling for legislative intervention in the public interest. Life, liberty and property have a substantial protection against serious invasion by the legislature in the traditions of the English-speaking race, and a pervading public sentiment which is quick to resent any substantial encroachment upon personal freedom or the rights of property. In no country is the force of public opinion so direct and imperative as in this. The legislature may transgress the principles of the Constitution. It has done so in the past, and it may be expected that it will sometimes do so in the future. But unconstitutional enactments have generally been the result of haste or inadvertence, or of transient and unusual conditions in times of public excitement which has been felt and responded to in the halls of legislation. The framers of the government wisely interposed the judicial power and invested it with the prerogative of bringing every legislative act to the test of the Constitution. But no serious invasion of constitutional guaranties by the legislature can for a long time withstand the searching influence of public opinion, which, sooner or later, is sure to come to the side of law and order and justice, however much for a time it may have been swayed by passion or preiudice, or whatever aberrations may have marked its course. So, also, in that wide range of legislative powers over persons and property, which lie outside of the prohibitions of the Constitution, and which inhere of necessity in the very idea of government, by which persons and property may be affected without transgressing constitutional guaranties, there is a restraining and corrective power in public opinion which is a safeguard of tremendous force against unwise and impolitic legislation, hampering individual enterprise, and checking the healthful stimulus of self-interest, which are the life blood of commercial progress. The police power may be used for illegitimate ends, although no court can say that the fundamental law has been violated. There is a remedy at the polls, and it is an efficient remedy, if, at the bottom, the legislation under it is oppressive and unjust. The remedy, by taking away the power of the legislature to act at all, would, indeed, be radical and complete. But the moment the police power is destroyed or curbed by fixed and rigid rules, a danger is introduced into our system which would, we think, be far greater than results from an occasional departure by the legislature from correct principles of government. We here conclude our examination of the important question presented by this case. The division of opinion in this and other courts is evidence of the difficulty which surrounds it. But it is ever to be remembered that a statute must stand so long as reasonable doubt can be indulged in favor of its constitutionality. We are of opinion that the statute of 1888 is constitutional, as a whole, and that although it may comprehend cases which, standing alone, might not justify legislative interference, yet they must be governed by the general rule enacted by the legislature.

The judgment should be affirmed.

GRAY, J. (dissenting). I am unable to assent to the views expressed in the opinion for the court in this case. Judge Peckham has very thoroughly examined and considered the question in People v. Walsh, a similar case, and I concur with him in that opinion. As his opinion exhaustively reviews the cases and the text books, I shall attempt no extended, nor historical discussion, but will briefly state the grounds of my dissent.

This legislation is sought to be upheld as constitutional upon the ground that it is within a proper exercise of the sovereign power to prescribe regulations, when demanded by the general welfare, for the common protection of all. It is said to fall within the scope of the police power of the state. If this is true of this measure, then I fail to see where are the limits, within which the exercise of that power can be confined. This act undertakes to regulate the prices, which can be charged by an individual in the prosecution of his private business. Its provisions are attempted to be justified in this case, because, it is said, the business in question is a virtual monopoly; owes its profitable existence to the benefit conferred by the Erie canal, and the interests of trade and commerce and the

welfare of the state demand that its charges should be regulated by the sovereign power. This plea for the extension of the police power to the extent named, of interfering with the conduct of a legitimate private business enterprise, seems to me to find no support in reason, and it certainly tends to nullify that provision of the Constitution, which is supposed to guaranty to each individual that he shall not be deprived of his life, or liberty, or property, without due process of law.

The learned judge, writing the opinion, concedes that the uses to which a man may devote his property, the price which he may charge for such use, how much he shall demand or receive for his labor and the methods of conducting his business, are, as a general rule, not the subjects of legislative regulation. He well says that "these are a part of our liberty, of which, under the constitutional guaranty, we cannot be deprived." He believes, however, that he finds in this particular business of elevating grain "special conditions and circumstances," which justify legislative control. In my view, the concession, which the learned judge is obliged to make with respect to our constitutional liberties, impairs the force and effect of his opinion, unless he is able to show that the business in question is affected with a public use or interest, within the strict and proper meaning of the term. This I do not see that he accomplishes. The circumstances amount to nothing more than that the transshipment of grain from and to barges, vessels and cars, is more expeditiously and advantageously done through the use of grain elevators than in any other way, and those persons, who are interested in the shipment of grain, must, for the better promotion of their private interests, have resort to them.

It may be admitted that the use of the grain elevator is necessary to the grain shipper for the profitable or successful transaction of his business. But do such facts invest the grain elevating business, which the individual carries on, with such a public character as to give the public the right to regulate the charges which the owner may make? If the question affected a corporation, deriving its franchises and powers from the state, a different case would be presented. But here we have the case of an individual, conducting his private business in a legitimate manner and owing nothing to the state for privileges, or powers, or assistance conferred. He exercises the right, common to all, of engaging in a legitimate business for his own profit and gain.

I understand it to be the general rule, that the individual has absolute liberty to pursue his avocations and to contract with respect to his property; subject, only, to the restriction that he may not interfere thereby with his neighbor's rights or use of property. He is bound to use his own property so as not to injure his neighbor's. That liberty I take to be guaranteed by the Constitution to him, and to be a most valuable right. What force or reason has the suggestion that the business of the individual sustains some important relation to a branch of trade, in which other persons are largely engaged, and that it is, therefore, public in its nature, and therefore it should become the subject of legislative control as to charges? Is it because those other persons complain of the charges and allege that the business, as managed by those engaged in it, is virtually a monopoly? Has government any concern or interest in the price which one individual may demand of another, who resorts to him because of his superior business skill or facilities? How does the magnitude, or the publicity, of an individual's business furnish a valid reason for legislative interference? Every business is, in a measure, public, and is dependent upon public patronage for its maintenance and success. It is not compulsory upon the public to resort to these elevators; nor is the business exclusive, or beyond competition. There is a very wide distinction between those cases, which are referred to in the books, and which Lord Ellenborough speaks of (12 East, 539), where the public have a right to resort to the premises of the individual and to make use of them, and that individual has a monopoly in them for that purpose, and the case of an individual prosecuting his own business upon his own premises, by no leave, privilege, or franchise of the sovereign power. Here, it is a matter of option, or, rather, of agreement with the owner, whether his premises may be resorted to and his property used by other persons. The public have no independent legal right to make use of them.

I believe the constitutional rights of the individual are directly attacked by this legislation. Under the pretense that his business has, by its magnitude and situation, become invested with a public interest, it is claimed to be brought within the right of the government to regulate. Where is the limit to the exercise of sovereign power, if such a pretext is considered a justification? Of what use are our vaunted constitutional guarantees, if we may be deprived of property rights on so flimsy a pretext? It is said that the remedy for such oppressive and unjust legislation is to be found at the polls. I do not think that to be the only resort of the citizen. The constitutional guarantees were provided for and are enforceable by him for his protection.

I cannot believe that the theory, or the frame of our form of government, involved the idea that so great a power should be lodged in the legislature.

If the door is opened to this species of legislation, what protection have we against socialistic laws? What is to prevent subsequent legislatures from interfering with any other kind of private enterprise, if, from improved methods in its conduct and for peculiar reasons, it ap-

pears to the legislative body to virtually monopolize that branch of business, and that the owner takes advantage of his diligence, or superior skill and advantages, to demand what to them seems an apparently high or even excessive price for his labor or property, of those who resort to him? The legislature, in effect, says to the individual, when interfering to regulate the charges he may make in his business: It is true you are a private individual, engaged in a private and legitimate business, in the prosecution of which you are authorized and protected by the Constitution; but, nevertheless, we think, in the public interest, because your business has become so advantageous and so necessary to a large portion of the public, because of its superior facilities, that you shall not be allowed to pursue it, unless you reduce your charges to a rate fixed by us. As well may the legislature claim a right to interfere to reduce and regulate the charges which a combination of manufacturers has fixed for a certain line of goods.

