CHAPTER 15.

OF THE MANAGEMENT OF THE ROAD.

§ **221.** *Formation of passenger trains.*—In forming a passenger train, baggage, freight, merchandise or lumber cars shall not be placed in rear of the passenger cars; and if they or any of them shall be so placed, the officer or agent who so directed, or knowingly suffered such arrangement, and the conductor of the train, shall be deemed guilty of a misdemeanor, and be punished accordingly. (*Laws* 1850, *chap.* 140, § 38.)

§ **222.** *Placing passenger car in front of baggage car, etc., a misdemeanor.*—A person, being an officer or employee of a railway company, who knowingly places, directs or suffers a baggage, freight, lumber, oil or merchandise car

to be placed in rear of a car used for the convenience of passengers in a railway train, is guilty of a misdemeanor. (*Penal Code*, § 422.)

§ **223.** *The Starting and running of railroad trains.*—Every such (*railroad*) corporation shall start and run their cars for the transportation of passengers and property at regular times, to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting, and at the junction of other railroads, and at the usual stopping places established for receiving or discharging way passengers or freight for that train, and shall take, transport and discharge such passengers and property at or from or to such places on the due payment of the fare or freight legally authorized therefor. No preference for the transaction of business shall be granted by said railroad corporation to any one of two or more companies or associations competing in the business of transporting property for themselves or for others upon the railroad owned or operated by such corporation, either upon the cars on in the depots or buildings or upon the grounds of such corporation, and whenever the railroad of such corporation, at or near the same place, connects with or is intersected by any other railroad, such corporation shall fairly and impartially grant or afford to each of such competing companies or associations equal terms of accommodation, privileges and facilities in the transportation of property and freight to and upon such connecting or intersecting railroad, and shall also grant and afford to each of such competing companies or associations, and to the officers, agents and employees thereof, equal facilities in the interchange and use of express, freight and other cars so far as may be necessary to accommodate the business of each of such competing companies or associations, and every railroad company shall be liable to the party aggrieved in an action for damages for any neglect or refusal in the premises. The provisions of this section shall apply to all existing railroad corporations. (*Laws of* 1850, *chap.* 140, § 36, *as amended by chap.* 49, § 1, *of the Laws of* 1867.)

The original section, previous to amendment, read as follows: "Every such corporation shall start and run their cars for the transportation of passengers and property, at regular times, to be fixed by public notice; and shall furnish sufficient accommodations for the transportation of all such passengers and property, as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting and the junction of other railroads, and at usual stopping places established for receiving and discharging way passen-

:ers and freights for that train; and shall take, transport and discharge such passengers and property at, from and to such places, on the due payment of the freight or fare legally authorized therefor; and shall be liable to the party aggrieved, in an action for damages, for any neglect or refusal in the premises. *Laws* 1850, *chap.* 140, § 36.)

The running of the trains.

A railroad company moving its cars in an unusual manner, which no one, not having previous knowledge, could anticipate, is bound to use extraordinary care in so doing. And a passenger, without such knowledge, is not in fault if he is injured while using the care necessary to avoid injury from the ordinary motions of the cars. *So held*, where the car and the track on which it stood were moved sideways. (*Supreme Ct.*, 1863, *Gordon* v. *Grand-street and Newtown R. R. Co.*, 40 Barb., 546; see, also, *Brown* v *N. Y. C. R. R. Co.*, 32 N. Y., 597.) It is the duty of the company to furnish all requisite information to its passengers of the route traveled, and the cars to be taken at its intermediate stations. It must give published notice of the running time of the trains, and also special notice to the travelers on the road of the necessity of changing cars at any particular station. (*Paige* v. *N. Y. C. R. R. Co.*, 6 Duer, 523.)

A joint action will lie against two companies, by a passenger injured by a collision resulting from the concurrent negligence of both. (*Colgrove* v. *N. Y. and N. H. R. R. Co.*, and *N. Y. and Harlem R. R. Co.*, 20 N. Y. 492; affirming S. C., 6 Duer, 382.) It is part of the duty of the company to render assistance to passengers in getting on or off the cars, in doing which, children and infirm or aged persons must be shown more consideration than persons under no disability, and are entitled to more time in getting on or off the cars. (*Sheridan* v. *Brooklyn, etc., R. R. Co.*, 36 N. Y., 39.)

Acts of a driver or brakeman on the car of a street railroad in assisting passengers to get upon the car are deemed within the scope of his employment by the company; and the company are liable for the consequences of any negligence in the manner in which they are performed. (*Ct. of Appeals*, 1862, *Drew* v. *Sixth Avenue R. R. Co.*, 26 N. Y., 49; see, also, *Mulhado* v. *Brooklyn City R. R. Co.*, 30 id., 370; *Same* v. *Same*, 3 Keyes, 429; *Nichols* v. *Same*, 38 id., 131; affirming S. C., 10 Bosw., 260; *Maverick* v. *Eighth Ave. R. R Co.*, 36 N. Y., 378; *Meyer* v. *Second Ave. R. R. Co.*, 8 Bosw., 305.) The company is guilty of negligence in arranging its time-tables in such a manner, that trains approaching a station from opposite directions on the same track, become due at the station at the same moment. (*Wright* v. *N. Y. C. R. R. Co.*, 28 Barb., 80.)

That when a railroad train is so carelessly and negligently run as to imperil the passengers, and one is compelled to jump out to avoid the danger, and in so doing injuries himself, the compppny is liable. (*N. Y. Superior Ct.*, 1847, *Eldridge* v. *Long Island R. R. Co.*, 1 Sandf., 89.) The company is liable for the acts of its servants, whereby the train is negligently or carelessly run. Thus, where the engineer ran the train against obstacles under the impression that he could knock them out of the way. (*Willis* v. *Same*, 34 N. Y., 670) Where a passenger's elbow was fractured by coming in contact with some object projecting from a car on an adjoining track of the company's road, it was *held* that the burden of proof was on the company to show that the injury was not attributable to its want of care. (*Holbrook* v. *Utica and Schenectady R. R. Co.*, 2 N. Y., 236.) In the management of horse cars, the company must provide

bells for the horses, and lights at night for the cars. (*Johnson* v. *Hudson R. R. R. Co.*, 20 N. Y.; affirming S. C., 6 Duer, 633.)

The acts of the driver of the car, in wrongfully ejecting a passenger from the platform, even though they be forcible, malicious and willful, and not merely negligent, are deemed within the scope of his employment by the company. (17 N. Y., 362; *N. Y. Superior Ct.*, 1861, *Meyer* v. *Second Avenue R. R. Co.*, 8 Bosw., 305.) The company is not liable to its employees for injuries from the negligent manner in which the train is run, where it has used reasonable care in selecting only such servants as were of competent skill and experience. (*Sherman* v. *Rochester and Syracuse R. R. Co.*, 17 N. Y., 153; affirming S. C., 15 Barb., 574; *Russell* v. *Hudson R. R. Co.*, 17 N. Y., 134; reversing S. C., 5 Duer, 39; *Coon* v. *Syracuse, etc., R. R. Co.*, 5 N. Y., 492,) It is the duty of a railroad company, in crossing on its level a public street in a populous town, with cars drawn by steam power, to use extreme care; and not only to employ servants to look ahead on both sides, but also to have the train under such control that it can be promptly stopped if any one is on the track. (*Supreme Ct.*, 1861, *Wilds* v. *Hudson R. R. R. Co.*, 33 Barb., 503; see also *Fero* v. *Buffalo and S. L. R. R. Co.*, 22 N. Y., 209; and see *Warner* v. *N. Y. Central R. R. Co.*, *infra.*)

The company is also liable for the willful acts of its servants, whereby the running of the train is prevented (*Blackstock* v. *N. Y. and Erie R. R. Co.*, 20 N. Y., 48; affirming S. C., 1 Bosw., 77, or delayed *Weed* v. *Panama R. R. Co.*, 17 N. Y., 362). Running of an engine across frequented highways, by a fireman alone, will render the company liable for negligence. (*O'Mara* v. *Hudson River R. R. Co.*, 38 N. Y., 445.) A higher degree of care is required in running trains along a highway than in the open country. (*Card* v. *N. Y. and H. R. R. R. Co.*, 50 Barb., 39; but see *Warner* v. *N. Y. C. R. R. Co.*, 44 N. Y., 465, *infra.*) The servants of the company are not bound to stop a train when ordered to do so by strangers, without giving any reason. (*Mott* v. *H. R. R. Co.*, 1 Robt., 585.) (See notes in regard to the transportation of persons and property and baggage, the rights, duties and liabilities of the company as a common carrier, the safety of the cars and tracks, the duties of connecting lines, etc.)

When a railroad company gives such published notice of the running of its trains, and such special notice in the cars of the necessity of changing cars at any particular station, that every traveler of ordinary intelligence, by the use of reasonable care and caution, would obtain all requisite information as to the route to be traveled and the cars to be taken at intermediate stations, it discharges its whole duty in this respect. (*Page* v. *N. Y. C. R. R. Co.*, 6 Duer, 523.) Effect of brakemen's announcement of the stations. (*Gonzales* v. *N. Y. and H. R. R. R. Co.*, 33 Sup. Ct. [1 J. & S.], 57.)

The sudden starting of the train without giving a signal, thereby endangering the safety of passengers when they are entering or leaving a car at a place at which they are accustomed so to do, is an act of negligence which should be submitted to a jury. (*Keating* v. *N. Y. C. R. R. Co.*, 3 Lans., 469; affirmed, 49 N. Y., 673, but no opinion reported.) See, also, *Probost* v. *South Side R. R. Co.*, 1 Sup. Ct. [T. & C.], Adden, *a* 10.) A regulation by a railroad corporation, setting apart, in the first instance, one car of a train for females traveling alone, or with male relations or friends, is a proper and reasonable one, and the corporation has the right to enforce such a regulation, even to the extent of forcibly removing from the car so set apart a male who enters it, having no

female under his care. (*Peck* v. *N. Y. R. R. R. Co.*, 70 N. Y., 587.) The company is, however, liable for an excess of force upon the part of the employees beyond what is needful to effect the result. (*Id.*) A railroad company ran two roads, one for through passengers, the other for trains between two points. A passenger with a through ticket held entitled to ride over only the first road. (*Bennett* v. *N. Y. C. R. R. Co.*, 69 N. Y., 594.) Failure of company to stop for a sufficient time to allow passengers to alight does not justify a passenger in exposing himself to danger by getting off while cars were in motion. (*Burrows* v. *Erie R. R Co.*, 63 N. Y., 556.)

Passenger seated near open window, with elbow on window sill; his arm was broken while passing over a bridge. Question whether defendants were guilty of negligence in having a bridge too narrow for the passage of the cars with safety. (*Dole* v. *Del., L. and W. R. R. Co.*, 73 N. Y., 468.) The running of a railroad train beyond the usual stopping place at a station before coming to a stand still is not negligence *per se;* nor is the delay, after it is brought to a stop for a period necessary to reverse the motion, so as to back it to the usual stopping place. (*Taber* v. *D., L. and W. R R. Co.*, 71 N. Y., 489.) The sudden jerking of a railroad train backward, while passengers are rightfully passing out of the cars, is liable to produce accidents, and is negligence. (*Souter* v. *N. Y. C. R. R. Co.*, 66 N. Y., 50.) Negligence in conductors allowing passenger to alight on track. (*Armstrong* v. *N. Y. C. R. R. Co.*, 66 Barb., 437.) Injury in alighting when train did not stop long enough. (*Burrows* v. *Erie R'way Co.*, 3 Supm. Ct. [T. & C.], 44. Cars not to be moved after announcing time for refreshments. (*Souter* v. *N. Y. C. R. R. Co.*, 6 Hun; 446.) That it is now settled that a railroad company is bound to manage their road and machinery with the utmost care and vigilance, and that the freedom from negligence which is required of a plaintiff involves only that ordinary prudence and attention which sensible men are accustomed to give in similar cases. (See *Cook* v. *N. Y. C. R. R. Co.*, 1 Abb. Ct. App. Dec., 432; S. C., 3 Keyes, 476.) Negligence cannot be inferred from the rate of speed alone with which the trains are run; the law does not restrict the rate of speed. (*Warner* v. *N. Y. C. R. R. Co.*, 44 N. Y., 465.) But where there is a city ordinance porphibiting railroad trains from running within the city limits beyond a certain speed, persons crossing the track may assume that this ordinance will be complied with. (*Cook* v. *N. Y. C. R. R. Co.*, 5 Lans., 401.)

Irrespective of any ordinance or law regulating the speed of railroad trains at crossings, the running at an excessive rate of speed is negligence, and if a collision is caused thereby, the company is liable. As to whether the rate of speed is excessive or dangerous in the locality, is a question of fact for the jury. (*Massoth* v. *D. and H. C. Co.*, 64 N. Y., 524.) Whether the violation of a municipal ordinance regulating the rate of speed is, as a matter of law, negligence, *quære.* (*Id.*) A child, four years old, escaped from house into street, and was run over and injured by defendants' cars. *Held*, the evidence did not not establish contributory negligence on part of the mother. (*Fullin* v. *C. R. N. and E. R. R. Co.*, 64 N. Y., 13.) Horse's foot caught between planking in street and rail of company. (*Poyne* v. *T. and B. R. R. Co.*, 83 N. Y., 572.) Amount of care required from infants to avoid imputation of negligence. (*Byrne* v *N. Y. C. and H. R. R. R. Co.*, 83 N. Y., 620.)

Liability of the company from fire occasioned by the running of the trains.

If the most approved known means are used by the company to prevent the

sparks from their engines from causing injuries, the railroad company is n liable in case damage is occasioned by fire communicated in that manner. Barb., 466; 8 Barb., 427; *Supreme Ct.*, 1854; *Rood* v. *N. Y. and Erie R. R. C* 18 Barb, 80.) The defendants, by the negligence of their servants in the ma agement of an engine, or by the defective condition of the engine, set fire to quantity of wood in one of their sheds. The fire consumed the wood shed, an spread to and consumed the house of the plaintiff, situate about one hundre and thirty feet distant from the shed. *Held*, that no cause of action existed favor of the plaintiff against the railroad company by reason of such loss. (*Ct. of Appeals*, 1866, *Ryan* v. *N. Y. Central R. R. Co*, 35 N. Y., 210.)

A railroad company running a locomotive through a village where wood buildings stand so near the track as to be exposed to take fire from sparks fro the engine, is bound to take a higher degree of care than one running across open and unsettled country. And at a time when the exposure of the buil ings is increased by the fact that a strong wind blows toward them direct from an engine stationary upon the track, the corporation is responsible for t utmost vigilance and care. (*Ct. of Appeals*, 1860, *Fero* v *Buffalo and State Li R. R. Co.*, 22 N. Y., 209.) The mere appearance of a fire consuming buildin in the vicinity of, but at some distance from, a railroad track in a city, the di play of a red light upon the track, and requests by firemen and others to tho in charge of an approaching train to stop it, without giving notice of any reas for stopping, do not make it the duty of the latter to stop, so as to render t company to which such railroad belonged, liable in damages to the owner the burning buildings, for the cutting of hose lying across the track, by t train in passing slowly on, whereby the supply of water to extinguish the fi is cut off. The servants of a railroad company are not bound to stop a tra when ordered to do so by strangers without giving a reason. (*N. Y. Super Ct.*, 1863, *Mott* v. *Hudson R. R. Co.*, 1 Robt., 585.)