It seems to me that the theory of such legislation is a startling departure from the true conception of governmental functions. They should work to protect and develop private rights and to secure to all individuals the uniform operation of the constitutional guarantees. The police power is incapable of being stretched to reach such a case as this, if we have any respect for the provisions of the Constitution. That power is properly exercised in the preservation of the private rights of individuals, in the maintenance of public order, in the supervision of public health and morals and in the prevention of a conflict of rights. Its justification for interference with a private, legitimate business is admissible, only, when that business may be said to be affected by a public use, or interest, by reason of some aid, grant or privilege conferred by the state. Judge Cooley says in his valuable work on Constitutional Limitations (p. 739): "The mere fact that the public have an interest in the existence of the business and are accommodated by it cannot be sufficient, for that would subject the stock of the merchant and his charges to public regulation."

This act, in my opinion, was an unconstitutional exercise of power by the legislature. Such legislation was not demanded by the general welfare, and it violates the social compact under which we live. It is a subversion of the constitutional guaranty. It is against such legislation that the constitutional guaranty was framed, and that the judicial power was intended by the Constitution to afford protection to the individual.

I think the judgment should be reversed and the appellant discharged.

PECKHAM, J. (dissenting.) The Federal Supreme Court has decided that a statute of the State of Illinois, which is somewhat similar to the one under consideration here, was a valid law so far as the Federal Constitution was concerned, and that it violated no right, privilege or immunity protected by that instrument.

A clause exists in the Constitution of this State which is similar to one of those in the Federal Constitution, under which the claim of invalidity was made and denied as to the Illinois statute. The case of Munn v. Illinois (94 U. S. 113) establishes the point that the Illinois statute there under discussion, as applied to the particular facts of that case, did not violate any provision of the Federal Constitution, nor infringe upon any privilege or immunity protected by it.

The facts in these New York cases differ considerably, in certain particulars, from those in the Munn case; and if the principles decided in that case were upheld, it might still become of the greatest importance to distinguish these differences and to discuss and decide upon their materiality as applicable to the question of the subjection of the defendants to the provisions of this act. But the question which arises in limine is based upon the assumption that the cases are substantially alike in their facts, and the question is this: In construing a clause in our state Constitution similar to one in the federal instrument, should we follow the interpretation of such clause as given by the federal court, which interpretation compels us to deny to these defendants the relief they ask for, although otherwise we are satisfied that they are justly entitled to that relief.

If any right, privilege or immunity claimed under the Federal Constitution or laws be denied by this court, its decision is reviewable in the Supreme Court, and in such cases it is our duty to follow in the footsteps of that court and to be guided and controlled by its decisions. But in this case the right is claimed under our state Constitution, and in matters pertaining to its proper construction our decision is final, excepting that if, as construed by us, the Constitution or our laws deny the existence of some right or privilege claimed by a party by virtue of the Federal Constitution or laws, our decision is reviewable by the federal court not for the purpose of reviewing our construction of our own Constitution or laws, but to see whether under the Constitution or laws as construed by us, any right or privilege existing by virtue of the Federal Constitution or laws has been violated or denied, and, if so, to give it effect, notwithstanding the state law or Constitution. But where we deny no right or privilege claimed, and, on the contrary, assert and protect it, there is no review by the federal court possible.

When the privilege or immunity is claimed under our state Constitution, and we believe that it is rightfully and legally claimed, although the claim rests upon a clause which is similar to the one in the federal instrument, under which it has been denied by the federal court; nevertheless we ought, as we think, to give ex-

pression to our own judgment, under the sanction of our official duty, to declare the law as we believe it to exist, notwithstanding we differ with the conclusions arrived at by the federal court. In so doing we decide against no right, privilege or immunity claimed under the Federal Constitution or laws, but, as a state court, we decide in a matter over which we have full jurisdiction, upon the proper construction to be given to the fundamental law of the state. We, therefore, proceed to give our views on the subject-matter involved in these appeals.

It is, perhaps, needless to inaugurate the discussion of the question by an expression of the very great respect we feel for the Federal Supreme Court, and for each of its distinguished and learned members, and yet in doing so we but give voice to the sentiments which, as we believe, possess judges and citizens alike throughout the land. It is only in the performance of our official duty that we venture to differ from that court regarding matters which we are bound to decide, and when there is an equal obligation to decide them in accordance with our own deliberate views.

The case of Munn v. Illinois (94 U. S. 113), has been referred to in our court but sparingly, as there has not been very frequent occasion for such reference.

It was referred to in Bertholf v. O'Reilly (74 N. Y. 509); Boardman v. Lake Shore and Michigan Southern Railway Company (84 id. 157, 186); People v. King (110 id. 418, at 424, 428), and in Buffalo East Side Railroad Company v. Buffalo Street Railroad Company (111 id. 132). These are the only cases I have observed, although there may be others which have escaped my attention.

In Bertholf v. O'Reilly (74 N. Y. 509), it was decided, that the legislature has power to create a cause of action for damages in favor of one who is injured in person or property by the act of an intoxicated person against the owner of real property, whose only connection with the injury is that he leased the premises where the liquor causing the intoxication was sold or given away, with knowledge that intoxicating liquors were to be sold thereon.

In speaking of the police power, Andrews, J., in above case cited The Slaughter House Cases (16 Wall. 36), and Munn v. Illinois, to show how far courts have gone in upholding legislation affecting private rights and property as a due exercise of the police power residing within the state. He said those "cases may perhaps be deemed to have carried the right of legislative interference with private rights and property to its utmost limit, but they illustrate the scope of the police power in legislation."

The legislation in question in the Bertholf case was placed upon the right of the legislature to control the use and traffic in intoxicating liquors, and its authority to impose liabilities upon those who exercise the traffic or who sell or give away intoxicating drinks, for consequential injuries to others, the court said, follows as a necessary incident. Such right of legislation as to the prohibition or regulation of the sale, etc., of intoxicating liquors comes within the narrowest definition of the police power, and is substantially denied by no one.

In the Bertholf case there was nothing which called for the approval or affirmance of the case of Munn, or the very broad principle asserted in and underlying that case. It was referred to, as stated in his opinion by Andrews, J., for the simple purpose of showing to what extent some courts had gone, and it was stated to be one where the right had been carried to its utmost limit, but the limit itself was neither approved or disapproved. Nothing in Boardman v. Lake Shore, etc., Railway Company (84 N. Y. 157, 186) is material upon the question. It was simply stated that the Munn case did not bear out the contention for which it was cited by the appellant.

In People v. King (110 N. Y. 418, 424, 428) the question was, whether the law securing to colored persons the right to admission on equal terms with others to public resorts and to equal enjoyment of privileges of a quasi public character, was a valid law as applied to defendant's place of amusement. It was held so to be.

The police power, it is acknowledged, may be rightfully exercised, among others, in cases involving the public health or the public morals. No one questions it in regard to either of those two important branches of government. The extent of its proper exercise in such cases is open, however, to some differences of opinion. The place of amusement of King was held to be so far public with reference to this specific power as to permit of its exercise, and the very point of the decision was that the public had this right of resort to plaintiff's premises by his own dedication, even including colored persons, upon payment of the prescribed fee.

Judge Cooley supports the legality of laws regulating places for public amusement, such as theaters, etc., upon the ground that they are properly the subject of police regulation, as they are generally licensed by the State or municipality wherein they exist. (See Cooley on Torts, 285.) But I have failed to observe any statute in this State which attempts to limit the price which a theatrical manager shall be allowed to charge for admission to his entertainments. Proper police regulation and inspection, to the end that peace and good order may be obtained and public morals reasonably protected, is one thing, while a power to limit compensation is another and far greater and more dangerous power, and the two powers are not necessarily co-existent. The latter power is not only a dangerous one, but it is not called for by the same principles which permit, and, indeed, demand the exercise of the former under a

general right to regulate the manner, within reasonable rules, in which a man shall use his property so as not to improperly interfere with the proper enjoyment by his neighbor of his own property, or so as not to injure the public health or morals, and in order that proper safeguards may be observed for escape in times of fire.

In the King Case Judge Andrews said: "The principle stated by Waite, Ch. J., in Munn v. Illinois, which received the assent of a majority of the court, applies in this case," the principle being that where one devotes his property to a use in which the public have an interest, he, in effect, grants to the public an interest in such use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. There was nothing in the case in this court which affirmed the correctness of the doctrines of the Munn Case, as applied to the facts upon which the decision in that case was based.

In Buffalo East Side Railway Company v. Buffalo Street Railway Company (supra) both parties were corporations. Ruger, Ch. J., said: It was unnecessary to discuss the proposition with much fullness, as it was conceded by the appellant that the authority of the legislature, in the exercise of the police power, could not be limited by provisions in contracts between individuals or corporations, and the contract between the parties as to the rate of fare was held subordinate to the legislative power to regulate the fare to be charged by the corporations.