Negligence in management of engine set fire to wood in company's sh which spread and consumed plaintiff's house, one hundred and thirty feet d tant. *Held*, no cause of action. (*Ryan* v. *N. Y. C. R. R. Co.*, 35 N Y., 2 *Penn. R. R. Co.* v. *Kerr*, 1 Am. Rep., 451 [62 Pa., 253]; *Toledo, etc., R. R* v. *Pinder*, 5 Am. R. [53 Ill.], 447.) But where defendant negligently allow coals to drop from its locomotive and set fire to the ties to the track, fr whence it spread to and burnt plaintiff's woodland. *Held*, plaintiff could re ver. (*Field* v. *N. Y. C. R. R. Co.*, 32 N. Y., 339; followed *Webb* v. *Rome, W and O. R. R. Co.*, 3 Lans., 453; affirmed 49 N. Y., 420.)

As to liability for fire set by brand thrown from engine, see *McCowen* v. *N Y. R. R. Co.* (66 Barb., 338). For fire from sparks, *Westford* v. *Erie R. C* (5 Hun, 75). In such a case, proof of dropping coals and scattering sparks not confined to the occasion when the injury was done, nor to defects in a s gle engine of the company. (*Idem;* see also *Sheldon* v. *H. R. R. R. Co.*, N. Y., 218; *Field* v. *N. Y. C. R. R. Co.*, 32 N. Y., 339.) As to contributo negligence by the plaintiff in throwing manure out of a barn, thrown with two feet of railroad track and allowing it to accumulate during a hot dry se son, and premises burned by sparks from engine. (See *Collins* v. *N. Y. C. R. R. Co.*, 5 Hun, 499.) That the fact that property in the vicinity of a railroad consumed by fire originating from sparks emitted from a passing locomoti does not necessarily imply that the railroad company has been guilty of negl gence. (See *Collins* v. *N. Y. C. R. R. Co.*, 5 Hun, 503.)

When the engine was first class, fitted with most approved kind of spark arrester, in good order on the day of the fire, and in proof that the escape of sparks from an engine when in motion could not be wholly prevented, *held* error for the court to refuse to charge that, unless there were defects in the smoke stack or spark arrester, from which the sparks escaped, that the defendant was not liable. (*Id.*) Fire from coals negligently dropped. (*Webb* v. *Rome, etc., R. R. Co.*, 49 N. Y., 420; affirming 3 Lans., 453.) The company in such case held liable; *held*, also, that the negligence did not consist only in letting the coals drop, but the dryness of the atmosphere and earth, the direction and strength of the wind, and the permitted accumulation of weeds, grass and rubbish were all constituents of the act and went to make it negligent. In this case, the cases of *Ryan* v. *N. Y. C. R R.* (35 N. Y., 210); *Penn. R. R.* v. *Kerr* (62 Penn., 353), were distinguished and explained. What is sufficient evidence to authorize a finding that the plaintiff's property was destroyed by sparks from a switch house of the defendant, and that there was negligence in the use of a stove therein. (*Briggs* v. *N. Y. C. R. R. Co.*, 72 N. Y., 26.)

Safety of the cars.

A common carrier is absolutely bound, irrespective of negligence, to provide road-worthy vehicles. (*Ct. of Appeals*, 1852, *Alden* v. *N. Y. C. R. R. Co.*, 26 N. Y., 102.)

A railroad corporation is liable for injuries to a passenger, caused by a crack in the iron axle of a car, although the defect could not have been discovered by any practicable mode of examination. They are bound to provide roadworthy vehicles. (*Ct. of Appeals*, 1862, *Alden* v. *N. Y. C. R. R. Co.*, 26 N. Y., 102.) A railroad company is liable in damages for an injury resulting to any person lawfully using its road, from its neglect to introduce any improvement in its apparatus which it knows to have been tested and found materially to contribute to safety, and the adoption of which is so within its power as to be reasonably practicable. (*Ct. of Appeals*, 1859, *Smith* v. *N. Y. and Harlem R. R. Co.*, 19 N. Y. [5 Smith], 127.)

Although carriers of passengers are not insurers, the law yet requires that they shall furnish a sufficient car to secure the saftey of their passengers, by the exercise of the utmost care and skill in its preparation. They may construct it themselves, or avail themselves of the services of others; but in either case, they engage that all that well-directed skill can do has been done for the accomplishment of this object. Thus they are liable for injuries sustained by a passenger, in consequence of the breaking of an axle by reason of a latent defect which could not be discovered by the most vigilant external examination, if it could have been discovered in the process of manufacturing, by the application of any test known to men skilled in such business. (*Ct. of Appeals*, 1855, *Hegeman* v. *Western R. R. Corporation*, 13 N. Y. [3 Kern.], 9.) *So, also*, it goes to show their negligence that the peril might have been avoided, if the defendants had used on their cars the safety beam, shown to have been, at the time, already in use on other roads for a considerable period. It is a question for the jury to determine whether they were not guilty of negligence in not ascertaining the utility of such an improvement, and adopting it to protect passengers from injuries by accidents to which cars are liable. (*Id.*)

The requirements of the statute are not the measure of the company's care and skill in the transportation of passengers. The fact that the statute requires

certain precautions to be taken, does not relieve the company of obligation to take precautions not enumerated, but adapted to secure the safety of its trains. (*Hegeman* v. *Western R. R. Corp.*, 13 N. Y., 9; *Bowen* v. *N. Y. C. R. R. Co.*, 18 id., 408; *Smith* v. *N. Y. and Harlem R. R. Co.*, 19 id., 127; *Alden* v. *N. Y. C. R. R. Co.*, 26 id., 102; *Brown* v. *Same*, 34 id., 404; *Maverick* v. *Eighth Ave. R. R. Co.*, 36 id., 378.)

When injury is caused by the defect of a railway car, the company using the car at the time, cannot escape liability by showing that the car was owned by and borrowed from another company. (*Ct. of Appeals*, 1865, *Jetter* v. *N. Y. and Harlem R. R. Co.*, 2 Keyes, 154.) Charge to jury in an action for injury to passenger, resulting from the breaking of a wheel. (*Oliver* v. *N. Y. and Erie R. R. Co.*, 1 Edm., 389.) Charge to jury in an action for injury to passenger, by breaking an axle and running off an embankment. (*Hanley* v. *Harlem R. R. Co.*, 1 Edm., 359.) In an action against the company for injury caused from defective vehicle, after the existence of the defect is established, evidence, that prior to the accident, the attention of the servants of the company was directed to the defect, is admissible. (*Hardencamp* v. *Second Ave. R. R. Co.*, 1 Sweeny, 490.) But the company cannot introduce in evidence a report of the accident made to it by its servants. (*Id.*) Company's duty to use patent brake. (*Costello* v. *Syracuse, Bing., etc., R. R. Co.*, 65 Barb., 92.)

§ **224.** *Car platforms, construction of.*—It shall be the duty of every railroad company or corporation in this State, and every railroad company or corporation running, or that may hereafter run its passenger cars in this State, to cause the platforms upon the ends of all passenger cars to be so constructed that when said cars shall be coupled together, or made up into trains and in motion, danger of injury to persons or loss of life between the ends of said cars, by falling between the platforms of said cars while passing from one car to another, shall, so far as practicable, be avoided. (*Laws* 1867, *chap.* 483, § 1.)

Each and every violation of this act by any railroad company or corporation shall, on conviction, be punished by a fine of not less than fifty dollars nor more than five hundred dollars, to be used for and collected in the name of the people of the State of New York by the Attorney-General, and the moneys, when collected, to be paid into the general fund of the State. (*Laws* 1867, *chap.* 483, § 2.)

This act shall not operate or be construed to exempt railroad companies or corporations from liability for damages to persons who may be injured or sustain loss or damage by or through any neglect to comply with the provisions of this act. (*Laws* 1867, *chap.* 483, § 3.)

Time shall be allowed to all railroad companies or corporations to comply with the provisions of this act, as follows, to wit: one-quarter of all the said cars of each of said companies or corporations shall be made to conform to the requirements of this act within three months from and after

the passage of this act, one other quarter thereof within six months, one other quarter thereof within nine months, and the remaining one-quarter thereof within one year from and after the passage of this act. (*Laws* 1867, *chap.* 483, § 4.)

§ **225.** *Non-construction, etc., of platforms to passenger cars a misdemeanor.*—A railway company and any officer or director having charge thereof, and any person managing a railway in this State or which runs its cars into and through this State, who fails to have the platforms or ends of the passenger cars constructed in such a manner as will prevent passengers falling between the cars while in motion, is guilty of a misdemeanor. (*Penal Code*, § 423.)

§ **226.** *Sleeping cars on railroads.*—Any patentee of a sleeping car, or his legal representative, may place his car upon any railroad of this State, with the assent of the company owning such road. Such patentee, or his legal representative, may charge for the use of said car, in all cases, to each passenger occupying the same, forty cents, which sum shall entitle such passenger to the use of a berth for one hundred miles; and the said patentee, or his legal representative, may charge at and after the rate of three mills for every additional mile, but in no case shall the charge exceed eighty cents. (*Laws* 1858, *chap.* 125, § 1.)

The railroad companies permitting the use of such cars shall, nevertheless, keep sufficient first class cars of other kinds for the convenient use and occupation of all passengers not wishing to use a sleeping car. And the tickets issued for the use of the sleeping cars shall have plainly written or printed thereon, "sleeping car," and all persons using a sleeping car shall be furnished with such tickets. (*Laws* 1858, *chap.* 125, § 2.)

No railroad corporation shall be interested in the additional sum paid for the use of berths in sleeping cars, pursuant to the provisions of this act. (*Laws*, 1858, *chap.* 125, § 3.)

Nothing in this act contained shall be so construed as to exonerate any railroad company from the payment of damages for injuries, in the same way and to the same extent they would be required to do by law if such cars were owned and provided by the company. (*Laws* 1858, *chap.* 125, § 4.)

§ **227.** *Drinking water for use of passengers to be supplied on cars.*—Every railroad company whose line of road shall exceed forty continuous miles in length, shall, for the better comfort of passengers, provide in such passenger car

a suitable receptacle for water, with a cup or drinking utensil attached, upon or near such receptacle, and shall keep the said receptacle, while said car is in use, constantly supplied with cool water; and any company failing to obey the provisions of this section, shall, for each offense of omission as aforesaid, forfeit as a penalty the sum of twenty-five dollars; one-half of said penalty to be paid to the informer, and the remaining one-half to the overseer of the poor of the county in which judgment shall have been recovered. (*Laws* 1864, *chap.* 582, § 3.)

228. *Signals at railroad crossings; bells to be rung or whistles sounded.*—A bell shall be placed on each locomotive engine run on any railroad, and rung at the distance of at least eighty rods from the place where the railroad shall cross any traveled public road or street on the same level with the railroad, and be kept ringing until it shall have crossed such road or street; or a steam whistle shall be attached to each locomotive engine, and be sounded at least eighty rods from the place where the railroad shall cross any such traveled public road or street upon the same level with the railroad, except in cities, and be sounded at intervals until it shall have crossed such road or street; and every neglect to comply with the foregoing provisions shall subject the corporation owning the railroad to a fine not exceeding twenty dollars, in the discretion of the court having cognizance of the offense; and every engineer having charge of the engine, for every neglect to comply with the requirements aforesaid, shall be fined not exceeding fifty dollars, or imprisoned in the county jail not exceeding sixty days, in the discretion of the court before which any indictment may be tried; and the said corporation shall, moreover, be liable for all damages which shall be sustained by any person by reason of such neglect.

All the penalties hereinbefore mentioned may be sued for in the name of the people of the State of New York by the district attorney of the county wherein the same shall accrue, within ten days thereafter; and in case such district attorney shall omit or neglect to sue for such fine or fines within the time aforesaid, then it may and shall be lawful for any person aggrieved to sue therefor in the name of the overseers of the poor of the town wherein any such fine or fines shall have accrued, which, when recovered, shall be paid to the said overseers of the poor, for the benefit of the poor of said town. And in case said person shall fail to make out and maintain any such action, it shall be the duty of the court before whom any such action shall be had to

enter a judgment against the complainant for the costs of said action. (*Laws* 1854, *chap.* 282, § 7.)

The foregoing is a substitute for section 39 of the general railroad act (*Laws* 1850, *chap.* 140, § 39). Section 18 of the Laws of 1854, chapter 282, expressly repealed section 39 of the general act, but by its terms provided that the repeal should not affect any action or proceeding theretofore commenced under said section. The following is a copy of the original section 39: "A bell shall be placed on each locomotive engine, and be rung at the distance of at least eighty rods from the place where the railroad shall cross any traveled public road or street, and be kept ringing until it shall have crossed such road or street; or a steam whistle shall be attached to each locomotive engine, and be sounded at least eighty rods from the place where the railroad shall cross any such road or street, except in cities, and be sounded at intervals until it shall have crossed such road or street, under a penalty of twenty dollars for every neglect of the provisions of this section, to be paid by the corporation owning the railroad, to be sued for by the district attorney of the county, within ten days after such penalty was incurred; one-half thereof to go to the informer, and the other half to the county; and said corporation shall also be liable for all damages which shall be sustained by any person by reason of such neglect, one-half of which penalty shall be chargeable to and collected by the company of the engineer having charge of the train, where the omission of duty consists in not sounding the whistle or ringing the bell."

In the original section the provision was not limited to crossings on the same level with the railroad track, and was *held* to embrace a crossing above or below the track. (*People* v. *N. Y. C. R. R. Co.*, 13 N. Y., 78; affirming S. C., 25 Barb., 199.)

Of signals by those in charge of the train, and the liability of the company to passersby.

The ringing of the bell or sounding of the whistle is required only as the engine approaches the crossing, not after it has passed. A complaint in an action founded on such negligence must allege that the omission occurred while the train was approaching. (*Supreme Ct.*, 1853, *Wilson* v. *Rochester and Syracuse R. R. Co.*, 16 Barb., 167.) Omitting to give a signal when the train approaches the crossing of a highway, amounts to negligence. (*Ct. of Appeals*, 1867, *Renwick* v. *N. Y. C. R. R. Co.*, 36 N. Y., 132.) Admissions of an engineer, in reference to an act of his while in the employ of the company, made after the transaction, and after he had ceased to be its servant or agent, is not binding upon the company. (*Card* v. *N. Y. and Harlem R. R. Co.*, 50 Barb., 39.) Before the act of 1854 (which restricted this requirement to the case of a crossing on the same level), the statute required that "when a railroad shall cross any traveled public road or street," a signal should be made at every passage of a train, and a penalty was affixed to the omission. *Held*, that a case where a railroad passed over the street upon a bridge at a height of fifteen feet above the street, was within both the letter and the intent of the statute, and the penalties were incurred by a neglect to make the signal. (*Ct. of Appeals*, 1855, *People* v. *N. Y. C. R. R. Co.*, 13 N. Y. [3 Kern.], 78; affirming S. C., 25 Barb., 19.) A new penalty is incurred every time that any engine of the company passes without making the signal. (*Id.*) To authorize a recovery, it must appear that such neglect was the sole cause of the injury complained of (*Dascomb* v. *Buffalo, etc., R. R. Co.*, 27 Barb., 221.) Either the running of an

engine by a fireman alone, without any engineer, or the omission to give the signals required by statute at a crossing, is negligence on the part of the company, which will permit a jury to hold them liable for an injury to a passerby. (*Ct. of Appeals*, 1868, *O'Mara* v. *Hudson R. R. R. Co.*, 38 N. Y., 445.)