The Munn Case proceeded upon the principle that the parties had devoted their property to a public use, because the productions of "seven or eight great states of the west" had to pass through their elevators for transshipment into vessels on their way to "four or five states on the sea shore," and that thus they had a "virtual" monopoly of that business, which created a right, on the part of the state, to regulate or limit the amount of their compensation for such use. It was placed on the theory of an implied grant on the part of the owners of such property to the public to thus limit the compensation, and such grant was implied because the property was thus devoted by the owners to a public use.

Two factors seem to have entered into the proposition as developed by the court, one of which was the extent of the business, and the other that in its performance there was a "virtual" monopoly. The combination of extent of user and so-called virtual monopoly seems, in the mind of the court, to have had the effect of clothing the property with this public interest and hence to have imposed upon its owners the necessity of submitting to the limitation of their compensation. It has never been carried to any such extent in this state. Various instances of the applications of these principles were cited by way of illustration, and it was asserted that no new principle of the law was created, but simply an application of an old principle to a new and different state of facts.

The learned chief justice, who delivered the opinion of the court, after citing these instances, thus continued:

"Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney coachman, pursues a public employment and exercises a sort of public office, these plaintiffs in error do not. Therefore, it was held that the business done by the owners of the elevators or warehouses was such as to clothe their property thus used with a public interest, and it ceased to be juris privati only."

I have examined, with very great care and attention, the various authorities cited by the court as illustrations of the principle laid down, and, with great diffidence, I am compelled to say, as the result of such examination, that it seems to me they do not justify the application of the principle to the case then before the court. (See Tiedeman on Limitations of the Police Power, 230.) If it be assumed that when one devotes or dedicates his property to a public use the public then has an interest in such use, and that, therefore, his compensation may be limited by law, still I deny that such devotion or dedication is made merely because the owner has embarked his property in a business in which large numbers of the public are interested in its use; and I also deny that any such person has a virtual or any monopoly in the business, without a grant thereof from the sovereign power, merely because the property is conveniently situated for the business, and it would cost a large amount of money to duplicate it. So long as every one is free to go into the same business, and invest his capital therein with the same rights and privileges as those who are already engaged in it, there can be no monopoly, in the legal acceptation of that term, virtual or otherwise.

I contend that, within the subject now under review, the meaning of the phrase, "devoting one's property to a public use," as evidenced in the cases cited by the learned chief justice, and also in other cases in this state, is that such devotion or dedication is made, when by reason of it the public thereafter have a legal right to resort to the property, and to use it for a reasonable compensation, or for such as the law provides, or else where some privilege or right is granted by the government, in which case the right of limitation is based upon and is really a part consideration for the grant.

In the one case the legal right to resort to and use the property by the public, so long as the owner chooses to remain in the business, springs from this dedication, and it is the criterion that is to decide the question whether the property has or has not been thus dedicated; and this right does not spring into existence merely because

the business is such as interests a great number of the public, or because it is of large extent, or because there is no other property at that place which is or conveniently may be devoted to the same kind of business; while, in the other case, the right of limitation exists because some privilege or franchise has been granted to the owner by the sovereign power, an acceptance of which carries with it the burden of submitting to the demand for the service. As has been said, the right to regulate places of public amusement, such as theaters and the like, comes from another branch of the police power, and, as I believe, does not extend to the power to limit prices. The right to make use of the owner's property, by reason of a dedication, has been held to have been created in the exceptional cases of a common carrier, the keeper of a common inn, and a common or public wharfinger, and, perhaps, in some others. These are exceptional cases, for they trench upon the well-grounded principle that no man can be compelled to enter into business relations with another unless the party carrying on the business shall have received some privilege, right or franchise from the sovereign power, when such compulsion may be annexed to the grant. The principle should not be extended. To include within its grasp the case of a warehouseman who has no privilege from the sovereign power, but simply builds his warehouse on the shores of a navigable stream and upon his own property, would be to overturn cases adjudged in this court and regarded as the law for many years past. The same is true of the owner of an elevator, who receives nothing from the state. (See Wetmore v. Atlantic White Lead Co., 37 Barb. 70; Wetmore v. Brooklyn Gas-Light Co., 42 N. Y. 384.) In most of the cases cited by the court in the Munn Case the right of limitation springs from a license or privilege awarded by the government, and this right of regulation or limitation is engrafted on or inheres in such license as a condition of the exercise of such privilege. Thus hackmen and cartmen have the privilege to stand in the public streets in exercising their calling, and the public has the right, in return for such license, to demand their services on tender of proper compensation. The same is true as to ferries, which are but parts of the highway (Mayor, etc., v. Starin, 106 N. Y. 1); and the right to establish them rested exclusively in the crown or, in this country, in the people. Consequently, when established in that way, the right of regulating or limiting the tolls remained in the sovereignty granting the license, and was exercised accordingly.

The ancient right to regulate the toll which millers should charge rested on the right, at common law, which the lord of the manor had to compel all his tenants to grind their corn at his mill, and no one could set up a mill but by his license or that of the crown, and with such license went the right of regulation as to the tolls to be received. (See Cooley on Constitutional Limitations, 735; 15 Viner's Abr. 398, 399.) As to the interest on money and the right to regulate it, it was by the common law prohibited to any one to take any interest for the use of money, and, subsequently, when parliament altered the common law, it simply allowed interest to be taken up to a certain percentage and upon certain terms. (Tiedeman on Limitations of Police Power, § 94.) All the instances above cited are commented on in the very able dissenting opinion of Mr. Justice Field in the Munn Case (concurred in by Mr. Justice Strong), and the same reasons for the exercise of the power to regulate these different branches of business are therein stated in a much more full and complete way than I have done.

As is said, there can be no legal objection to the power to direct the weight of a loaf of bread, for that is a mere police regulation, interfering with no man's real liberty, and it is the same as if the length of a yard were declared by law or the weight of a ton. But I deny the right of any legislature in this country to limit the price for which an individual baker shall sell his bread per loaf, or the price per ton for which a coal dealer shall sell his coal, or the price which a tailor shall charge for his coat, or the shoemaker for his shoes. A common carrier exercises, it has been stated, a kind of public office, and when a man devotes himself to such a calling, and holds himself out to the public as a common carrier, he thereby grants to the public such an interest in his business that each individual has the legal right to demand the carriage of his property by the carrier, upon payment or tender of a reasonable compensation for carriage in the absence of a legal regulation thereof. (Allen v. Sackrider, 37 N. Y. 341.) He thus becomes a common carrier because of this dedication to the general public, and this legal right of the public to demand this service springs from such dedication. The same is true of a public wharfinger or the keeper of a common inn. They were all called "common" in their several occupations, and were common because they held themselves out as such to the public, and, as was said in some of the old books, entered into a general contract with the whole public to do the work, and hence arose the right of the public to call upon them to fulfill this contract. No such right of access to the premises of defendants exists, and no such right to demand the use of their property can be, or, as I understand, is pretended. But unless the innkeeper was the keeper of a common inn, or the carrier a common one, or the wharfinger was a public one, no matter what the extent of their business, or how large a number of the public were entertained by them, as the public had no right of resort to their premises or to demand transportation for or the care of their goods, or entertainment at their house, the right of regulation did not exist as to the compensa-

tion they should receive. The cases are, as has been said, exceptions to the general rule, that no man can be compelled to have business relations with another. (See Tiedeman on Limitations of Police Power, § 92, p. 226.)

There is no satisfactory ground, in my judgment, upon which the power may be based to regulate or limit the price of transportation by a common carrier, or the price of entertainment by an innkeeper, who is a private individual and who has received no privileges from the state of any kind. To say that the carrier (while a private individual) holds a kind of public office, and, therefore, his prices should be limited, is not, as it seems to me, a very accurate description of his attitude to the public. He holds no office, public or private, within any fair meaning of such word —and there is no reason, in justice or common sense, why his compensation should be limited by law which would not hold good in the case of every individual dealing with the public, and holding himself out as ready, willing and eager to sell his goods to all comers.