Although a highway crossing a railroad track has been regularly laid out, yet, until it has been actually opened or notice "of such laying out" has been served upon an officer of the railroad corporation named in and as required by the act of 1853 (*chap.* 62, *Laws of* 1853), the duty imposed by the general railroad act, as amended in 1854 (§ 7, *chap.* 282, *Laws of* 1854) of ringing a bell or sounding a whistle upon a train approaching the crossing does not attach, the highway is not a "traveled public road or street" within the meaning of said last-mentioned act. (*Cordell* v. *N. Y. C. and H. R. R. R. Co.*, 64 N. Y., 535.) (For *chap.* 62, *Laws* 1853, see § 188.) Ordinary care and prudence may require the giving of signals from an approaching train to warn persons lawfully upon the track, and the omission to do so when so required will subject the corporation to liability for injury caused by the omission, but unless it is at a highway crossing in respect to which the statutory duty exists, the omission to give the designated signals is not negligence as matter of law, but the question of negligence is one of fact for a jury. (*Id.*) The statute which requires that a bell shall be placed on each engine and rung at a certain distance from and while passing crossings is complied with by the ringing of a bell upon the engine, and the company are not required to ring a bell elsewhere to give notice of the approach of the train, on the ground that a different place was necessary to give effectual notice in the case, for instance, of a train backing over a crossing. (*Griffin* v. *N. Y. C. R. R. Co.*, 40 N. Y., 34.)

Evidence of drunkenness on the part of one crossing the track, raises a strong presumption of contributory negligence on his part. (*Brand* v. *Schenectady and Troy R. R. Co.*, 8 Barb., 368.) Where in an action against a railroad company to recover damages for a personal injury, there was no pretense that there was any negligence on the part of the defendants, which could sustain the action, except in the omission of the engineer, or person in charge of the defendants' locomotive, to ring the bell or sound the whistle, at a street crossing; and the testimony of the engineer upon that point, was positive and unqualified that the whistle was blown and the bell rung; and another witness testified that he heard the bell ringing, and saw the engine pass; and this testimony was clear, positive and circumstantial, and uncontradicted except by the testimony of the plaintiff and another person near by at the time, who swore that they heard no bell or whistle; *held*, that a verdict in favor of the plaintiff was not warranted by the evidence; and a new trial was granted. (*Supreme Ct.*, 1867, *Seidert* v. *Erie R. Co.*, 49 Barb., 583.) The signals must be made "at the distance of at least eighty rods" from the crossing, and the jury have no right to change the limit as thus fixed by the statute; nor is it error for a judge to refuse to charge "that it mattered not whether the bell was rung the distance of eighty rods, if it was rung far enough from the crossing to warn passers-by." (*Havens* v. *Same*, 53 id., 328.)

To recover for being injured by a railroad train while plaintiff was crossing the track, he must prove that the company's agents were guilty of negligence, and that himself was without negligence and without fault. (1 Cow., 78; 6 id., 184, 191; 6 Hill, 592; 5 id., 282; 19 Wend., 399; *Supreme Ct.*, 1849, *Spencer* v. *Utica and Schenectady R. R. Co.*, 5 Barb., 337.) Compare, however,

Johnson v. *Hudson R. R. R. Co.* (20 N. Y. [6 Smith], 65); affirming S. C. (6 Duer, 633), were the contrary was asserted as to plaintiff's freedom from negligence. A person attempting to cross a railroad track must make use of his ordinary faculties, to ascertain if there is danger in the attempt. (*Gonzales* v. *N. Y. and Harlem R. R. Co.*, 38 N. Y., 440; *Beisiegel* v. *N. Y. C. R. R. Co.*, 34 N. Y., 622; see *Hogan* v. *Eighth Avenue R. R. Co.*, 15 N. Y., 380; *Gordon* v. *Grand St., etc., R. R. Co.*, 40 Barb., 546; *Harpell* v. *Curtis*, 1 E. D. Smith, 78.)

Where the injured party had what appeared to be satisfactory evidence that it was safe for him to venture to cross, he is not absolutely bound to look up or down the track. (*Ernst* v. *Hudson R. R. R. Co., supra; McGrath* v. *Same*, 32 Barb., 144; *Brown* v. *N. Y. C. R. R. Co.*, 32 N. Y., 597; *Stillwell* v. *Same*, 34 id., 29.) Although, as a general rule, "ordinary prudence" is all that can be exacted from a railroad company in respect to passers-by, yet the rule is not to be understood as meaning that only the same degree of care is to be required in all cases. The only safe rule is that the company is bound to use a degree of care and vigilance to prevent accidents and injury to others which is proportioned to the dangerous character of its business and of the mode and means of conducting it. The true rule may be thus stated: The degree of vigilance which the law exacts in its requirements of ordinary care, varies with the probable consequences of negligence, and also with the command of means to avoid injuring others, possessed by the person on whom the obligation is imposed. (12 N. Y., 425; *N. Y. Superior Ct.*, 1857, *Johnson* v. *Hudson R. R. R. Co.*, 6 Duer, 633; affirmed, 20 N. Y. [6 Smith], 65; disapproving *Brand* v. *Schenectady and Troy R. R. Co.*, 8 Barb., 368.)

Where a person sees an engine upon a railroad, and knows in time to avoid an injury that it is approaching a crossing, the railroad company is not chargeable with negligence in not ringing the bell upon the engine, or because of the absence of a flagman usually standing at the crossing, or the absence of a light upon the engine in the night-time, as the sole object of the ringing of the bell, or of keeping a flagman, or of having a light, so far as travelers upon a highway are concerned, is to notify them of the approach of trains. (*Pakalensky* v. *N. Y. C. and H. R. R. R. Co.*, 82 N. Y., 424.) Case of embankments, deep cuttings and fence obstructing view, constituting negligence, question of fact for jury. (*Kellogg* v. *N. Y. C. R. R. Co.*, 79 N. Y., 72.) The provisions of the railroad act of 1854 (§ 7, *chap.* 282, *Laws of* 1854), requiring certain signals to be given upon railroad trains approaching highway crossings, was intended not only to protect persons lawfully using a highway from danger of collisions at crossings, but also from danger arising from the fright of horses by passing trains. (*Voak* v. *N. Y. C. R. R. Co.*, 75 N. Y., 320.) It is the duty of railroad corporations to warn persons who may be traveling on a highway which crosses its road by some proper signals of the approach of trains, and to give such warning in time, so that the traveler may avoid the danger. (*Dyer* v. *Erie R. R. Co.*, 71 N. Y., 228.) It is not enough in all cases that the statutory signals have been given to absolve the corporation from a charge of negligence. Other precautions may be required under some circumstances. (*Id.*) It is not, however, for a jury to determine that signals should have been given in a particular case on a general submission of that question to them, without qualification or limitation, is error. (*Id.*) The fact that a railroad company has complied with the requirements of the statute in the running and management of its trains does not necessarily and in all cases relieve it from liability for negli-

gence. The care necessary to be observed is not in all cases confined to the statutory requirements, but depends upon circumstances. (*Cordell* v. *N. Y. C. R. R. Co.*, 71 N. Y., 119.)

The object of requiring the engineer to sound an alarm *before* reaching the crossing is to put the way traveler on his guard; and when the engineer neglects the necessary signals, he deprives the traveler of one of the means upon which he has a right to rely for protection against the danger of a collision. (*Beisiegel* v. *N. Y. C. R. R. Co.*, 34 N. Y., 622.) What facts amount to negligence, or will sustain the defense of contributive negligence, in an action against a railroad company for injuries to a person crossing their track. (*Havens* v. *Erie R'way Co.*, 53 Barb., 328; *Mentz* v. *Second Ave. R. R. Co.*, 2 Rob., 356; *Baxter* v. *Second Avenue R. R. Co.*, 3 id., 510; *Schwartz* v. *Hudson River R. Co.*, 4 id., 347.) Where the traveler on a public highway approaches the track, and can neither see nor hear any indication of an approaching train, he is at liberty to assume that none is sufficiently near to render the crossing dangerous. (*Id.*; *Ernst* v. *Hudson R. R. R. Co.*, 35 N. Y., 9; *Renwick* v. *N. Y. C. R. R. Co.*, 36 id., 132; *Newson* v. *N. Y. C. R. R. Co.*, 29 id., 383; *Johnson* v. *Hudson R. R. R. Co.*, 20 id., 65; see, also, *Hegan* v. *Eighth Ave. R. R. Co.*, 15 N. Y., 380.)

The neglect of an employee of a railroad company to comply, in an instance, with a rule prescribing the use of flags on a railway, which are directed merely as signals to the engineers and other employees of a railway company, and are not required, as regards travelers on a highway crossing such railway, by any rule of law or statute, is not negligence as between the company and such travelers. (*N. Y. Superior Ct.*, 1867, *Schwartz* v *Hudson R. R R Co.*, 4 Robt., 347.) Negligence in driving upon the track without making the slightest effort to ascertain whether a locomotive was approaching, is gross negligence, and the plaintiff cannot recover of the company; and under such circumstances it is immaterial whether the train was on time, or behind hand, when the collision occurred. (*Dascomb* v. *Buffalo, etc., R. R. Co.*, 27 Barb., 221.) *It seems* that the omission of a railroad company to keep a flagman at a crossing to give notice of the approach of a train, is not in itself negligence, unless the company by their own established and uniform practice have given ground for an expectation by passers by that such warnings are to be given. (*Ernst* v. *Hudson R. R. R. Co.*, 39 N. Y., 61; S. C., 36 How. Pr., 84; see, also, *Biesegel* v. *N. Y. C. R. R. Co.*, 40 N. Y., 9; *Griphen* v. *Same*, id., 34; *Swartz* v. *Same*, id., 4 Robt., 347.)

Where a flagman has been uniformly stationed by a railroad corporation at a street crossing, the negligence of the flagman in failing to give warning and properly to discharge his duty, or in absenting himself from his post, is imputable to the corporation. (*Dolin* v. *D. and H. C. Co.*, 71 N. Y., 385.) In an action against a railroad corporation to recover damages for injuries resulting from a collision at a street crossing, evidence that a flagman had always been kept at the crossing, and that he was absent at the time of the accident, is competent as bearing upon the question whether, under all the circumstances, defendant run and managed its train with the requisite care and prudence. (*McGrath* v. *N. Y. C. R. R. Co.*, 63 N. Y., 522.) It is not material that the defendant was not the owner of the road over which it was running its train. (*Id.*) In such a case a municipal ordinance properly passed and promulgated, requiring a flagman to be stationed at all street crossings, is competent as evi-

dence (*Id.*), but a violation of the ordinance is not conclusive proof of negligence. (*Id.*)

Where there was nothing to obstruct the plaintiff's view of the approaching train; *held*, that he could not recover (*Sheffield* v. *Rochester, etc., R. R. Co.*, 21 Barb., 339; *Spencer* v. *Utica, etc., R. R. Co.*, 5 id., 337; *Steves* v. *Oswego and Syracuse R. R. Co., supra*), since, under such circumstances, it will be presumed that he did not look. (*Wilcox* v. *Rome, etc., R. R. Co.*, 39 N. Y., 358.) The language of this provision of the statute requires the application of a different rule from that which holds in the case of neglect to comply with the requirements respecting cattle-guards. (*Supreme Ct.*, 1858, *Dascomb* v. *Buffalo and State Line R. R. Co*, 27 Barb., 221.) To recover for being injured by a railroad train while plaintiff was crossing the track, he must prove that the company's agents were guilty of negligence, and that himself was without negligence and without fault. (1 Cow., 78; 6 id., 184, 191; 6 Hill, 592; 5 id, 282; 19 Wend, 399; *Supreme Ct.*, 1849, *Spencer* v. *Utica and Schenectady R. R. Co.*, 5 Barb., 337; compare, however, *Johnson* v. *Hudson R. R. R. Co.*, 20 N. Y., [6 Smith], 65.) Gross negligence in a person injured at a railroad crossing will defeat his action for damages, notwithstanding the omission of those running the train to ring the bell or sound the whistle as required by statute. (*Steves* v. *Oswego and S. R. R. Co.*, 18 N. Y., 422.)

It is not erroneous to charge the jury that persons approaching a railroad in plain sight are bound to look and see if any train is coming, and that if they look up and down the track, as men of ordinary prudence would do in such case, and are not negligent, the plaintiff is entitled to recover, if the company is negligent. (*Havens* v. *Erie R. R. Co.*, 53 Barb., 328.) One who crosses a railroad, without looking to see whether a train is coming, and is injured by the train, is guilty of negligence, and cannot recover therefor. (*Ct. of Appeals*, 1858, *Brooks* v. *Buffalo and Niagara Falls R. R. Co.*, 27 Barb, 532, *note;* affirming S. C., 25 id., 600; followed, *Buffalo Superior Ct.*, 1858, *Brendell* v. *Buffalo and State Line R. R. Co.*, 27 id., 532, *note;* and see *Mackey* v. *N. Y. C. R. R. Co.*, id., 528.) It is for the jury to determine how far a man should look in such a case; but he must use his eyes and ears, as would, under all circumstances, men of ordinary prudence. (*Havens* v. *Erie R. R. Co.*, 53 Barb., 328.)

In cities, where intervening obstacles constantly obstruct the view of the track, it has been held that a foot traveler is not guilty of negligence in attempting to cross the track, provided he has first listened at a point near the crossing, and heard no signal or warning. (*Mackay* v. *N. Y. C. R R. Co*, 35 N. Y., 75; *Beisiegel* v. *N. Y. C. R. R. Co., supra.*) In such a case, the company are not liable for a collision, if they have run their engine with moderate speed and made the usual signals before reaching the crossing. The duty of railroad companies to exercise care and prudence in running their trains, not only as to the conduct of the train, but also in view of the fact that travelers on a highway which crosses the track, may probably be careless, stated. (*Card* v. *N. Y. and Harlem R. R. Co.*, 50 Barb., 39.) Nor can he recover where, after being notified of the approaching train, he whipped up his horses and drove upon the track. (*Mackay* v. *N. Y. C. R. R. Co., supra; Ernst* v. *Hudson R. R. Co.*, 35 N. Y., 9.)