The rule as to private individuals who happened to be common carriers or innkeepers, etc., was established in the earlier days of the law, and it was regarded by Lord Hale as most proper that individuals who followed such callings should be placed under state supervision and control. The habits, customs and general intelligence of the people of those days were far different from those of today; and laws which might possibly be pardoned on account of ignorance, sparseness of population, difficulties of communication and rural and unsettled habits of life, can have no such justification in our times.

It must be constantly borne in mind that in those days the theory of a paternal government which was to watch over and protect the individual at every moment, to dictate the quality of his food and the character of his clothes, his hours of labor, the amount of his wages, his attendance upon church, and generally to care for him in his private life, was almost at its height.

The famous statute of the fifth of Elizabeth, chapter 4, concerning laborers, was in full force when Lord Hale wrote. (Lecky's England in Eighteenth Century, vol. 6, p. 233.) That statute assumed to regulate the existence and determine the numbers of the artisans in the whole country. It provided how long one should work as an apprentice; how many there should be in proportion to journeymen; where they should live; under what circumstances move to another neighborhood; how many hours they should labor, and for how long a time a journeyman should be employed; and, finally, it provided that wages should be assessed for the year by the justices of the peace, who were also directed to settle all disputes between masters and apprentices. By an act of the first of James I, chapter 6, the above act was extended by giving to the justices power to fix the wages, not only of journeymen and apprentices, but of all kinds of laborers and workmen

During this time, also, there were statutes making it a felony to export wool from England, and the exporter of sheep, rams or lambs was liable to imprisonment, the forfeiture of all his property, and to have his left hand cut off for the first offense, and for the second offense to be adjudged a felon and to suffer death accordingly. (See 8 Eliz. Ch. 3; 13 and 14 Chas. 18.) Provisions were extant forbidding exportation of hides, raw or tanned leather, and many other things, and all for the supposed benefit of the kingdom or the various interests in whose favor the legislation was enacted. (Smith's Wealth of Nations, by McCulloch, p. 292 et seq.) Laws were then in force which regulated down to the minutest detail the manner of life, and the texture of the dress and the costliness thereof, and the variety of dishes upon the tables of the people; special laws determined how much land of an estate should be plowed and how much left in pasture; how much was to surround a laborer's cottage; how many sheep should be supported on a farm. (England in the Eighteenth Century, Lecky, vol. 6, p. 231 et seq.)

In speaking of the above mentioned statute of Elizabeth, the late Mr. W. Stanley Jevons, in his little work on "The State in Relation to Labour," in the English Citizen Series (at page 34), says, that it was a monstrous law, and that, according to the opinion of historians, it represented the triumph of the craft guilds, that is, the medieval trade-unions, and that in operation it was, there is reason to believe, little more than a dead letter. In the same work the author says, that the justification of state interference in matters of private concern, as in the inspection of certain kinds of food, etc., lies in the fact that government may properly interfere to prevent abuses in those special cases where it is impossible, or at least difficult, for the buyer of goods to verify their character for himself. Inspection of factories is justifiable for the purpose of thereby protecting the health and morals of large masses of the people who labor in them, and who, as experience has shown, are unable to protect themselves. The work is a most able treatment of the question as to how far it is proper to interfere in the general industrial department of the country. It is needless to say that such a law as is under consideration here, does not fall under any of the conditions in which state interference is regarded as proper.

But it was during the times when laws such as I have above alluded to, were in force that Lord Hale lived and wrote. He was, without doubt, a very great lawyer, but he wrote regarding the law as it then existed, and when views of governmental interference with the private concerns of individuals were carried to the greatest extent; and he was naturally and necessarily affected by the atmosphere of

the times in which he lived; and his views as to the policy and propriety of laws involving an interference with the private concerns of the subject, were, of course, colored by the general ideas as to the proper function of government then existing. This great magistrate, it will be remembered, was a firm believer in the existence of witchcraft, and presided at the trials of old women accused of such crime, and condemned them to death on conviction thereof. I do not mention this as any evidence against the ability, integrity or learning of this upright man and able lawyer; but it is entirely conclusive of the truth of the statement that all men, however great and however honest, are almost necessarily affected by the general belief of their times, and that Lord Hale was not one of the few exceptions to this rule. I have spoken thus somewhat at length upon this subject, not for the purpose of attempting to show the incorrectness of the rule laid down by Lord Hale regarding common carriers, innkeepers, wharfingers, etc., who were, at the same time, nothing but private individuals, having no privilege from the state; but I have thus spoken for the purpose of showing that, because the rule is correctly stated in those cases, no reason exists in such fact for the extension of the principle of that rule to other cases, and, by doing so, go back to the seventeenth or eighteenth century ideas of paternal government, and thereby wholly ignore the later and, as I firmly believe, the more correct ideas which an increase of civilization and a fuller knowledge of the fundamental laws of political economy, and a truer conception of the proper functions of government have given us at the present day. Rights which we would now regard as secured to us by our bill of rights against all assaults, from whatever quarter, were in those days regarded as the proper subjects of legislative interference and suppression. The fact that certain rules of the common law have come down to us unimpaired, although based upon a view of the relations of government to the people which obtained in the seventeenth century, should certainly furnish no reason for extending those rules to cases which, but for such extension, would be regarded as clearly within the protection of the constitutional limitations contained in our bill of rights. I think that no further violation of the general rule of absolute liberty of the individual to contract regarding his own property, should be sustained by this court. This violation would have to occur if we should hold legislation of the kind under consideration, valid.

Tiedeman—in his work already cited—at the end of section 93, on page 238, in speaking of Lord Hale and his observations, and generally in regard to this power, says: "Lord Hale, therefore, cannot be cited in support of the doctrine that the state may regulate the prices charged in a business which, from the circumstances, becomes a virtual monopoly. And even if he did justify such regulations, his opinions can hardly be set up in opposition to the rational prohibitions of the American Constitution. By all the known rules of constitutional construction the conclusion must be reached that the regulation of prices in such a case is unconstitutional; and while the common law is still authority for the propriety and justification of laws which antedate the American Constitution, it cannot be cited to defeat the plain meaning of the Constitution in respect to laws subsequently enacted." (See, also, same author, p. 588.)

Judge Cooley, in his Constitutional Limitations (5th ed.), at page 739, gives four heads under which such regulations are admissible, and such a case as this comes under none of them. He says, in summarizing his own views as to when the property of the citizen could be said to be affected with a public use or interest, so that prices might be limited, that they were in four classes: (1.) When the business is one, the following of which is not of right, but is permitted by the state as a privilege or franchise, and under this head he includes such cases as lotteries, giving shows, keeping billiard tables for hire, etc. (2.) Where the state, on public grounds, renders to the business special assistance by taxation or otherwise. (3.) Where, for the accommodation of business, some special use is allowed to be made of public property or of a public easement. (4.) Where exclusive privileges are granted in consideration of some special return to be made to the public. Possibly, he says, there may be other cases. He does not include such a case as this or the Munn case, though the latter was under criticism in this very definition.

That learned author, in speaking on this same subject, says, in same volume, pages 737, 738, 739: "What circumstances shall affect property with a public interest is not very clear. The mere fact that the public have an interest in the existence of the business, and are accommodated by it, cannot be sufficient, for that would subject the stock of the merchant and his charges to public regulation. The public have an interest in every business in which an individual offers his wares, his merchandise, his services or his accommodations to the public; but his offer does not place him at the mercy of the public in respect to charges and prices. If one is permitted to take upon himself a public employment, with special privileges, which only the state can confer on him, the case is clear enough," etc.

The case put by Lord Hale of the owner of a private wharf, which was the only one in a new port, being properly subjected to a limitation of his charges, because of an alleged monopoly, is spoken of by Cooley, and explained as grounded upon the use of public property under a license, as the title to the soil under the water in

navigable streams is in the sovereign, and its use by a private person upon which to build a wharf is under the license of the crown.

Judge Cooley then says, at page 739 of his Constitutional Limitations, as follows: "If, then, by public permission, one is making use of the public property, and he claims to be the only one with whom the public can deal in respect to the use of that property, it seems entirely reasonable that his business is affected with a public interest which requires him to deal with the public on reasonable terms."

The right arises from the use of the property of the public by the license of the public, or, in other words, by the license of the crown, and thus the right of limitation attaches to such user. It does not spring from any assumed monopoly arising simply from convenience of location, or because no others are engaged in the business, but only because of the user of public property by the license of the crown or the people.