What constitutes negligence in the management of railroad cars, to the injury of persons crossing the track, determined in a particular case. (*Lehey* v. *Hudson R. R. R. Co.*, 4 Robt., 204.) It is not erroneous to charge the jury

that, if the plaintiff could have seen the approaching train by looking in the direction of it, before he reached the crossing, and in time to have avoided a collision, his attempt to cross was wrong. (*Dascomb* v. *Buffalo, etc., R. R. Co., supra.*) Gross negligence in a person injured at a railroad crossing by a train will defeat his action for damages, notwithstanding the omission of those running the train to ring the bell or sound the steam whistle, as required by law. (*Ct. of Appeals*, 1858, *Steves* v. *Oswego and Syracuse R. R. Co.*, 18 N. Y. [4 Smith], 422.) To the same effect is *Dascomb* v. *State Line R. R. Co.* [*Supreme Ct.*, 1858] (27 Barb., 221). A passer-by cannot recover damages for a collision in any degree produced by his own want of care. (*Supreme Ct.*, 1850, *Brand* v. *Schenectady and Troy R. R. Co.*, 8 Barb., 368.)

It is the clear duty of a person, as he comes near to and upon a railroad crossing, to use all proper precautions to avoid injury, and the least he can do is to look in both directions. If he does not do so and this omission contributes to his injury he is guilty of such negligence as will bar his recovery, nothwithstanding the negligence of those in charge of the train in omitting to sound the whistle or ring the bell. (*Gorton* v. *Erie R. R. Co.*, 45 N. Y., 660.) This case cited as authority the cases of Ernst (85 N. Y., 9), Beisiegel (34 id , 625), and Havens (41 id , 296), for the above doctrine as having been declared and reaffirmed by the Court of Appeals. See also, to the same effect, *Davis* v. *N. Y. C. and H. R. R. Co.* (47 N Y., 400), where, however, it is said that this rule does not require the traveler to stop, or if he is with a team to get out and leave his vehicle and go to the track, or to stand up and go upon the track in that position, in order to obtain a better view. So also negligence of a passer by, injured or killed, contributes to produce the result, no right of action arises in his favor, and the omission of the company to sound the whistle or ring the bell near the crossing of a highway, does not relieve the person who is about to cross the highway from the obligation of employing his senses of hearing and seeing to ascertain whether a train is approaching (*Ct. of Appeals*, 1868, *Wilcox* v. *Rome, W. and O. R. R. Co.*, 39 N. Y., 358), and when he could have seen the cars as he approached in season to have avoided them had he first looked before attempting to cross, it will be presumed that he did not look; and by omitting so plain a duty he will be deemed guilty of negligence which precludes a recovery. (*Idem.*) Plaintiff's absorption in thought is no excuse for his omission to look and listen; but the existence of physical obstacles to seeing, such as a hill concealing the track, is an excuse, and the care required of a passer-by does not render it necessary that if unable to look along the track without leaving his team, he should leave it and go over the track for that purpose before driving thereon. (*Baxter* v. *T. and B. R. R. Co.*, 41 N. Y., 502.)

It is the duty of a traveler upon a highway approaching a railroad crossing, before he passes over, to exercise a proper degree of care and caution, and to make a vigilant use of his eyes and ears for the purpose of ascertaining whether a train is approaching; and if by a proper use of his faculties he could have discovered the approach of a train and so have escaped injury, he is chargeable with contributory negligence and cannot maintain an action against the railroad. (*Salter* v. *U. B. R. R. R. Co.*, 75 N. Y., 273.) If driving a team the same principle requires the traveler to so use his faculties on managing the team as to keep out of danger (*idem*). It makes no difference that the train is behind time (*idem*). When a person has been killed at a railroad crossing and there

are no witnesses of the accident to authorize a recovery against the railroad company, the circumstances must be such as to show that the deceased exercised proper care for his own safety. When the circumstances point just as much to negligence on his part as to its absence, or point in neither direction, a recovery cannot be had against the company (*Cordell* v. *N. Y. C. R. R. Co.*, 75 N. Y., 330). Case of obstructions to sight along railroad, other noise preventing hearing approach of train, and absence of flagmen; *held*, not duty of traveler to stop his team and go forward to see if train was coming (*Dolan* v. *D. and H. C. Co.*, 71 N. Y., 385). A railroad corporation has the right to use its own land for any legitimate purpose in the prosecution of its business. Such use is not unlawful if negligent, although it may obstruct the vision of those crossing its track (*Cordell* v. *N. Y. C. R. R. Co.*, 70 N. Y., 691). The existence of the obstructions may have a material bearing, in an action for negligence, upon the question of contributory negligence, and also upon the degree of care and vigilance required of the plaintiff, but it cannot be an independent ground of recovery (*idem*). Case of obstructions to view in railroad lands near farm crossing (*idem*). Case of obstacles interrupting the view of the track from highway; charge to the jury; question of contributory negligence left to the jury. (*Marcotte* v. *D and H. C. Co.*, 64 N. Y., 524.)

Passenger attempting to board train in depot run over by freight train. *Terry* v. *Jewett*, 78 N. Y., 338.) Ringing of bell or sounding of whistle in such case no answer to negligence. Statutory enactment does not provide for notice to passengers seeking to get on train at a station. (*Id.*) Rule requiring travelers crossing track to use eyes and ears does not apply to such case. (*Id.*) Case, when view of track was obstructed by a row of buildings. (*Casey* v. *N. Y. C R. R. Co.*, 78 N. Y., 518.) Duty of traveler crossing track to look each way along the track and listen for coming of train. (*Adolph* v. *C. P. N. and E. R. R. Co.*, 76 N. Y., 530.) The rule requiring persons, before crossing a railroad track, to look to see whether trains are approaching, is not applied inflexibly in all cases, without regard to age or other circumstances. (*McGovern* v. *N. Y. C. and H. R. R. R. Co*, 6. N. Y., 417.) In the above case, the person injured was a child eight years old. The Court of Appeals said the law is not so unreasonable as to expect or require the same maturity of judgment or the same degree of care or circumspection in a child of tender years as an adult. Citing *Reynolds' Case* (58 N. Y., 252), and *Drew* v. *Sixth Avenue R. R.* (26 id., 49).

In *Button* v. *Hudson R. R. R. Co.*, 18 N. Y., 248, it was held that while the burden was on the plaintiff to show his freedom from contributory negligence, it is not presumed, and he is not bound, in the first instance, to show it by direct evidence; but where there is conflicting evidence, the preponderance must be with him to enable him to recover. "Ordinarily, in similar actions, where there has been no fault on the part of the plaintiff, it will sufficiently appear in showing the fault of the defendant, and that it was a cause of the injury; and when it does so, no further evidence on the subject is necessary. The fact must appear in some way, but in what particular mode is unimportant. The evidence of it may be direct and positive, or only circumstantial."

In *Johnson* v. *Hudson R. R. R. Co.*, 20 N. Y., 65, it is said: "I am of the opinion that it is not a rule of law of universal application, that the plaintiff must prove affirmatively that his own conduct on the occasion of the injury was cautious and prudent. The *onus probandi* in this, as in most other cases

depends upon the position of the affair, as it stands upon the undisputed facts." "The absence of any fault on the part of the plaintiff may be inferred from circumstances." "Nor is it correct to say, as a general rule, that the defendant must himself prove, in order to establish his defense, that the plaintiff was guility of negligence. That, as well as the absence of fault, may be inferred from circumstances." "The true rule in my opinion is this: The jury must eventually be satisfied that the plaintiff did not, by any negligence of his own, contribute to the injury. The evidence to establish this may consist in that offered to show the nature or cause of the accident, or in any other competent proof. To carry the case to the jury, the evidence on the part of the plaintiff must be such as, if believed, would authorize them to find that the injury was occasioned solely by the negligence of the defendant. It is not absolutely essential that the plaintiff should give any affirmative proof touching his own conduct on the occasion of the accident. The character of the defendant's delinquency may be such as to prove, *prima facie*, the whole issue, or the case may be such as to make it necessary for the plaintiff to show, by independent evidence, that he did not bring the misfortune upon himself." (See, also, *Morrison* v. *N. Y. C. R. R. Co.*, 63 N. Y., 648.)

The Albany Law Journal (vol. 20, No. 16), in a leading article upon this subject, in which the decisions of the various States are cited at length, says: The question, upon whom rests the burden of proof as to contributory negligence, has been variously decided in the courts of this country. In Wisconsin, Vermont, Pennsylvania, New Jersey, Rhode Island and Alabama, it is substantially held that it is upon the defendant In Maine, Massachusetts, Connecticut, Illinois and Indiana, it is held that it is upon the plaintiff to show his freedom from contributory negligence. Such is the English doctrine. In New York, the doctrine is the same, except that the plaintiff need not prove his freedom from contributory negligence in the first instance, which amounts pretty much to saying that he is not bound to prove it at all. This is one of the few instances where a plaintiff is held to prove a negative, and it is based on the idea that the affirmative negligence of the defendant cannot be shown, even *prima facie*, until the contributory negligence of the defendant is eliminated from it. This reasoning seems a departure from the general theory of evidence. In a case, however, where the engine driver might, with the exercise of ordinary care, stop the engine and avoid the injury, the fact that the plaintiff was wrongfully on the defendant's railroad, nor the fact that his own negligence contributed to the injury, will not constitute a bar to a recovery. Neglect on the part of the person in charge of the engine to use ordinary care to avoid injury to a person on the track furnishes a just and well-established exception to the general rule that contributive negligence on the part of the plaintiff will bar a recovery. (*Kenyon* v. *N. Y. C. R. R. Co.*, 5 Hun, 480, citing many cases.)

For rules applicable to contributory negligence of minors, see *Mongan* v. *R. R.* (38 N. Y., 455); *Hongsburgh* v. *Second Avenue R. R.* (33 How. Pr., 193); *Burke* v. *Broadway R. R. Co.* 49 Barb., 529); Sherman & Redfield on Neg., § 48, and cases cited; *Hartsfield* v. *Roper* (21 Wend., 615); see, also. *Sherman's Case* (36 N. Y., 39); also *Prendegrast* v. *N. Y. C. R. R. Co.* (58 id., 652). *Mowrey* v. *Central City R'way* (66 Barb., 43); *Thurber* v. *Harlem Bridge, etc., R. R. Co.* (60 N. Y., 326); and *Costello* v. *Syracuse B. and C. R. R. Co.* (65 Barb., 92); also 56 N. Y., 652; 49 id., 255, as to the rules of negligence appli-

able to aged and crippled persons. (*Colt* v. *Sixth Avenue R. R. Co.*, 33 Sup'r Ct. [1 J. & S.], 180.)

As to injury to person who was prevented from hearing the train by noise of another train, see *Ingersoll* v. *N. Y. C. and H. R. R. R. Co.* (6 Sup. Ct. [T. & C.], 416). Contributory negligence in not looking at crossing. (*Break* v. *N. Y. and N. H. R. R. Co.*, 5 Daly, 454; *Hought* v. *N. Y. C. R. R. Co.*, 7 Lans., 11; *Reynolds* v. *The Same*, 58 N. Y., 248; *Weber* v. *The Same*, id., 451.) The last case holding the passer-by should make a vigilant use of his senses, look in every direction from which danger may be apprehended and listen attentively for any signals or evidences of approaching trains. The question whether ordinary care is used by plaintiff is one of fact for the jury. (*Weber* v. *N. Y. C.*, *supra*.) For the rules applicable in action for injuries when train backed without signals, see *Eaton* v. *Erie R'way Co.* (51 N. Y., 544). Liability when flagman beckons person to cross. (*Borst* v. *Lake Shore and Mich. Southern R'way Co.*, 4 Hun, 846.) In fast driving across a track. (*Morse* v. *Erie R'way Co.*, 25 Barb., 490.) Approaching track fast in a covered carriage without precaution. (*McCall* v. *N. Y. C. R. R. Co.*, 54 N. Y., 642.) Crossing several tracks without looking. (*Mitchell* v. *N. Y. C. and H. R. R. R. Co.*, 2 Hun, 535.) Effect of permitting usage to cross the track. (*Sothern* v. *N. Y. C.*, 4 Hun, 760.) In such case, company not permitted to allow cars to run over that portion of the track without any one to control them. Running over foot passenger at a station by backing train at night. (*Maginnis* v. *N. Y. C. and H. R. R. R. Co.*, 52 N. Y., 215.) The rate of speed at crossings is not restricted by law, nor is the company liable for damages accruing from the speed of trains, if the signals required by law are given. Negligence cannot be inferred from speed alone. (*Warner* v. *N. Y. C. R. R. Co.*, 44 N. Y., 465; reversing 45 Barb., 299; see *Massoth* v. *D. and H. C. Co.*, 64 N. Y., 524;) that excessive speed is negligence. Negligence in omitting statute signal (*Cordell* v. *N. Y. C. R. R. Co.*, 6 Hun, 461), holding that the omission to sound the bell or whistle, as required by the statute, is conclusive evidence of negligence on the part of the company, citing *Renwick* v. *N. Y. C. R. R. Co.*, 36 N. Y., 132), but holding, however, that the plaintiff must be free from fault.

§ **229.** *Failure to ring bell, etc., a misdemeanor.*—A person acting as engineer driving a locomotive on any railway in this State who fails to ring the bell or sound the whistle upon such locomotive, or cause the same to be rung or sounded, at least eighty rods from any place where such railway crosses a traveled road or street on the same level (except in cities), or to continue the ringing such bell or sounding such whistle at intervals until such locomotive and the train to which the locomotive is attached shall have completely crossed such road or street, is guilty of a misdemeanor. (*Penal Code*, § 421.)

(See *People* v. *N. Y. C. R. R. Co.*, 13 N. Y., 78.)

§ **230.** *Alteration of signals, lights, etc., a misdemeanor.*—A person who, with intent to bring a vessel, railway engine or railway train into danger, either

1. Unlawfully or wrongfully shows masks, extinguishes, alters or removes a light or other signal, or
2. Exhibits any false light or signal,

is punishable by imprisonment not more than ten years. (*Penal Code*, § 639.)

§ 231. *Canada thistles, daisies and noxious weeds to be cut down.*—It shall be the duty of the several railroad corporations and turnpike road corporations within this State to cause all Canada thistles, white and yellow daisies and other noxious weeds growing on any lands owned or occupied by such corporations, to be cut down twice in each and every year, once between the fifteenth day of June and the twenty-fifth day of June, and once between the fifteenth day of August and the twenty-fifth day of August. (*Laws of* 1847, *chap.* 100, § 3, *as amended by Laws of* 1881, *chap.* 296, § 1.)

If the said corporations, or any or either of them, shall neglect to cause the same to be cut down, at the times in the third section of this act mentioned, it shall be lawful for any person to cut the same, between the twenty-fifth day of June and the fifth day of July inclusive, and between the twenty-fifth day of August and the fifth day of September inclusive in each year, at the expense of the corporation on whose lands said Canada thistles, white and yellow daisies, or other noxious weeds shall be so cut, at the rate of three dollars per day for the time so occupied in cutting, to be recovered in any court of justice in this State. (*Laws* 1847, *chap.* 100, § 4, *as amended by Laws of* 1881, *chap.* 296, § 2.)

This section, previous to amendment, read as follows: It shall be the duty of the several railroad corporations and turnpike road corporations within this State, to cause all Canada thistles and other noxious weeds growing on any lands owned or occupied by such corporations, to be cut down twice in each and every year, once between the fifteenth day of June and the first day of July, and once between the fifteenth day of August and the first day of September. (*Laws* 1847, *chap.* 100, § 3.)