There is not the slightest proof in this case that the warehouse is built below low-water mark in the East river, on the Brooklyn side, and so on land the title to which may be in the state. If it be thus built, then, perhaps, the state could compel its removal; but it has done or attempted nothing of the kind, and does not seek to do it by this legislation, nor is there any pretense of the limitation of price being placed as a condition of the continued user of the land by the owner of the warehouse. There is no grant of any right by the state, nor of any privilege or franchise upon which to base a claim of the power to limit the price for the user of the warehouse.

Both these able writers, whom I have quoted, are plainly of the opinion that the Munn Case cannot be upheld as within any branch of the police power, as that power is limited under our constitutional government; and I think that, notwithstanding the great respect which is entertained for the Federal Supreme Court, the doctrines of the Munn Case have never received the unqualified approval of the profession. I think, in order to follow it in these cases, we should have to overturn cases and principles decided in this state, after mature deliberation and upon the most impregnable grounds.

The Munn Case was published in 16 American Law Register (N. S.), 526, in 1877. A note is added, at the end of the report, which is entirely adverse to the doctrines of the case, and it is stated that no other court had ever held that a warehouse, situated as was that of the plaintiff in error in that case, was private property which was affected with a public use. A private individual's property was supposed to be affected by a public use, as stated in the note above referred to, when the public had a somewhat greater or less proprietary right therein, as in a public stream over which a person established a ferry, or in the right to a fishery, etc.; and the right to regulate the business of a common carrier it was thought might be placed on the ground of the use the carrier made of a public highway, maintained more or less directly by the taxation of the public.

Commenting on the Munn Case, it is said, in 2 Hare's American Constitutional Law, 771: "Such legislation may be eminently just as regards companies which have been chartered by the state or clothed with the power of eminent domain, because grants of this description not infrequently preclude the competition which is the security against overcharge in trade, but seems questionable when the way is left, open to individual enterprise," etc.

There is some evidence, also, that the decision in the Munn case has not been accepted without criticism by lawyers, even in the land from which we derive our common law, upon the principles of which the learned chief justice claimed to rest it. Mr. Bryce, one of the most accomplished of English lawyers and statesmen, and the author of the late great work on "The American Commonwealth," thinks that the decision was, perhaps, more the effect of public opinion in its action upon the court than of a strict adherence to legal principles; and while, as he says, not presuming to question its correctness, yet adds that it evidently represents a different view of the sacredness of private rights, and of the powers of the legislature, from that entertained by Chief Justice Marshall and his associates. (See 1 Bryce's American Commonwealth (2 vol. ed.), p. 267; (3 vol. ed.) p. 365.)

Upon the question of what is meant by the expressions public use and virtual monopoly, when found in the cases upon the subject under consideration, that of Allnutt v. Inglis, as Treasurer of The London Dock Company (12 East, 527), is a most instructive one. The defendants were the owners of certain London docks, and they had received from parliament the right to store foreign wines in their warehouses connected with such docks, in bond, until their sale, and the payment of duties thereon. This license was, at that time, exclusive, as none but the owners of these docks had the right to receive the wines on storage. This gave the importers of such wines the legal right to resort to the docks and warehouses for unloading and storing, and hence the court held that their owners had devoted them to a public use. The court said that "if the crown should thereafter think it advisable to extend the privilege" (of warehousing these foreign wines in bond) "more generally to other persons and places, so far as that the public will not be restrained from exercising a choice of warehouses for the purpose, the company may be enfranchised from the restriction which attaches upon a monopoly," etc. And Ellenborough, Ch. J., said "there is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his

own property, or the use of it; but if for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose; if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms." It is seen that this was a case where parliament, in the first place, granted a monopoly, and, as a consequence of an acceptance thereof by defendants, the public had a right to resort to the warehouse for the purpose of storing the wines in bond; and, by thus accepting the monopoly, the defendants dedicated their property to a quasi public use, because the public, by virtue of such monopoly and for such purpose, had the right to resort to their warehouses and to demand the storage of the wines.

The facts of the case must be taken into account whenever expressions are used of a somewhat general nature; and it is evident that when the English judges and courts spoke of an owner of property devoting it to a public use, or one in which the public had an interest, they meant that by reason of such devotion the public thereafter had a right to resort to the place where the property was, and a legal right to demand its use on payment of a reasonable compensation. And the cases they were discussing, and in which they made use of the term "virtual monopoly," and where they held the owners had devoted their property to a public use, were cases where such owners were receiving from the government some special privilege or franchise by accepting which they did thereby so devote their property. Unless the public had that right of resort and that right of user upon payment of such compensation, there was no devotion of the property to a public use within the meaning of this expression, which, ex vi termini, means a devotion to the public use to such an extent that the public thereby has a legal right to resort to the premises and to demand such use upon payment or tender of reasonable compensation.

The case of Bolt v. Stennett (8 Durnf. & East, 606) is an illustration of the same principle. The crane was set up by its owners on a public quay (either by the express or implied license of the government) to which the public had the right to resort for the purpose of loading and unloading vessels, and, being so set up and under such circumstances that the public had the right to make use of it, the compensation therefor was properly limited to a reasonable sum.

In this state neither the amount of work done by the owner for the public in the use of his property, nor the numbers of the public who use it, nor the convenience of situation of the property, nor all combined, make the use a public one within the meaning of the term as used in this discussion. Where the owner of property holds himself out to the public as the common servitor thereof, as in the case of a common carrier or innkeeper, or wharfinger (which, as I have said, are ancient exceptions to the general rule), or where he has received some privilege or franchise from the government, then he has granted to the public an interest in his property as to its use, or he accepts the privilege or franchise upon such conditions as the government may annex to its exercise. And when he opens his premises to and invites the public generally to repair to them for the purpose of a resort for some kind of public entertainment or amusement, then he, for the time being at least, brings such property within the exercise of the police power as applied to regulations for the public health or morals, as in the late case of People v. King in this court (110 N. Y. 418), already cited. Even the law, referred to in the King Case, made no provision as to the amount of compensation to be demanded for entrance to the premises.

The decision in the Munn Case entirely changed the common-law character of the warehouses or elevators, and transformed the business from a private to a public one, and this transformation was held to have taken place simply because of the extent of the user of the property and the convenience of situation. The change being affected, the right to demand the services of the plaintiffs in error was assumed without argument; and such right existing, the right to limit the charge was evolved therefrom. The fact that the owners of the property had received no license or privilege from the state, had been endowed with no legal monopoly, virtual or otherwise, were neither common carriers nor public wharfingers, and were simply using their private property in a business which, in its real nature, was as strictly private as that of the large houses of A. T. Stewart, Claflin & Co., and hundreds of other large firms in New York and elsewhere, had no effect with the court in determining this question of public use. The business was placed on the same foundation as a common carrier, and the right of the public to compel business relations was assumed. I am confident that the courts of this state have never gone to any such length in determining when property is devoted or dedicated to a public use.

What is alluded to in the books as a monopoly, or as a "virtual" monopoly, is, in either case, a right created by license from the crown or by virtue of an act of parliament. (See 4 Bl. Com. 159; 4 Stephens' Com. 291.) The important fact is that it emanates from the sovereign power either by license or by legislation, and in both cases, either as an exclusive or a virtual monopoly, it is a privilege or immunity granted to an individual or corporation, and, of course, upon such conditions as to compensation, etc., as the licensing power may choose to impose. Thus in the case in 12 East (supra), it was stated that the dock owners would have had a virtual monopoly of the storage business if the choice of the public as to where to store its wines

were so far restricted, by the government licensing only a few, that its freedom of choice practically did not exist; but that if the license should so far become general that there was practically a fair freedom of choice, then there would be no monopoly and the owners of the warehouses would be free to charge such rates as might be agreed upon.

It was nowhere stated or implied that there could be an exclusive or a virtual monopoly grounded on the fact of convenience of situation, or the costliness of the erections, or a mere combination of owners to raise prices. Such combinations might be illegal, and they might subject the persons who entered into them to prosecution as violators of the law, but that would confer no right to regulate or limit the amount of compensation which a private individual might charge for the use of his property, where he had not devoted it to a public use, as I understand the meaning of that term, and where he had not received any privilege or immunity from the state, upon the exercise of which the right of limitation might be imposed. The virtual monopoly, in the case in East, rested wholly upon the grant of the privilege of bonding given by the crown.