If the said corporations, or any or either of them, shall neglect to cause the same to be cut down, at the times in the third section of this act mentioned, it shall be lawful for any person to cut the same, between the first and fifteenth days of July, and between the first and fifteenth days of September in each year, at the expense of the corporation on whose lands said Canada thistles or other noxious weeds shall be so cut, at the rate of one dollar per day for the time so occupied in cutting, to be recovered in any court of justice in this State. (*Laws* 1847, *chap.* 100, § 4.)

Section 1 of chapter 49, Laws of 1878, which is made applicable to all corporations is as follows: "It shall be the duty of every person or corporation owning or occupying under a lease, for one or more years, any cultivated or

enclosed lands abutting upon any highway, to cause all noxious weeds, briars and brush growing upon said lands, within the bounds of said highway, to be cut and destroyed between the fifteenth day of June and the first day of July, and between the fifteenth day of August and the first day of September, in each and every year. But boards of supervisors may fix a different period or periods for the cutting or destruction in their several counties. This section shall not be construed to restrict any of the powers heretofore conferred upon boards of supervisors." Section 3 of the same provides the penalty, and section 4 makes it the duty of the commissioners of highways to prosecute persons and corporations offending.

§ **232.** *Certain regulations concerning the management of narrow gauge railroads.*—And it is further provided that such railroad company shall not use an engine exceeding eighteen tons weight, or run at a greater speed than fifteen miles an hour. (*Laws* 1871, *chap.* 560, § 6, *as amended by Laws* 1879, *chap.* 293, § 6.; *sub nomine*, § 6, *chap.* 560, *of the Laws of* 1850.)

§ **233.** *Railroad companies in Kings county not to stop cars, etc., on crossings, etc.*—From and after the passage of this act, it shall not be lawful for any railroad company organized and operated under any law of this State, and operating its road wholly or partly in the county of Kings, to stop its cars, horses, or locomotives upon any railroad crossing of any other company intersecting or crossing the same on the surface, for the purpose of receiving or delivering passengers or freight, or any other purpose whatever. (*Laws* 1879, *chap.* 415, § 1.)

Any person or corporation violating the provisions of this act shall, on conviction, be punished by a fine of not less than fifty dollars, or more than five hundred dollars, to be sued for and collected in the name of the People of the State of New York, by the attorney-general, and the moneys, when collected, to be paid into the general fund of the State. (*Laws* 1879, *chap.* 415, § 2.)

§ **234.** *Liability of company for wrongful act.*—Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default, is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, in respect thereof, then and in every such case, the persons who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. (*Laws* 1847, *chap.* 450, § 1.)

A lessor is not liable for such wrongful act of the lessee (*Norton* v. *Wiscal* 26 id., 618). It is immaterial whether the death was immediate and instanta neous or consequential (*Brown* v. *Buffalo and State Line R. R. Co.*, 22 N. Y 191). That corporations are liable for wrongful act causing death (*Baker* v *Bailey*, 16 Barb., 54). An action cannot be maintained under the acts of 184 and 1849, where the injuries complained of were inflicted without the Stat (*Whitford* v. *Panama R. Co.*, 23 N. Y., 465; affirming S. C., 3 Duer, 67; *Crow ley* v. *Same*, 30 Barb., 99; *Vandeventer* v. *N. Y. and N. H. R. R. Co.*, 27 id 244; *Mahler* v. *Norwich Trans. Co.*, 45 id., 226; *Beach* v. *Bay State Co.*, 30 id 433; reversing S. C., 27 id., 248; S. C., 16 How. Pr., 1). That an action wi not lie by the personal representatives of a brakeman, against a railroad com pany, to recover damages under the act of 1847 (*Sherman* v. *Rochester, etc., R R. Co.*, 15 id., 574).

§ 285. *Action prosecuted, for whose benefit.*—Every such action shall be brought by and in the name of the persona representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the husband or widow and next of kin of such deceased person, and shall be distributed to such husband or widow and next of kin, in the proportion now provided by law in relation to the distribution of personal property of persons dying intestate. And in every such action the jury may give such damages as they shall deem a fair and just compensation, not exceeding five thousand dollars with reference to the pecuniary injuries resulting from such death to the husband or widow and next of kin of such deceased person. And the amount of damages recovered in any such action shall draw interest from the time of the death of such deceased person, which interest shall be added to the verdict and inserted in the entry of judgment in such action, provided that every such action shall be commenced within two years after the death of such deceased person. But nothing herein contained shall affect any suit or proceeding heretofore commenced and now pending in any of the courts of this State. (*Laws* 1847, *chap.* 450, § 2; *amended Laws* 1849, *chap.* 256, § 1; *amended Laws* 187 *chap.* 78, § 1.)

The court may give the jury definite instructions as to what may or may not properly be taken into consideration in estimating the pecuniary loss; and explicit instructions are refused, when asked, or erroneous instructions given a new trial may be granted (*Green* v. *Hudson R. R. R. Co.*, 32 Barb., 25). B no proof of pecuniary damage is necessary to sustain the action (*Oldfield* v. *N. Y. and Harlem R. R. Co.*, 14 N. Y., 310; affirming S. C., 3 E. D. Smith, 1 *Keller* v. *N. Y. C. R. R. Co.*, 24 How. Pr., 172). And the jury, acting up their knowledge, and without proof, may find that the services of a boy fr eleven to twelve years of age, were valuable to the father, and to estimate th value (*O'Mara* v. *Hudson R. R. R. Co.*, 38 N. Y., 445); but damages, if an in the case of the wrongful death of a child four years of age, should be nomi

Lehman v. *City of Brooklyn*, 29 Barb., 234). A party's interest in the damages which may be recovered, is assignable (*Quin* v. *Moore*, 15 N. Y., 432). Such a party is not disqualified to testify, on the ground that he or she is the person for whose immediate benefit the suit is prosecuted (*Id.*)

It is not indispensable, in order to support the action, that the deceased should leave him surviving, in the words of the statute, "a widow and next of kin." (*Quin* v. *Moore*, 15 N. Y., 432; *McMahon* v. *The Mayor, etc., of N. Y.*, 33 id., 642; *Oldfield* v. *N. Y. and Harlem R. R. Co.*, 14 id., 310; affirming S. C., 4 E. D. Smith, 103; *Tilley* v. *Hudson R. R. R. Co.*, 24 N. Y., 471.) Previous to the passage of the amendatory act of 1870, given in the text, *held*, that since the husband was not next of kin to his wife, he could not recover damages under the statute, resulting from such death. (*Lucas* v. *N. Y. C. R. R. Co.*, 21 Barb., 245; *Dickens* v. *Same*, 23 N. Y., 158; reversing S. C., 28 Barb., 41; *Green* v. *Hudson R. R. R. Co.*, 32 id., 25; but see *Same* v. *Same*, 31 id., 260; 28 id., 9.)

The Court of Appeals, in the late case of *McGovern* v. *N. Y. C., etc., R. R. Co.*, 67 N. Y., 417), recognize *Ford* v. *Monroe* (20 Wend., 210), as a binding authority. They held that, in an action under the statute by a father, as administrator, for the negligent killing of his minor son, where the whole recovery is for his exclusive benefit, he may recover his whole damages, not only as next of kin, but as father, including the loss of the son's services during minority. The court say: "Assuming, as seems to have been held in *Ford* v. *Monroe* (20 Wend., 210), that a father can recover damages for the loss of service of his minor son against a person who negligently caused his death, to be computed and ascertained from the time of his death until the time when the son, if living, would have attained his majority, the question arises whether, in an action brought by the father, as administrator, under the statute, the entire damages may be recovered, including the loss of service when, as in this case, the father elects to proceed for and claim his whole damages in the statutory action, and the recovery is for his exclusive benefit. We are inclined to the opinion that, in such a case, damages for the loss of service may be included in the recovery as a part of the pecuniary loss to the next of kin of the deceased, resulting from his death, and that a recovery will bar another action for the same damages by the father as such. The point is certainly not free from difficulty, but this construction of the statute is, we think, permissible, and it is convenient, avoiding as it does the necessity which would otherwise exist of splitting up what is substantially a single claim, and bringing two actions for its recovery. We confine our opinion to the precise case presented, assuming, on the authority of *Ford* v. *Monroe*, that the father has a right of action, independent of the statute, for loss of service." Here is no mention of *Green* v. *Hudson R. R. R. Co.* (*supra*), which was decided upon the same statute, but which, to be sure, was a case of husband and wife; and there seems to have been no intention of overruling it, as indeed the case did not profess to overrule *Ford* v. *Monroe*. But what just distinction can be drawn between the two relations? Both actions proceed on the theory of loss of service. (See a leading article in the Albany Law Journal, vol. 24, No. 20, entitled "Action at common law for injury causing immediate death." Also see 2 Thompson on Negligence, 1272.)

A pecuniary loss, is a loss of money, or of something by which money, or something of money value may be acquired. (*Beach* v. *Ranney*, 2 Hill, 309;

Ransom v. *N. Y. and Erie R. R. Co.*, 15 N. Y., 415.) No deduction, however, should be allowed in assessing damages with reference to the death of a husband, on account of the wife having received the insurance effected upon deceased's life, for her benefit. (*Althof* v. *Wolf*, 2 Hilt., 344.) The jury are not limited to the assessment of damages for the actual present loss that may be proved, but may go farther and compensate for the relative injury with reference to the future. They may compensate for the "pecuniary injuries" present and prospective. (*Oldfield* v. *N. Y. and Harlem R. R. Co.*, 14 N. Y., 310; affirming S. C., 3 E. D. Smith, 103.) No pecuniary damage can be predicated of the loss of the society of a wife. It is a case for which money cannot compensate, and cannot be estimated in money. (*Green* v. *Hudson River R. R. Co.*, 32 Barb., 25.) So, damages cannot be awarded in respect to the mental sufferings of the party. (*Id.*) It is not improper to charge the jury, in an action to recover damages resulting from such death of the mother, that they may take into consideration, in assessing the damages, the loss of the nurture, instruction, and physical, moral and intellectual training, which the mother gave to the children. (*Tilley* v. *Hudson R. R. R. Co.*, 29 N. Y., 252; *Same* v. *Same*, 24 id., 471; S. C., 23 How. Pr., 363); though otherwise, where such offspring are adults. (*McIntyre* v. *N. Y. C. R. R. Co.*, 47 Barb., 515; S. C. affirmed, 37 N. Y., 287.)

§ **236.** *Prevention of accidents upon railroads.*—Any person or persons who shall get on or off a freight car or engine while in motion, or who shall ride on any wood or freight car, unless employed by or with permission from the proper officers of such railroad, or the person in charge of such car or engine, shall be deemed guilty of a misdemeanor, and shall be liable to a fine of twenty-five dollars or three months' imprisonment or both fine and imprisonment. (*Laws* 1878, *chap.* 261, § 1.)

§ **236**(*a*). *Prevention of accidents to children.*—No minor child within this State, not being a passenger, shall be allowed upon the platform or steps of any railroad car drawn by steam, or of any omnibus, street car, or other vehicle drawn by horses; and the parents or guardian of any child who shall permit such child to ride or play upon the steps or platform of any such railroad car, omnibus, street car, or other vehicle shall be punished, on conviction, by a fine not less than five nor more than ten dollars. (*Laws* 1880, *chap.* 585, § 1.)

It shall be the duty of all constables and policeman within this State, to arrest any child or children violating the provisions of this act; and any such child or children shall likewise, on conviction, be punished by a fine not exceeding five dollars for each offense. (*Id.*, § 2.)

§ **237.** *The prevention of trespassing and intrusion upon railroad cars and engines.*—No minor or other person, not

a passenger, shall climb, jump, step, stand upon, cling to, or in any way attach himself to, any locomotive, engine or car, upon any part of the track of any railroad in this State, unless in so doing such person shall be acting in compliance with law, or by permission under the lawful rules and regulations of the corporation or proper officer managing such railroad. (*Laws* 1880, *chap.* 370, § 1.)

No person in the employment of any said corporation or officer, or intrusted with the care or possession of any such engine, or any freight or baggage car upon any said track, shall invite, or solicit any such minor or other person to come, or be, or consent to his remaining upon any last-named car or upon any engine, unless said minor or last-named person shall have the right by law or permission as aforesaid to go or remain upon such car or engine. (*Laws* 1880, *chap.* 370, § 2.)

And any person who shall violate either section of this act shall be guilty of a misdemeanor, and be liable to a fine not less than five nor exceeding twenty-five dollars, which may be imposed by any court or magistrate having jurisdiction of any misdemeanor; and the person so offending shall be further liable to imprisonment until such fine and costs of prosecution shall be paid. (*Laws* 1880, *chap.* 370, § 3.)

All acts and parts of acts inconsistent with this act are hereby repealed. (*Laws* 1880, *chap.* 370, § 4.)

§ **238.** *Riding on freight trains a misdemeanor.*—A person who rides on any engine or any freight or wood car of any railway company, without authority or permission of the proper officers of the company or of the person in charge of said car or engine, is guilty of a misdemeanor. (*Penal Code*, § 426, *sub.* 1.)

§ **239.** *Getting on train while in motion a misdemeanor.* A person who gets on any car or train while in motion, for the purpose of obtaining transportation thereon as a passenger, is guilty of a misdemeanor. (*Penal Code*, § 426, *sub.* 2).

§ **240.** *Walking upon railroad tracks declared unlawful.*—It shall not be lawful for any person, other than those connected with or employed upon the railroad, to walk along the track or tracks of any railroad except where the same shall be laid along the public roads or streets. (*Laws* 1850, *chap.* 140, § 44.)

§ **241.** *Injury to railroad property.*—Every person who shall willfully, with malicious intent, remove, break, displace, throw down or destroy, any iron, wooden or other

rail, or any branches or branchways, or any parts of t track, or any bridge, viaduct, culvert, embankment, or oth fixture, or any part thereof, attached to or connected wi such tracks of any railroad in this State now in operatio or which shall hereafter be put in operation, or who sha willfully with like malicious intent, place any obstructio upon the rails or track of such railroad, shall, upon convi tion, be punished by imprisonment in the State prison n exceeding five years, or in a county jail not less than s months. (*Laws* 1838, *chap.* 160, § 1.)

See section 635 of Penal Code, section 244, *post*, and note to same.

The preceding section should not be so construed as to extend to cases wh death to a human being shall result from the commission of either of offenses mentioned in said section. (*Laws* 1838, *chap.* 160, § 2.)

Previous Legislation.

Section 3 of the act of 1838 cited in the text (to wit, chap. 160) repea chapter 187 of the Laws of 1834, of which the following is a copy: "Ev person who shall thereafter be convicted of placing upon any railroad wit this State any stone, pieces of wood or any other obstruction, with the desig obstruct or impede the passage of the cars upon the said railroad, and with intent to injure the said railroad, or the passengers or cars passing there shall be deemed guilty of a misdemeanor, and shall be punished by imprisonment in the county jail not exceeding one year, or by a fine not exceeding f hundred and fifty dollars, or both, in the discretion of the court before wh such conviction shall be had." (*Laws* 1834, *chap.* 187.)

§ **242.** *The same; offender liable to company for da ages.*—If any person or persons shall willfully do, or cau to be done, any act or acts whatever, whereby any buildin construction or work of any railroad corporation, or a engine, machine or structure, or any matter or thing appe taining to the same, shall be stopped, obstructed, impaire weakened, injured or destroyed; the person or persons offending shall be guilty of a misdemeanor, and shall forf and pay to the said corporation treble the amount of dam ages sustained by means of such offense. (*Laws* 1850, *cha* 140, § 42.)

(See section 635, Penal Code, § 244, *post*, and note to same.)

§ **243.** *Injuries and obstructions to railroads, punis ment of.*—Any person who shall willfully place any obstru tion upon any railroad, or loosen, tear up or remove a part of a railroad, or displace, tamper or in any way inte fere with any switches, frogs, rail, track, or other part any railroad so as to endanger the safety of any train, who shall willfully throw any stone or other missile at a train on any railroad, or at any street car or omnibus up or in which there shall be at the time any passenger or pas

ngers, shall, upon conviction thereof, be punished by imprisonment in a State prison not exceeding ten years, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment. (*Laws* 1877, *chap.* 261; *amended by Laws* 1881, *chap.* 436, § 1.)

(See section 635 of Penal Code, § 244, *post*, and note to the same.)

Chapter 261 of Laws of 1877, previous to amendment, was as follows: Any person who shall willfully place any obstruction upon any railroad, or loosen, tear up or remove any part of a railroad, or displace, tamper or in any way interfere with any switches, frogs, rail, track, or other part of any railroad so as to endanger the safety of any train, or who shall willfully throw any stone or other missile at any train on any railroad, shall, upon conviction thereof, be punished by imprisonment in a State prison not exceeding ten years, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment. (*Laws* 1877, *chap.* 261.)

§ **244.** *Injury to railroads, tracks, etc., how punished.*—A person who,

1. Displaces, removes, injures or destroys a rail, sleeper, switch, bridge, viaduct, culvert, embankment or structure, or any part thereof, attached or appertaining to or connected with a railway, whether operated by steam or by horses; or

2. Places any obstruction upon the track of said railway; or,

3. Willfully discharges a loaded firearm or projects or throws a stone or any other missile at a railway train, or at a locomotive, car or vehicle standing or moving upon a railway, is punishable as follows:

1. If thereby the safety of any person is endangered, by imprisonment for not more than ten years.

2. In every other case, by imprisonment for not more than three years, or by a fine of not more than two hundred and fifty dollars. (*Penal Code*, § 635.)

See *Loomis* v. *Edgerton* (19 Wend., 419).

The several statutes in regard to trespassers upon and injuries to railroad property, which are given in the text, were not repealed in 1881, the year in which the Penal Code was adopted. A repealing act was prepared by the commissioners who drafted the Code and submitted to and passed by the Legislature, but failed to receive the Governor's signature. It is probable that another repealing act may be introduced again in 1882, when, in case of its passage, it would be well enough to examine in all cases where provisions have been made in the Penal Code for crimes in any way connected with railroads, and ascertain whether the previous legislation upon the same or similar acts is repealed by any repealing act to be hereafter passed.

§ **245.** *Punishment of crimes committed on railroads.*—When any crime or offense shall have been committed within this State, on, in, or on board of any railroad train or

railroad car making a passage or trip on or over any railroad in this State, or in respect to any portion of the lading or freight of any such railroad train or railroad car, an indictment for the same may be found in any county through which, or any part of which, such railroad train or railroad car shall pass, or shall have passed, in the course of the same passage or trip, or in any county where such passage or trip shall terminate or would terminate if completed; and such indictment may be tried and a conviction thereon had, and all other proceedings to bring the offender to punishment may be had, in any such county, in the same manner and with the like effect as in the county where the offense or crime was committed. (*Laws* 1877, *chap.* 167, § 1.)

See next section of Code of Criminal Procedure, § 137.

The above section was not repealed by the Legislature of 1880 which enacted the Penal Code. The repealing act of that year was not signed by the governor.

§ **246.** *Crime committed on railway train, etc., how prosecuted.*—When a crime is committed in this State, in or on board of any railway engine, train or car making a passage or trip on or over any railway in this State or in respect to any portion of the lading or freightage of any such railway train or engine car, the jurisdiction is in any county through which it or any part of which the railway train or car passes or has passed in the course of the same passage or trip, or in any county where such passage or trip terminates or would terminate if completed. (*Code Crim. Pro.*, § 137.)

See *People* v. *Dowling*, 23 Alb. Law Journal, p. 353.

§ **247.** *Breaking and entry of railroad car is burglary.*—The term "building," as used in this chapter (*chapter two, title fifteen, Penal Code, burglary*), includes a railway car, vessel, booth, tent, shop or other erection or enclosure. (*Penal Code*, § 504.)

So, also, a railway car is the subject of arson. (*Penal Code*, §§ 487, 488.)

§ **248.** *Penalties, how sued for.*—All penalties imposed by this act may be sued for in the name of the people of the State of New York; and if such penalty be for a sum not exceeding one hundred dollars, then such suit may be brought before a justice of the peace, and may be commenced by serving a summons on any director of such company. (*Laws* 1850, *chap.* 140, § 48.) 140 See 43

The reference is to the general railroad act, Laws 1850, chap. 140.)

The Legislature may authorize the attorney-general to discharge a judgment recovered against the corporation for neglecting to report agreeable to law

(*Laws* 1853, *chap.* 279.) It shall be the duty of the several district attorneys to prosecute for all penalties and forfeitures exceeding fifty dollars which shall be incurred in their respective counties, and for which no other officer is by law specially directed to prosecute (1 R. S., 388, § 91, and by 1 R. S., 179, § 1), it is made the duty of the attorney-general to prosecute and defend all actions in the event of which the people of this State are interested.

CHAPTER 16.

OF THE TRANSPORTATION OF PERSONS AND PROPERTY, AND OF THE COMPENSATION AND RATE OF FARE THEREFOR.

§ 249. *Powers of the corporation to convey persons and property.*—Every corporation formed under this act (*general railroad act*), shall have power to take and convey persons and property on their railroad by the power or force of steam, or of animals, or by any mechanical power, and to receive compensation therefor; to regulate the time and manner in which passengers and property shall be transported, and the compensation to be paid therefor, but such compensation for any passenger and his ordinary baggage, shall not exceed three cents per mile. The re-enactment of this provision shall not be construed as increasing the rate of passenger fare which any railroad of this State is now authorized to charge. (*Laws* 1850, *chap.* 140, § 28, *subds.* 7 *and* 9; *as re-enacted by the Laws of* 1880, *chap.* 133, § 2, *subds.* 7 *and* 9.)

Who is a passenger.

In an action by a passenger to recover for injuries caused by negligence of the company, the question of his right as a passenger to be upon the train—*Held*, to depend, not on whether his check was good for the passage, but whether the conductor had recognized his right. (*Ct. of Appeals*, 1868, *Edgerton* v. *N. Y. and Harlem R. R. Co.*, 39 N. Y., 227; affirming S. C., 35 Barb., 38.) Neither an entry into the cars, upon a railroad, nor the payment of the fare, is essential to create the relation of carrier and passenger. Being within the waiting-room, waiting to take the cars, is as effectual to make one a passenger as if he were within the body of a car. (*Brown* v. *N. Y. C. R. R. Co.*, 32 N. Y., 597; *Stinson* v. *Same*, id , 333; *Gordon* v. *Grand St., etc., R. R. Co.*, 40 Barb., 546.)

When a railroad company admits passengers into a caboose car attached to a freight train to be transported as passengers, and takes the customary fare for the same, it incurs the same liability for the safety of the passengers as though they were in regular passenger cars at the time of the injury. (*Edgerton* v. *N. Y. and Harlem R. R. Co.*, 39 N. Y., 227.) A person taking his seat on a railroad car, or other vehicle employed by the company to gather passengers for the purpose of being carried to the train, may be deemed a passenger from the start under a contract for transportation. (*Baffett* v. *T. and B. R. R. Co.*, 40 N. Y., 168.)

Duty of the company in the transportation of passengers.

Passenger carriers bind themselves to carry safely those whom they take into their vehicles, as far as human care and foresight will go; that is, to the utmost care and diligence of very cautious persons (18 N. Y., 408; 34 id., 9; *Ct. of Appeals*, 1867, *Maverick* v. *Eighth Av. R. R. Co.*, 36 N. Y., 378). In respect to carrying passengers, a railroad company is bound to exercise all the care and skill which human prudence and foresight can suggest to secure the safety of their trains; and the fact that a statute expressly requires certain precautions to be taken, does not relieve the company of obligation to take precautions not enumerated, but adapted to promote safety (*Ct. of Appeals*, 1866, *Brown* v. *N. Y. C. R. R. Co.*, 34 N. Y., 404). Of the duties of passenger carriers, see *Edgerton* v. *N. Y. and Harlem R. R. Co.* (35 Barb., 193). The carrier of passengers is bound to exercise extraordinary care and diligence in providing and using

the means of transportation, and is liable for an injury to a passenger, unless it arises from force or pure accident (2 Campb., 79; 2 Esp., 533; 9 Metc., 1; *N. Y. Superior Ct.*, 1852, *Caldwell* v. *Murphy*, 1 Duer, 233). The carrier of passengers owes a duty to them as carrier, though there may be no privity of contract between him and them. Thus the owners of a line of canal boats engaged in the business of common carriers of passengers and goods, who charter a boat to another transportation company for a single trip, retaining the charge of it and navigating it with their own master and crew, are liable to a passenger for the loss of his goods upon the passage (*Ct. of Appeals*, 1853, *Campbell* v. *Perkins*, 8 N. Y. [4 Seld.], 430).

What proof is sufficient to show negligence, and what will sustain the defense of contributive negligence, in an action by a passenger against a railroad company, to recover for personal injuries sustained upon the journey (*Mooney* v. *Hudson R. R. R. Co.*, 5 Robt., 548 (*Ginnon* v. *N. Y. and Harlem R. R. Co.*, 3 id., 25). The same questions discussed, with reference to a street railroad company (*Mettlestadt* v. *Ninth Av. R. R. Co.*, 4 Robt., 377; S. C., 32 How. Pr., 428). In an action for injuries sustained by a passenger, by a railroad accident, the fact that the train left the track is presumptive evidence of negligence on the part of the company. And after such a case is made out, the company must show itself free from negligence or it will be liable (*Ct. of Appeals*, 1868, *Edgerton* v. *N. Y. and Harlem R. R. Co.*, 39 N. Y., 227; affirming S. C., 35 Barb., 38). The carrier is not liable for injuries to a passenger by the negligence of others not connected with him. A passenger in a vehicle in a city street who voluntarily takes a position which is not intended and ordinarily used for his conveyance—*e. g.*, in riding upon the fenders at the side of a sleigh which are not shown to have been provided for the purpose of carrying passengers—himself contributes to the injury which he sustains by a collision produced by the driver of another vehicle (*Supreme Ct.*, 1862, *Spooner* v. *Brooklyn City R. R. Co.*, 36 Barb., 217; affirming S. C., 31 *id.*, 419). Compare *Willis* v. *Long Island R. R. Co* (32 id., 398), as to passenger riding on car platforms.

The act of an engineer in running the train against obstacles, under the opinion that he could knock them out of the way, by which a passenger standing on the platform was injured—*Held*, negligence on the part of the company (*Ct. of Appeals*, 1866, *Willis* v. *Long Island R. R. Co.*, 34 N. Y., 670). The carrier of passengers held liable for injuries sustained by them by the bursting of a spirit lamp in his vehicle (*Wilkie* v. *Bolster*, 3 E. D. Smith, 327). Shortly after the safe passage of several trains over the track of the defendant's road, a train was thrown from the track from the culpable act of some unknown person, who drew the spikes which fastened the rails. *Held*, that, under the circumstances, the company were not liable to a passenger injured in consequence thereof, for no negligence on the part of the company was made out (*Ct. of Appeals*, 1865, *Deyo* v. *N. Y. C. R. R. Co.*, 34 N. Y., 9). Recovery against a railroad company for injuries sustained by a passenger, in consequence of alighting on the wrong side of the track; notwithstanding charges of contributive negligence against the passenger (*Dickens* v. *N. Y. C. R. R. Co.*, 1 Keyes, 23).

A mail agent or other person whom a railroad, in pursuance of a contract made with and for the benefit of a third party, undertake to carry in their trains, may maintain an action against the railroad company for an injury sustained by him while so carried; but the foundation of his action is not the contract between the defendants and the third party, nor any contract, express

or implied, but the obligation which the law imposes upon every one who attempts to do anything, even gratuitously, for another, to exercise some degree of care and skill. The basis of the liability of defendants in such a case is culpable negligence. The contract of the defendants with the third party may, however, be resorted to for the purpose of showing that the plaintiff became a passenger with the assent of the defendants, and not as a mere intruder. (*Ct. of Appeals*, 1857, *Nolton* v. *Western R. R. Corp.*, 15 N. Y. [1 Smith], 444; affirming S C., 10 How. Pr., 97.)

It seems, that in all cases where a railroad company voluntarily undertakes to convey a passenger upon their road, whether with or without compensation, in the absence at least of an express agreement exempting it from responsibility, if such passenger is injured by the culpable negligence or want of skill of the agents of the company, the latter is liable. (*Id.*)

The provisions of section 36 of the general law (*Laws of* 1850, *chap.* 140) do not prevent railroad companies from making special contracts with passengers, limiting the liability of such companies. (*Ct. of Appeals*, 1862, *Bissel* v. *N. Y. C. R. R. Co.*, 25 N. Y., 442; reversing S. C., 29 Barb., 602; S P., *Buffalo Superior Ct.*, 1866, *Heineman* v. *Grand Trunk R. R Co.*, 31 How. Pr., 430.)

It is no defense to an action against a railroad corporation for its failure to transport a passenger with proper dispatch, that the detention was the willful act of a conductor in charge of the train. An intentional default of a servant is not an excuse for delay in the performance of a duty the master has undertaken. (*Ct of Appeals*, 1858, *Weed* v. *Panama R R. Co.*, 17 N. Y. [3 Smith], 362.)

Where defendants show that a rule of the company had been violated by plaintiff, conducing to the injury complained of, though such rule was not communicated to the public, *held*, no error to refuse to charge that plaintiff could not recover if the jury believed that such a rule existed, and was generally known to passengers on that road. (*N. Y. Superior Ct., Pollard* v. *N. Y. and New Haven R. R. Co*, 7 Bosw., 437.) When a railroad company admits passengers into a caboose car attached to a freight train, to be transported as passengers, and takes the customary fare for the same, it incurs the same liability for the safety of the passengers as though they were in the regular passenger coaches at the time of the occurrence of the injury. (*Edgerton* v. *N. Y. and Harlem R. R. Co.*, 39 N. Y., 227.)

When a railroad company gives such published notice of the running of its trains, and such special notice in the cars of the necessity of changing cars at any particular station, that every traveler of ordinary intelligence, by the use of reasonable care and caution, would obtain all requisite information as to the route to be traveled, and the cars to be taken at intermediate stations, it discharges its whole duty in this respect. If a passenger, merely by a failure of his own to use such care and caution, instead of changing cars at a particular station, and there taking cars which go to the place to which he has paid his fare, continues in the cars in which he started, and is carried in another direction, the result is to be attributed to his own negligence, and not to a breach of duty or of contract on the part of the company. (*N. Y. Superior Ct.*, 1857, *Page* v. *N. Y. C. R. R. Co.*, 6 Duer, 523.)