Finally, and much later than the Munn Case, the Supreme Court, in defining just what it did decide in that case, said (per Mr. Justice Miller) that the Munn Case presented the question whether one engaged in a public business, in which all the public had a right to require his service, could be regulated by acts of the legislature in the exercise of this public function and public duty, so far as to limit the amount of charges that should be made for such services, and the court answered such question in the affirmative. (See Wabash S. L. & P. R. Co. v. Illinois, 118 U. S. 557, 569.) The court seems, therefore, to have assumed in the later case that the Chicago elevator owners were bound to place their elevators at the service of the public upon demand, and could not, so long as they remained in the business, refuse to do the business required of them, and that the Munn Case simply decided that principle. The elevators were made public elevators, not by the Constitution or laws of Illinois, but by the facts of that case.

The Slaughter-house Cases (16 Wall. 36) decided that the act of the Louisiana legislature, although granting an exclusive right or privilege as to the slaughtering of cattle, and designating the place for it, was yet valid as a police regulation as to such business, and came under the description of a health regulation, and did not violate any provision of the Federal Constitution. But, if the mere extent of the use of one's property by the public, in the particular business in which he is engaged, is to stamp that use as a public one, and if he is, therefore, to be held to have devoted his property to a public use, the power of the legislature may be imposed upon a vast number of employments which have heretofore been regarded as wholly private, although at the same time very extensive.

A man may set up scales for weighing merchandise by the wholesale, upon his own lands, and announce his readiness to weigh the merchandise of all comers upon such terms as they may agree as to compensation. As soon as his business reaches proportions large enough to enable the legislature, in its discretion, to declare that he has devoted his property to a public use, that moment it is clothed with the power to limit him in his compensation for the use of his own property. It is in vain for him to say that he has asked and received nothing from the state by way of any special privilege or right, and that he has a right to charge what he will for the use of his own property, and the public has no right to demand his services; the answer would be you have devoted your property to a public use because great numbers of the public desire to and do use your property for the purpose that you have offered it, and it is entirely immaterial that the public has no legal right to demand such use. As long as you are in the business you must submit to be regulated by the power of the state.

If a man should erect on his own land a large steam mill to grind corn, and, by reason of his superior facilities, large numbers of persons should resort to it for the purpose of having their corn ground, has he devoted his property to a public use because of the extent to which the public make use of his property for the purpose for which he erected or fitted it up? So long as no person has the right to make use of such property against the will of the owner, and so long as he neither exercises nor receives any special privilege from the state, can it be plausibly maintained in this state that it can impose upon him a limitation as to the amount which he is to receive for the use of his own property?

Nothing like this question was discussed or decided in Township, etc., v. Beasley (94 U. S. 310), as the only controversy there existing was whether the particular purpose for which the bonds were in that case issued was covered by the Kansas enabling statute. The validity of that statute was not discussed or decided. But there are some states where a riparian owner has been given the right to build dams for the purpose of running mills by water power, and to overnow thereby the lands of others, upon payment of the damage done, and it has been held that the overflowing of the land was for a public purpose, i. e., for a mill, and that it might be done under the authority of the legislature upon due compensation being made. Many of such statutes are set forth in the note to the very learned opinion of Mr. Justice Gray, in Head v. Amoskeag, Manufacturing Company (113 U. S. 9), in which case it was held by the federal court that such a statute violated no clause of the Federal Constitution; but the act was upheld in that court, not as a proper exercise of the right

of eminent domain, as taking property for a public use, and it was considered as one regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed.

This court has never gone to any such length, however, in determining what was a public use, within the taxing power or within that of eminent domain. In Hay v. Cohoes Company (3 Barb. 42, 47) it was stated that no exercise of any such assumed right (that of eminent domain) had ever been attempted by our legislature in favor of mills of any kind, and it was said that sites for steam-engines, hotels, churches and other public conveniences might as well be taken by its exercise.

In Weismer v. Village of Douglass (64 N. Y. 91), which was substantially a mill case, where the defendant was authorized to issue its bonds to raise money to pay a subscription to a corporation which was expected to run a saw-mill on the Delaware river, this court held that the bonds were not issued for a public purpose, and the property of individuals could not be taxed to raise money to pay the principal or interest on such bonds. The purpose was declared not to be a public purpose, because (among other reasons) the public had no right to go to the mill of the corporation, when completed, and demand the right to have logs sawed into lumber there. As the corporation could refuse, at any and at all times, to saw the lumber for any particular person, or for all persons, the business of building or running the mill was not a public purpose or use; and, of course, property thus used was not devoted to a public use, and taxation for it was illegal. And In re Application of Eureka Basin, etc., Company of Long Island (96 N. Y. 42), the company was organized to (among other things) acquire certain swamp lands and erect thereon basins, docks, wharves and piers, and warehouses for storing goods from vessels, etc., and it desired to obtain certain lands by the exercise of the power of eminent domain, upon the assertion that the use contemplated was a public one. This court held that as the public did not have the right to use the warehouses, or to direct, in any way, their management, and the property remained under private ownership, it was not a public use to which it was to be put, and hence no right existed to exercise the power asked for. The court said: "The fact that the use to which the property is intended to be put, or the structure intended to be built thereon, will tend, incidentally, to benefit the public by affording additional accommodations for business, commerce or manufactures, is not sufficient to bring the case within the operation of the right of eminent domain, so long as they are to remain under private ownership and control, and no right to their use or to direct their management is conferred upon the public."

These two cases, in our own courts, illustrate the matter of a public use when that term has been employed with reference to the two great powers of taxation and eminent domain, and they show that, in circumstances such as therein stated, the fact that the public had no legal right to resort to the premises and to demand the use of the owner's property, on payment of reasonable compensation, was fatal to the claim that such use was of a public nature, or that the property was in such case devoted to a public use. There is no distinction of principle between the cases; and whenever it has been claimed heretofore that property has been devoted to a public use the term has expressed the fact which existed; that the public had a right of resort to the premises and to use the property, or to demand transportation, etc., upon reasonable compensation being paid or tendered. And the case of a steam mill, which I have instanced, would not in this state be regarded as in the least degree a property which was devoted to any public use whatever, although its presence might greatly tend to benefit and accommodate the public.

The same principle has been decided in Vermont in Tyler v. Beacher (44 Vt. 648), and the opinion of Mr. Justice Wheeler is referred to as a very able examination of the subject of what is a public use. If the power were as broad as is sometimes claimed, so that every sovereignty might regulate the conduct of its citizens towards each other in this way, when necessary for what the legislature should determine to be the public good, and could regulate the manner in which each person should use his property, to the extent of making this limitation, then the whole power of legislation rests with the legislative department, unrestrained by any constitutional prohibition; and it is but necessary for the legislature to decide that its proposed enactment is for the public good and general welfare, and such decision stands as a conclusive reason for and justification of its action. This cannot be and is not true. There are limitations to this doctrine other than the mere will of the legislature and its decision as to what constitutes the public good or the general welfare; these limitations are to be found in our fundamental law, and have been frequently discussed; and limitations have been placed upon the exercise of such power by the decisions of this court in carrying out the provisions of the Constitution. For example, see Wynehamer v. People (13 N. Y. 378); In re Jacobs (98 id. 98); People v. Marx (99 id. 377); People v. Gillson (109 id. 389).

The clause in our Constitution that no person shall be deprived of life, liberty or property without due process of law (Const. art. 1, § 6), is to have a large and liberal interpretation, as this court has said in so many words, and as is evidenced by the above cited and other cases. The citizen is thereby protected against any unlawful invasion of such rights or of any essential incident to the enjoyment thereof. Many instances of the benefits of this provision are cited in those cases, and in the dissent-

ing opinion of Mr. Justice Field in the Munn Case, which, it seems to me, is a most masterly examination and clear statement of the principles which I believe this state has always stood by, and protected through its courts.

These cases hold that the liberty mentioned in the bill of rights is not the mere right to be free from personal restraint. It includes a right to labor and to receive the fruits of one's labor (which includes the price for the use of one's property), in all ways which are not harmful to the welfare, the health, the happiness of others. The whole reason for the existence of the police power rests in the theory that one shall so use his own property as not to interfere with the proper use by others of their property, and so as not to interfere with the public health, morals or general welfare. The last words do not give power to the legislature, arbitrarily, to determine the question what is for the general welfare; but such power is subject to the constitutional restrictions already adverted to, beyond or in violation of which the legislature cannot go.