In an action against a city railroad company for injuries sustained by a passenger leaving the car, it appeared that the plaintiff, the car being stopped for another passenger, said to the driver, "Be so kind as to keep on your brake;" and commenced to alight from the car. The driver replied, "Yes, sir;" but

almost immediately turned the brake and started the car, by which the plaintiff was precipitated into the street and injured. *Held*, 1. The language of the passenger was a clear request to stop the car until he should alight. 2. The request was rightfully preferred to the *driver*. There was no fault in not speaking to the *conductor*. 3. Nor could any fault be imputed to the plaintiff for endeavoring to leave the car from the front platform, in the absence of notice posted prohibiting passengers so to do. 4. The evidence was sufficient to warrant the jury in finding the driver guilty of negligence, for which the company were liable. (*Ct. of Appeals*, 1864, *Mulhado* v. *Brooklyn City R. R. Co.*, 30 N. Y., 370.)

What is a sufficient proof of negligence, and what will sustain the proof of contributive negligence in an action by a passenger to recover for personal injuries sustained upon the journey. (*Mooney* v. *H. R. R. Co.*, 5 Robt., 548; *Gonnon* v. *N. Y. and H. R. R. Co.*, 3 id., 25.) The same questions discussed with reference to a horse railroad company. (*Ninth Ave. R. R Co.*, 4 Robt., 377.) In an action to recover damages for negligence, plaintiff cannot be nonsuited on the ground that his own negligence contributed to the injury, unless evidence to that effect is perfectly clear and decisive. (*McGrath* v. *Hudson River R. R. Co.*, 32 Barb , 144; 19 How., 211; *Bernard* v. *R. and S. R. R. Co.*, 32 Barb., 165; 19 How. Pr., 199.)

A woman traveling on a railroad train, who, in obedience to a direction of a person in charge of the train, attempted to pass from one car to another while the train was in motion, and, in so doing, was injured; *held*, not guilty of negligence, such as to preclude a recovery for damages. (*McIntyre* v. *N. Y. C. R. R. Co.*, 43 Barb., 532.) It is not negligence, *per se*, for a mother to allow her son twelve years of age, traveling with her on the railroad, to leave the car in which she is sitting where there was no seat for him, and go alone to another car for the purpose of finding a seat. (*Downs* v. *N. Y. Cent., R. R. Co.*, 47 N. Y., 83.) Passenger thrown off on attempting to alight before train backed in (*Taber* v. *Del., L. ond W. R. R. Co.*, 4 How., 865.) Injury to passenger alighting, by sudden starting. (*Milliman* v. *N. Y. C., etc., R. R. Co.*, 6 Supm. Ct. [T. & C.], 585.) Negligence of passengers in trying to mount a car in motion. (*Phillips* v. *Rens., etc., R. R. Co.*, 49 N. Y., 177; reversing, 57 Barb., 644.) Effect of directions given to passenger by servant of the company. (*Feler* v. *N. Y. Cent. R. R.*, 49 N. Y., 47; *Maher* v. *Cent. Park R. R. Co.*, 39 Sup'r Ct. [7 T. J. & S.], 155.) A passenger, who, after the car had started, alighted with her child—*held*, guilty of contributory negligence. (*Morrison* v. *Erie R'way Co.*, 56 N. Y., 302. (Injury by bar projecting from the train. (*Walker* v. *Erie R'way Co.*, 63 Barb. 260.)

§ **250.** *Duty of corporation in respect to passengers and freight.*—Every such corporation shall start and run their cars for the transportation of passengers and property, at regular times, to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of all such passengers and property as shall within a reasonable time previous thereto be offered for transportation at the place of starting, and at the junctions of other railroads, and at the usual stopping places established for receiving and discharging way passengers and freights for that train; and

shall take, transport and discharge such passengers and property at and from and to such places on the due payment of the fare or freight legally authorized therefor. No preference for the transaction of business shall be granted by said railroad corporation to any one of two or more companies or associations competing, in the business of transporting property for themselves or for others, upon the railroad owned or operated by such corporation, either upon the cars, or in the depots or buildings, or upon the grounds of such corporation; and whenever the railroad of such corporation, at or near the same place, connects with, or is intersected by any other railroad, such corporation shall fairly and impartially grant and afford to each of such competing companies or associations, equal terms of accommodation, privileges and facilities in the transportation of property and freight to and upon such connecting or intersecting railroad, and shall also grant and afford to each of such competing companies or associations, and to the officers, agents and employees thereof, equal facilities in the interchange and use of express, freight and other cars, so far as may be necessary to accommodate the business of each of such competing companies or associations, and every railroad corporation shall be liable to the party aggrieved in an action for damages for any neglect or refusal in the premises. The provisions of this section shall apply to all existing railroad corporations. (*Laws* 1850, *chap.* 140, § 36; *amended Laws* 1867, *chap.* 49, § 1.)

See notes to § 223, *ante.*

Rate of freight.

The rate of freight by the railroad act (*Laws* 1850, *chap.* 140) is left entirely to the contract of the parties (*Nelson* v. *Hudson R. R. R. Co.*, 48 N. Y., 498.)

Section 36 of chapter 140, Laws of 1850, previous to its amendment was as follows: Every such corporation shall start and run their cars for the transportation of passengers and property, at regular times to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of all such passengers and property, as shall within a reasonable time previous thereto, be offered for transportation at the place of starting and the junctions of other railroads, and at usual stopping places established for receiving and discharging way passengers and freights for that train; and shall take, transport and discharge such passengers and property at, from and to such places, on the due payment of the freight or fare legally authorized therefor, and shall be liable to the party aggrieved in an action for damages for any neglect or refusal in the premises.

§ 251. *Companies to receive from each other and forward freight.*—And all companies whose railroads are or shall hereafter be crossed, intersected or joined as aforesaid, shall receive from each other and forward to their destina-

tion all goods, merchandise and other property in points on their respective roads, with the same and at a rate of freight not exceeding the local charged for similar goods, merchandise and other received at and forwarded from the same points viduals and other corporations. (*Laws* 1850, *ch* 28, *sub.* 6; *amended by Laws* 1872, *chap.* 350; *by Laws* 1880, *chap.* 583, § 1.)

(See section 267, *post.*)

§ **252.** *Duties of connecting roads prior to passage of the general railroad act.*—Every railroad company whose railroad shall, at or near the same place, connect with or be intersected by two or more other railroads, which are competing lines for the business to or from such railroad, shall fairly and impartially grant and afford to the proprietors of each of such connecting or intersecting railroads, equal terms of accommodations, privileges and facilities in the transportation of cars, passengers, baggage and freight over and upon their railroads, and over and upon such connecting or intersecting railroads, and shall also grant and afford the proprietors of each of said connecting or intersecting railroads, equal facilities in the interchange and use of passenger, baggage, freight and other cars, so far as may be required to accommodate the business of each railroad; and also in furnishing passage tickets to passengers who may have come over, or may wish to go over either of such connecting or intersecting railroads; and if the proprietors of either of such connecting or intersecting railroads shall deem themselves aggrieved by the arrangements or conduct of the company with whose railroad their railroad connects in the premises, such proprietors may make application by petition to the governor of this State, on giving fourteen days' notice to the companies or proprietors of the railroads with which their railroad connects, for the appointment of three commissioners, to inquire into the alleged complaints; and it shall be the duty of said governor to appoint three disinterested persons as commissioners, who shall summarily examine into the alleged grievances, and shall prescribe such regulations in the premises as will, in their judgment, secure the enjoyment of equal privileges, accommodations and facilities to the proprietors of the said connecting or intersecting railroads, in the transportation, use and interchange of cars, passengers, baggage and freight, as may be required to accommodate the business of each of said railroads; and in the management and conduct of the several railroads connecting with each other; and the said commissioners shall also determine

and fix the terms and conditions upon which such facilities and accommodations shall be afforded to each of said connecting railroads. The award of the commissioners, when approved by the Supreme Court, shall be binding on the parties for two years, and the court shall have power to compel the performance thereof by attachment, mandamus or otherwise. And the expenses of the foregoing proceedings shall be paid by such of the parties as shall be determined on by said court. (*Laws* 1847, *chap.* 222, § 1.)

§ **253.** *United States mail, transportation of.*—Any such corporation shall, when applied to by the postmaster-general, convey the mails of the United States on their road or roads respectively; and in case such corporations shall not agree as to the rate of transportation therefor, and as to the time, rate of speed, manner and condition of carrying the same, it shall be lawful for the governor of this State to appoint three commissioners, who, or a majority of them, after fifteen days' notice in writing of the time and place of meeting to the corporation, shall determine and fix the prices, terms and conditions aforesaid; but such price shall not be less for carrying said mails in the regular passenger trains, than the amount which such corporation would receive as freight on a like weight of merchandise transported in their merchandise trains, and a fair compensation for the post-office car. And in case the postmaster-general shall require the mail to be carried at other hours, or at a higher speed than the passenger trains are run, the corporation shall furnish an extra train for the mail, and be allowed an extra compensation for the expenses, and wear and tear thereof, and for the service, to be fixed as aforesaid. (*General Railroad Act, Laws* 1850, *chap.* 140, § 34.)

For action for damages by a mail agent injured by negligence of the company, see *Nolton* v. *Western R. R. Corp.*, 15 N. Y., 444.

§ **254.** *Legislation in regard to carrying of U. S. mails prior to passage of the general railroad act.*—In addition to such railroad companies as now are required by law to transport the mails of the United States, each and every other railroad company, heretofore incorporated by the Legislature of this State, now built and in use, and which hereafter may be built and brought into use, shall, when applied to by the postmaster-general, convey the mails of the United States on their road or roads respectively; and in case such company or companies shall not agree with him as to the rate of transportation therefor, and as to the time, rate of speed, manner and condition of carrying the same, it shall be lawful for the gover-

nor of this State to appoint three commissioners, who, or a majority of them, after fifteen days' notice in writing of the time and place of the meeting to such company or companies respectively, shall determine and fix the prices, terms and conditions aforesaid. (*Laws* 1845, *chap.* 149, § 1.)

Every railroad company, upon being thereto required by the postmaster general of the United States, shall enter into a contract with the United States, in the usual form, and with the usual conditions of such contracts, for transporting the mails of the United States upon its railroad, for such compensation as the said board shall deem reasonable, not exceeding that provided by an act of Congress, entitled "An act to reduce the rates of postage, to limit the use and correct the abuse of the franking privileges, and for the prevention of frauds on the revenues of the post-office department," approved March 3, 1845, and every railroad company that shall neglect or refuse to enter into such contract, upon being so required, shall forfeit and pay to the people of this State, one hundred dollars for every day it shall so neglect or refuse. (*Laws* 1846, *chap.* 215, § 17.)

The above is an extract from the act to incornorate the New York and Connecticut Railroad Company.

§ **255.** *Regulations concerning the transportation of live stock.*—No railroad company in this State, in the carrying and transportation of cattle, sheep or swine, shall confine the same in cars for a longer period than twenty-eight consecutive hours, unless delayed by storms or other accidental causes, without unloading for rest, water and feeding, for a period of at least ten consecutive hours. In estimating such confinment, the time the animals have been confined without such rest on connecting roads from which they are received shall be computed, it being the intention to prevent their continuous confinement beyond twenty-eight hours, except upon the contingencies herein stated. Nothing in this act contained shall require the unloading of cattle, sheep or swine from the cars of the Buffalo and State Line railroad before their arrival at Buffalo, and the Atlantic and Great Western railroad, before they arrive at Salamanca. (*Laws* 1866, *chap.* 560, § 1.)

Provided the owner or person in charge of said animals refuses or neglects to pay for the care and feed of animals so rested, the railroad company may charge such expense to the owner or consignee, and retain a lien upon the animals until the same is paid; and *provided further*, that no claim of damages for detention shall be recovered by the owner or shipper of any animals for the time they are detained under the provisions of this act. (*Laws* 1866, *chap.* 560, § 2.)

Any railroad company, owner, consignee, or person in charge of said cattle, sheep, or swine, who shall violate any provision of this act, shall, for each and every such violation, be liable for and forfeit and pay a penalty in the sum of one hundred dollars, to be sued for and collected in any court having jurisdiction, by any person, in the name of the people of the State of New York; one-half of the penalty, when collected, to belong to the informer, and the balance to be paid to the State treasurer of the State of New York. (*Laws* 1866, *chap.* 560, § 3.)

See section 663 of the Penal Code; see the next section and note to the same. By section 2, chapter 134, Laws of 1878, entitled "An act in relation to infectious and contagious diseases of animals," the governor is given power to prescribe regulations for the disinfection of railway cars, and to order all animals coming into the State to be detained for the purpose of inspection and examination, and to provide regulations for their destruction. (See amendment to the act chapter 306, Laws 1879.)

§ **256.** *Transporting animals for more than twenty-four consecutive hours a misdemeanor.*—A railway corporation, or an owner, agent, consignee or person in charge of any horses, sheep, cattle or swine in the course of or for transportation, who confines, or causes or suffers the same to be confined, in cars for a longer period than twenty-four consecutive hours without unloading, for rest, water and feeding, during ten consecutive hours, unless prevented by storm or inevitable accident, is guilty of a misdemeanor. In estimating such confinement, the time during which the animals have been confined, without rest, on any connecting road from which they are received, must be computed. If the owner, agent, consignee or other person in charge of any such animals refuses or neglects upon demand to pay for the care or feed of the animals so unloaded or rested, the railway company or other carriers thereof may charge the expense thereof to the owner or consignee, and shall have a lien thereon for such expenses. (*Penal Code*, § 663.)

Chapter 560, Laws 1866, *supra*, was not repealed by the Legislature of 1881, which passed the Penal Code. The usual repealing act, in connection with a revision of the statutes, passed the Legislature, but the same was not signed by the governor and become imperative. Though a carrier who undertakes to transport animals by railroad is not an insurer against injuries arising from the nature and propensities of the animals, and which diligent care cannot prevent —*e. g.*, fright, refusal to eat, etc.—yet laying out of view cases of inevitable accident, he is liable, in the absence of special agreement, unless the damage was caused by an occurrence incident to the carriage of animals in a railroad car, and which the defendants could not, by the exercise of diligence and care, have prevented. (*Ct. of Appeals*, 1856, *Clarke* v. *Rochester and Syracuse R. R. Co.*, 14 N. Y. [4 Kern.], 570; compare *Conger* v. *Hudson R. R. R. Co.*, 6 Duer,

375.) A contract between the company and the owner of live stock for their transportation, whereby the latter undertakes "all risk of loss, injury, damage and other contingencies, in loading, unloading, conveyance and otherwise," will exempt the company from liability for injury sustained by the animals from unnecessary confinement and want of food and water. (*Heineman* v. *Grand Trunk R. R. Co.*, 31 How. Pr., 430.)