The case of Vanderbilt v. Adams (7 Cow. 349) was decided by our Supreme Court in the early part of the century. The facts show a clear case for the exercise of the authority claimed under the act of the legislature providing for the regulation of the harbor of New York. The plaintiff was the owner of a private wharf, such an one, I assume, as is spoken of in the cases of Langdon v. Mayor, etc., (93 N. Y. 129), and Williams v. Mayor, etc., (105 id. 419), as I know of no other kind of private wharf in New York. It was held that the wharf was subject to the harbor regulations contained in the legislative act, because such regulations were merely an exercise of the police power necessary to prevent confusion and to promote the peace and good order necessary to be observed in a crowded harbor, such as New York was even then regarded. It was held that the city had never, by its grant of the land under water, or of the right to build a wharf, parted with the right which it had received under its charter over the subject-matter of the wharves and their regulation.

The difference of title of shore owners on the New York and Brooklyn sides of the East river is discussed in Wetmore v. Atlantic White Lead Company (37 Barb. 70), and referred to and recognized in the case of same plaintiff against Brooklyn Gas Company (42 N. Y. 393). And it was distinctly stated in last cited case that the state did not, by its former acts, grant any right or privilege or franchise to the owners of the land under water, upon which could be based the right to compel the owner of the land to consent to its use by the public.

The License Cases (5 How. (U. S.) 504, at 583) decided only that regulations for the sale of intoxicating liquors were valid and did not infringe any provision of the Federal Constitution. Taney, Ch. J., in speaking of the police power of the state, simply said that it was of the same class as any other power inherent in every sovereignty. There was no pretense of a claim that it was a sovereign power uncontrolled and unlimited by the clauses of the Constitution providing for the liberty of the citizen. When the state legislates it does so by virtue of the power of sovereignty, which is, as the learned chief justice said, the power to govern men and things within the limits of its dominion.

It has been frequently said that the police power rests for its foundation upon the general duty of each citizen to so use his property as not to interfere with the fair and proper use by his neighbor of his property, and to protect and guard the public health and morals. The power to regulate or limit the price for the use of property situated like that in this case comes within no fair definition of such power, nor does it belong to the category of things that should be regulated in order that another may properly enjoy his own property, or that the public health or morals may be protected.

An examination of the cases now before us, in view of these observations, will show, as I think, that these defendants have never devoted their property to a public use, so that the public had a right to require their service, and that they have received no immunity or privilege from the state upon which this claimed right of limitation can be imposed as a condition to its exercise.

These defendants are the owners or lessees of certain elevators or warehouses, used in the harbor of New York for the purpose of transfering grain from one vessel to another, from canal boat to steamship, or from boat to rail car, or for the storing of grain. They are not a corporation, nor have they received any special privilege from the state in regard to their business, nor are they engaged in a business which is not absolutely free to any one who wishes to use his property in the same way. They have no special right to use the waters within the jurisdiction of the state in a manner not equally open to every citizen, not only of the state, but of the United States. The state furnishes them no special facilities for the carrying on of their business, and they are under no obligations to it for any protection to their business or property, other than such as is given by and is due from the state to all the inhabitants thereof, viz., the duty of protection to their persons and property while they are lawfully engaged in their occupations. They are under no legal duty to engage in such occupation for all who may come and ask them. They have the perfect right to refuse to elevate, by means of their elevators, a bushel of grain for A, and, at the same time, they have the right to use such elevators to elevate the grain of B. They have the equal right to refuse to store the grain of any or of all persons. I fail entirely to see how such a business can be said to be one in which the public have an interest in the way of a right

to limit, through legislation, the price for which such business shall be done.

The defendants are situated entirely differently from the elevator owners in Chicago, whose rights were adjudicated upon in the Munn. case. The canal boats loaded with grain, after their passage down the Hudson river, seek the owners of the storehouse in which to store the same until wanted, or the floating elevator is sought for and found, and employed to unload the cargo of the boat into the hold of the steamship. There are large numbers of warehouses and elevators which are in no way connected with each other. In neither case is there anything like what can be called a monopoly, virtual or otherwise; the utmost stretch of the imagination cannot so regard it. The warehouses are private property, and no one can enter upon them without the consent of their owners. (Wetmore v. Atlantic White Lead Co., 37 Barb. 70; Wetmore v. Brooklyn Gas-Light Co., 42 N. Y. 384.)

Still more plainly is this the case with a floating elevator. It is not a common carrier or wharfinger or warehouseman. It has no monopoly, virtual or otherwise, as to facilities of place, convenience of situation, or license or privilege from the state. In the nature of the business of both the warehouseman and the elevator owner it is wholly private. Now in what is the case made less strong, when, instead of the scales or the mill, heretofore instanced, an elevator or warehouse is substituted? It is built by individuals or private partnerships, and occupied by them or leased to other private individuals or partnerships. It is built on lands owned by individuals, or it is in the substantial form of a boat, and floats on the public waters of the state, and its owners have received no kind of license, privilege or immunity from the state, in any way special in its nature, or which is not common to all the people of the state. How, then, has the owner devoted it to a public use? It is claimed that he has done so because the elevator or warehouse is to be used to elevate or store a vast amount of grain which comes from the west seeking transportation through the Erie canal; and because it costs a large amount of money to build such structures, and owing to the facility and cheapness with which the elevator does the work, as compared with the labor of individuals, those who own the grain, or those who are interested in its transportation, are compelled to use such elevator if they desire to successfully compete in the business of transportation and in the loading or unloading of such grain. Hence, it is said, a virtual monopoly exists, and the persons who own it are under the regulating power of the legislature as to their compensation. But I deny that there is any virtual monopoly. There was such in the case in 12 East (supra), because there was no right in any other owners of warehouses to receive the wines on storage, and the right existed in the dock owners by virtue of a special grant from the sovereign. A monopoly in a business, where the persons engaged in it have no exclusive privilege, and into which business the whole world is at liberty to enter, and upon entering which they will be possessed of precisely the same rights and privileges as the others engaged in it, is a contradiction in terms. Loosely speaking, a person or corporation is said to have a virtual monopoly of a business when, on account of its great extent and the facilities it has for transacting it, arising from its large proportions, the article it manufactures or sells substantially takes possession of the market. Such, for instance, is the case in the manufacture and sale of matches. One company does an enormous business, and has almost what is called a monopoly in some parts of the country, arising not from any special privilege or right granted to or exercised by it, but because of its facilities; and it is therefore, enabled to make the article cheaper and sell it cheaper than its competitors. But would any one suggest that the state has, therefore, a right to limit the price which the company shall charge for matches? If it be a corporation, indeed, or if it has received any special privilege or right from the state, then conditions may be imposed upon it, although none can be simply because of the greatness of its sales or the number of the public interested in procuring cheap matches.

But when the right of regulation as to compensation is spoken of because the person has a virtual monopoly, the term has heretofore been used as indicative of some special privilege or franchise granted to the individual by the sovereign which results in such virtual monopoly, and the right of such regulation exists by reason of such grant. No monopoly of that kind exists in this case. If it be said that the effect is the same, the answer is that it is not the same. In the one case the monopoly exists by reason of the action of the government, and no other citizen can come in and devote his capital and energy to such use. In the other the monopoly exists only as long as other citizens choose to keep out of the business, and just as soon as it is seen that the least degree over the ordinary profit can be realized by an investment in elevator property just that moment capital will flow into that channel, and probably away from some industry where the average rate of profit has ceased to be made. Thus in one case the result cannot be avoided or in any way altered excepting by the action of the sovereign, while in the other case it may be altered by the action of the ordinary laws of trade. The effect, while it lasts, may possibly be the same in both cases, but in the one it is arbitrary and dependent upon the government, and in the other subject to alteration according to general commercial rules. But in this case there is no pretense of a monopoly grounded upon lack of ability in the public to compete. On the

contrary, the complaint is that the competition has been so fierce and the numbers of those engaged in the business so great that they have combined to fix upon prices below which they would not work, and it is, in reality, the combination of which complaint is made. If the prices for doing the work are higher than is reasonable, owing to such combination, the combination itself may be illegal (see Hooker v. Vandewater, 4 Denio, 349; Stanton v. Allen, 5 id. 435); and, as has been said, the persons engaged in it may render themselves amenable to the criminal laws of the state, but no power of the state to limit the price for which a person may sell his property, or the use of it, results from a violation of the law against conspiracies or combinations to raise illegally the prices of articles or the charges for services which have a commercial value.

It is said, however, that the defendants have received some privileges or benefits from the state in their business of elevating or storing grain, because the state has built the Erie canal and spent large sums of money for that purpose, and the business of elevating grain into and out of a canal boat, or of storing it, is made much greater than would be possible but for the constant maintenance of the canal by the state; and if the state should cease to maintain the canal the business of transporting grain over it would be wholly destroyed, and, therefore, it must be conceded that the business of elevating grain receives support from the public, and it is only through such support that the business can exist. It is difficult, as it seems to me, to regard this argument seriously. The state, it is thus said, has built a canal and there are men (not the defendants) who propose to avail themselves of its existence, and to transport merchandise in their boats over its waters. Before undertaking such transportation, however, they must load their boats or unload them after such transportation is finished, and in the process of loading or unloading their boats in the public waters of the state they hire the defendants to do the elevating of the cargo. If the canal had not been built there would have been no boatmen with canal boats asking for cargoes, and, consequently, the defendants would not have had the opportunity of loading their vessels, therefore, the state has conferred a privilege upon the defendants by using which they acquiesce in the right of the state to limit the amount of compensation they can lawfully demand for the use of their own property. The mere statement of the proposition, it seems to me, is its best refutation. To argue upon it would seem to admit that it is debatable. By reason of the action of the state in building the canal more frequent opportunities have arisen from which the defendants have been enabled to engage in a certain kind of labor and to invest their capital in certain kinds of property, but not a privilege, immunity or franchise of any description has the state granted to them even by the loosest construction of language.

The legislation in question is nothing less than an effort, not only to regulate the business of private individuals, but to limit the amount for which they shall exact compensation for the use of their own property, in which the public has no interest whatever, in the legal meaning of that term. If it is legal in this case, it is legal in any. The legislature can step in and limit the prices of every article of commerce, the product of the field, the mine or the manufactory. There is seemingly no length to which it may not go, and no home to which this power may not be applied in matters of the most individual and private nature, and all under the guise of legislation for the public good and the general welfare.

It is true that the question of the validity of this law is one of power and not of propriety; and if the legislature, in any case, may have, under any circumstances, the power to limit the compensation which a private individual may receive for the use of his own property, not devoted to a public use and in regard to which he receives and exercises no special privilege or immunity from the state, then we are bound to suppose such circumstances to exist in the case before the court. We are of the opinion that the legislature has no such power.

There is no foundation for the argument that the elevator owners have a monopoly because they have their charges fixed by the Produce Exchange, which only recognizes as regular the warehouse receipts given by elevator owners or warehousemen who are members of that body. If that be the fact, it constitutes in no view of the subject a monopoly. What has already been said upon the subject applies in equal degree to such an argument; nor have the defendants thereby received any privilege or franchise from the state.

The disposition of legislatures to interfere in the ordinary concerns of the individual, as evidenced by the laws enacted by parliaments and legislatures from the earliest times, and the futility of such interference to accomplish the purposes intended, have been the subject of remark by some of the ablest of English-speaking observers. Buckle, in his History of Civilization in England, in speaking of the course of English legislation, says: "Every great reform which has been effected has consisted, not in doing something new, but in undoing something old. The most valuable additions made to legislation have been enactments destructive of preceding legislation, and the best laws which have been passed have been those by which some former laws have been repealed." And again: "We find laws to regulate wages; laws to regulate prices; laws to regulate profits; laws to regulate the interest of money; custom-house arrangements of the most vexatious kind, aided by a complicated scheme, which was well called the sliding scale—a scheme

of such perverse ingenuity that the duties constantly varied on the same article, and no man could calculate beforehand what he would have to pay. A system was organized, and strictly enforced, of interference with markets, interference with manufacturers, interference with machinery, interference even with shops. In other words, the industrious classes were robbed in order that industry might thrive." (Buckle's History of Civilization in England, vol. 1, pp. 199, 200, etc.)

The legislation under review is of the same general nature. To uphold legislation of this character is to provide the most frequent opportunity for arraying class against class; and, in addition to the ordinary competition that exists throughout all industries, a new competition will be introduced, that of competition for the possession of the government, so that legislative aid may be given to the class in possession thereof in its contests with rival classes or interests in all sections and corners of the industrial world. We shall have a recurrence of legislation which, it has been supposed, had been outgrown not only as illegal, but as wholly useless for any good effect, and only powerful for evil. Contests of such a nature are productive only of harm. The only safety for all is to uphold, in their full vigor, the healthful restrictions of our Constitution, which provide for the liberty of the citizen, and erect a safeguard against legislative encroachments thereon, whether exerted today in favor of what is termed the laboring interests, or to-morrow in favor of the capitalists. Both classes are under its protection, and neither can interfere with the liberty of the citizen, without a violation of the fundamental law.

In my opinion the court should not strain after holding such species of legislation constitutional. It is so plain an effort to interfere with what seems to me the most sacred rights of property and the individual liberty of contract that no special intendment in its favor should be indulged in. It will not, as seems to me plain, even achieve the purposes of its authors. I believe it vain to suppose that it can be other than one of the most ephemeral nature at its best, or that it will have any real virtue in altering the general laws of trade, while, on the other hand, it may ruin or very greatly impair the value of the property of wholly innocent persons. If the compensation limited by the act is not sufficient to permit the average rate of profit upon the capital invested, it will result either in its evasion or else the work will not be done, and the capital employed will seek other channels where such average rate can be realized, or the property will become of little or no value. If the compensation be sufficient, the same result aimed at would soon follow from the general laws of trade, from the law of supply and demand, and the general cost of labor and materials.

Every one having the same right to build an elevator or warehouse that these defendants have, and upon its completion to employ it in the same business, if the rate of profit is above the average, capital, if allowed absolute freedom and legal protection, will flow into the business until there is enough invested to do all or more than all the work offered, and then, by the competition of capital, the rate of compensation would come down to the average. Such, at least, would be the tendency, and it could only be averted by combination among the owners of the property, which could not long be sustained in the face of perfect freedom to all to invest in such undertakings. That they are expensive and require the outlay of a large amount of money to build and maintain them, and that the warehouses now existing may have an advantage in location, does not, as has been shown, make them a monopoly, but simply tends to make the inevitable result a trifle more slow in its approach than in other cases requiring a smaller outlay. If it be said that there is already a superabundance of elevators, more than can be or are used, and that some of them lie idle when others do the work, and they all share in the profit; if the profit exceed what the owners of the grain or those engaged in its transportation can afford to pay, the result will then be that the persons so engaged will cease from that kind of work, or else the owners of the elevators will reduce their charges. This reduction of charges will most surely take place before the owners of the elevators would allow the business to pass out of existence, provided the compensation after such reduction would enable them to realize the average rate of profit for their capital; while, if it would not, it would be conclusive proof that the business of transportation of grain or other commodities where the boats were to be loaded or unloaded by elevators, could no longer be conducted with profit to all parties, and some new way would have to be discovered and put in practice, for capital will not seek investment or employment where the average rate of profit cannot be commanded, and men will not continue to transport grain or any other commodity at a loss, or upon such terms that they cannot earn a livelihood. If this is the case in the transportation of grain by the canal, owing to the competition of railroads and their ability to transport it cheaply and rapidly, then that fact must be faced. Such a business cannot be maintained for any length of time, by legislation, at the expense either of capital or of the transporter. Each must earn the average profit in the same general line of business, or the business must, from economical reasons, cease.

The legislation under consideration is not only vicious in its nature, communistic in its tendency, and, in my belief, wholly inefficient to permanently obtain the result aimed at, but, for the reasons al-

ready given, it is an illegal effort to interfere with the lawful privilege of the individual to seek and obtain such compensation as he can for the use of his own property, where he neither asks nor receives from the sovereign power any special right or immunity not given to and possessed by every other citizen, and where he has not devoted his property to any public use, within the meaning of the law.

The orders of the General and Special Terms of the Supreme Court should, therefore, be reversed, and the relators discharged.

All concur with ANDREWS, J., except GRAY and PECKHAM, JJ., dissenting.

Judgment affirmed.