The fact that the owner of the animals bargained for a passage on the train by which they were carried does not prove conclusively, if at all, that he was to attend to their safety during the journey. (*Ct. of Appeals*, 1856, *Clarke* v. *Rochester and Syracuse R. R. Co.*, 14 N. Y. [4 Kern.], 570.) A railroad company held liable for the loss of a horse who was strangled by the halter in the car, although his owner assisted in fastening him there, and was allowed a passage on the train. (*Id.*) Where the cattle train was detained at a station a number of hours, in constant readiness to start on the arrival of a belated train, and the owner proposed to take the cattle out and water them, but was informed that the train might start within a period too brief for that purpose, *held*, that it was for the jury to decide whether this amounted to a refusal to permit the unloading of the animals. (*Harris* v. *Northern Indiana R. R. Co.*, 20 N. Y. 232.) The common law liability of a carrier does not extend to the carriage of animals. (*Cragin* v. *N. Y. C. R. R. Co.*, 51 N. Y., 61, *vide* 49 id., 204.) And when live stock is killed by an accident, the company is not bound to deliver the carcasses. (*Lee* v. *Marsh*, 43 Barb., 102.)

§ **257.** *Carrying animals in a cruel manner forbidden.*—A person who carries or causes to be carried in or upon any vessel or vehicle or otherwise any animal in a cruel or inhuman manner or so as to produce torture, is guilty of a misdemeanor. (*Penal Code*, § 659.)

(See the preceding section.)

The term person in the above act includes a corporation as well as a natural person. (*Penal Code*, § 718.)

§ **258.** *Check to be affixed to be baggage.*—A check shall be affixed to every parcel of baggage, when taken for transportation, by the agent or servant of such corporation, if there is a handle, loop or fixture so that the same can be attached upon the parcel or baggage so offered for transportation, and a duplicate thereof given to the passenger or person delivering the same on his behalf; and if such check be refused on demand, the corporation shall pay to such passenger the sum of ten dollars, to be recovered in a civil action; and, further, no fare or toll shall be collected or received from such passenger, and if such passenger shall have paid his fare, the same shall be refunded by the conductor in charge of the train; and on producing said check, if his baggage shall not be delivered to him, he may himself be a witness in any suit brought by him, to prove the contents and value of said baggage. (*Laws* 1850, *chap.* 140, § 37.)

What is deemed baggage.

Common carriers are liable for the loss of such property of a passenger received by them as baggage as is designed for the personal use of himself and the members of his family, and is of a kind customarily carried by travelers as baggage, although such property is not intended to be used and is not necessary for the use, comfort or convenience of the passenger on the journey. Their liability does not extend to articles which the passenger has purchased for a person not a member of his family and has packed with his own baggage. (*Dexter* v. *Syracuse, Binghamton and N. Y. R. R. Co.*; 42 N. Y., 326.) In the above case it was held that wearing apparel for members of his family, as material for two dresses, are property included under the term "baggage," and recoverable as such. An agreement to carry a passenger and his baggage, includes only ordinary baggage, or such articles of necessary and personal convenience as are usually carried by passengers. (*N. Y. Com. Pl.*, 1857, *Nordemeyer* v. *Loescher*, 1 Hilt., 499.)

Baggage, within the rule of the carrier's liability, is confined to such articles as are usually carried as baggage, for the personal use of the passenger, or for his convenience, instruction, or amusement on the way. (*Hawkins* v. *Hoffman*, 6 Hill, 586; see *Blanchard* v. *Isaacs*, 3 Barb., 388; *Van Wyck* v. *Howard*, 12 How. Pr., 147.) The traveler's watch, and other articles of jewelry usually worn about his person, are, when placed in his trunk, a part of his baggage, for which the carrier is liable. (*N. Y. Com. Pl.*, 1855, *McCormick* v. *Hudeon River R. R. Co.*, 4 E. D. Smith, 181.) Guns for sporting purposes, and a small quantity of clothing materials, may be included in the baggage of a passenger from Europe to New York, for which the carrier is responsible. (*N. Y. Com. Pl.*, 1855, *Van Horn* v. *Kermit*, 4 E. D. Smith, 453; to the same effect is *Duffy* v. *Thompson*, 4 id., 178.) Tools used by the plaintiff in his trade, and also a gun, carried in his trunk, are properly included under the term "baggage," and recoverable as such. (Citing 4 Bing., 218; 9 Wend., 85; 25 id., 459; 10 Ohio, 145; 6 Hill, 586; 26 Maine, 458; 9 Humph., 623; 11 id., 419; 2 Harris, 129; 3 Ban., 451; 5 Cush., 69; 13 Ill., 746; *Supreme Ct.*, 1854, *Davis* v. *Cayuga and Susq. R. R. Co.*, 10 How. Pr., 350.)

What not deemed baggage.

A carrier of passengers is liable for such baggage as passengers carry for their personal convenience on the journey, within a reasonable limit. The question of reasonable amount is for the jury. (*N. Y. Superior Ct.*, 1859, *Nevins* v. *Bay State Steamboat Co.*, 4 Bosw., 225.) He is not liable for articles not intended for the personal convenience of the passengers—*e. g.*, presents for their friends, masonic regalia and jewels, etc. (*Id.*) A trunk containing nothing but merchandise, is not baggage for the safety of which the carrier of the traveler is liable. (*Supreme Ct.*, 1841, *Pardee* v. *Drew*, 25 Wend., 459; see *Slomen* v. *Great Western R'way, infra.*) Baggage does not include samples of the merchandise which he wishes to sell. (*Supreme Ct.*, 1844, *Hawkins* v. *Hoffman*, 6 Hill, 586; and see *Blanchard* v. *Isaacs*, 3 Barb.. 388.)

A carrier who is engaged in carrying a traveler's trunk, containing the traveler's wearing apparel and equipments, presented to him and paid for as ordinary traveling baggage, is not liable for the loss of a box of jewelry belonging to a third person, put up for sale as merchandise, and packed in such trunk. Deception may as easily be effected by imposing upon the carrier valuable mer-

chandise, under the guise of the owner's traveling baggage, as by a direct verbal misrepresentation. (*N. Y. Superior Ct.*, 1858, *Richards* v. *Westcott*, 2 Bosw., 589; and see *Orange Co. Bank* v. *Brown*, 9 Wend., 85; and *Pardee* v. *Drew*, 25 id., 459) A trunk containing silver-ware was carried as baggage, without charge, from New York to Albany—*Held*, not baggage for which the carrier was liable. There is no difference between silver-ware and silver-money. (*N. Y. Com. Pl.*, 1855, *Bell* v. *Drew*, 4 E. D. Smith, 59.) Railroad corporations are not liable for the loss of merchandise delivered to them under the guise of baggage for transportation with a passenger. (*Slaman* v. *Great West. R'way*, 6 Hun, 546.) They are liable, however, if they knowingly undertake to transport merchandise in trunks or boxes which have been received by them for transportation in passengers trunks, unless the agent who receives the package for that purpose violates a regulation of the company by so doing, and the passenger has notice of such regulation. (*Id.*)

Whether money carried for traveling expenses is considered as baggage.

The baggage of a passenger, intrusted to one whose business it is to transport persons and their baggage, and with whom the owner has embarked, is under the same protection as the goods which are intrusted to a common carrier of goods (26 Wend., 591); and a proper sum of money for traveling expenses, contained in the trunk of the passenger, is to be considered as a part of his personal baggage. (*Ct. of Appeals*, 1864, *Merrill* v. *Grinnell*, 30 N. Y., 594.) The reason why property of any kind is included in the contract of carriers of persons is that it is the usual concomitant of a journey for the traveler to take traveling conveniences with him; and men who engage in the business of transporting persons from one part of the country, or of the world, to another, must make provisions for carrying, also, whatever may be reasonably necessary to the traveler, under ordinary circumstances, for the prosecution of the journey. Nothing can be more essential to this end than an adequate supply of money for traveling expenses. (Reviewing many cases.) Per Denio, C. J. (*Id.*)

It is not possible to enumerate the articles or limit the amount which may be carried by a passenger as his baggage. The question is to be determined by the jury under the circumstances of each case. A sum of money reasonably necessary to defray the expenses of the journey is properly baggage, and may be carried in a trunk at the risk of the carrier. The amount of money which may be thus carried will depend on the length of the journey, and, to some extent, on the wealth of the traveler. In regard to amount, the jury must be guided by considerations similar to those which would govern them in determining what would be necessary clothing in a given case. Per Mullin, J. (*Id.*)

The amount of money which a passenger is entitled to claim as a part of his "baggage" must necessarily be measured, not alone by the requirements of the transit over a particular part of the entire route, to which the line of one carrier extends, but must embrace the whole of the contemplated journey, and include such an allowance, for accidents or sickness, and for sojournings on the way, as a reasonably prudent man would consider it necessary to make. Whether the amount claimed in the case of a loss is reasonable or excessive in a particular instance will depend upon the character of the journey and the special circumstances of the case. It is very clear that it would not include funds carried for the purpose of transportation or remittance, or for investment in another locality. It should be limited to money taken for traveling expenses properly so called. (*Id.*)

Money, except what may be carried for the expenses of traveling, is not included in the term "baggage." (*Supreme Ct.*, 1832, *Orange County Bank* v. *Brown*, 9 Wend., 85; *Grant* v. *Newton*, 1 E. D. Smith, 95.) Whether money carried for traveling expenses is within the rule, see id.; and *Hawkins* v. *Hoffman*, 6 Hill, 586; *Taylor* v. *Monnot* (1 Abbott's Pr., 325); see, also, *N. Y. Com. Pl.*, 1855, *Duffy* v. *Thompson* (4 E. D. Smith, 178).

Carriers' obligation to transport baggage.

The obligation of a railroad company is to take whatever is delivered and received as baggage, from a passenger, in the baggage car of a passenger train in which the passenger takes his passage, and take it along with and deliver it to the passenger at the place of destination in the usual manner of transporting and delivering baggage (*Supreme Ct.*, 1862, *Glasco* v. *N. Y. C. R. R Co.*, 36 Barb., 557). The obligation is the same, whether the baggage is within the quantity allowed to a passenger, to be carried without any charge, other than the ordinary fare of the passenger, or whether it is an extra quantity, for which an additional charge is made. If it be taken as the baggage of the passenger, whether ordinary or extra, it is to be carried with the passenger, unless there is some agreement to the contrary (*Id*). Carriers of passengers, by land and water, are regarded as insurers of the baggage of the passenger, and must answer for any loss not occasioned by inevitable accident or the public enemies (9 Wend., 85; 13 id., 611; 4 Bing , 218; 4 Esp., 177; 2 Kent, 601; *Supreme Ct.*, 1838; *Hollister* v. *Nowlen*, 19 Wend., 234; *Cole* v. *Goodwin*, 19 id., 251; and see *Camden R. R. and T. Co.* v. *Belknap*, 21 id., 354). The company cannot limit its liabilities by a regulation that all claims for damages for goods lost or injured while in its custody, must be made within ten days after delivery of the property at the station (*Browning* v. *Long Island R. R. Co.*, 2 Daly, 117).

The ordinary undertaking of a steamboat or railroad company with a passenger, is, to carry the passenger and his trunk to the place of destination, and to deliver the trunk with its contents to him there, on presentation of his check for it, within a reasonable time under the circumstances, after the arrival (*Supreme Ct.*, 1867, *Jones* v. *Norwich and N. Y. Trans. Co*, 50 Barb., 193). The company, except in cases where the loss occurs through the enemies of the country or inevitable accident, is bound to deliver safely to each passenger, his baggage, in a reasonable time and manner, after its arrival at the place of destination (*Camden, etc., R. R. and T. Co.* v. *Burke*, 13 Wend., 611; *Roth* v. *Buffalo, etc., R. R. Co.*, 34 N. Y., 548; *Joaes* v. *Norwich, etc., T. Co.*, 50 Barb., 193; *Glasco* v. *N. Y. C. R. R. Co.*, 36 id., 557; *Cary* v. *Cleveland, etc., R. R. Co.*, 29 id., 35). What is is a reasonable time for the delivery of baggage is a mixed question of law and fact, to be determined by the jury, under the instructions of the court when the facts are unsettled; but when there is no dispute about the facts, then by the court alone (*Roth* v. *Buffalo, etc., R. R. Co., supra; Gilhooly* v. *N. Y. and Steam N. Co.*, 1 Daly, 197).

Where it appears on trial that a trunk was lost, it is not necessary to show a demand of the trunk, and refusal by the company to deliver the same, before the suit was brought; proof of delivery and loss is *prima facie* sufficient to entitle the plaintiff to recover (*Garvey* v. *Camden and Amboy R. R. Co.*, 1 Hilt., 280). The company cannot limit its liability for loss of, or injury to property transported by it, by a regulation and notice to the effect that all baggage is at the risk of the owner (*Camden, etc., Trans. Co.* v. *Belknap*, 21 Wend., 354; *Rawson* v. *Penn. R. R. Co.*, 2 Abb. Pr. [N. S.], 220). One who purchases a

ticket, and receives a check for his baggage, from a railroad company, for a point beyond the terminus of such road, and without the State in which the company is incorporated, may sustain an action against it for the loss of his baggage at that point. Such a contract is not beyond the power of the corporation (8 N. Y., 37; 17 id., 306; 8 M. & W., 421; 3 Eng. L. & E., 497; 18 id., 553; disapproving 22 Conn., 1; 24 id , 468; *Supreme Ct.*, 1859, *Cary* v. *Cleveland and Toledo N. R. Co.*, 29 Barb., 35.)

Delivery to carrier.

A passenger from Chicago to New York purchased at Chicago a "through ticket," or coupons—*i. e.*, four tickets upon one paper, to be separated and delivered up on demand at different points on the route. Three of them were delivered at points between Chicago and Albany, and the fourth was received by the defendants for transporting him from Albany to New York. *Held*, that the defendants were liable for the loss of a trunk, the passenger having received their check upon surrendering the trunk, with a carpet-bag, at Buffalo, and they having delivered the carpet-bag alone at New York. (*N. Y. Com. Pl.*, 1855, *McCormick* v. *Hudson River R. R. Co.*, 4 E. D. Smith, 181.)

Where carrier has an agent on his boat to receive and take charge of baggage and to check it, it is not a good delivery of baggage to him to leave it upon the boat without obtaining a check, or calling the agent's attention to it. To charge a carrier there must be an acceptance of the goods, either in a special manner, or according to the usage of their business. (Story on Bailm., § 533; Ang. on Carr., § 140; 1 Ld. Raym., 46; 5 Esp., 41; 7 Hill, 47; 2 Man. & S., 172; 3 Taunt., 264; 2 Show., 128; *N. Y. Com. Pl.*, 1865, *Ball* v. *N. J. Steamb. Co.*, 1 Daly, 49.)

Where, by the usage, a person is employed by the carrier to receive and take charge of baggage as distinguished from freight, the delivery of baggage must be to him, and not to one engaged in the discharge of other duties. (3 Barb., 388; 1 Car. & P., 638 [*Id.*]). In an action against the company to recover for lost baggage, the fact that the plaintiff was a passenger, and that the company took his baggage—*Held*, sufficiently proved by the passenger's possession of the baggage check, and testimony of the baggage-master as to the custom of giving checks. (*Davis* v. *Cayuga, etc., R. R. Co.*, 10 How. Pr., 330.) The fact that the baggage was delivered to a person whom witness supposed to be the baggage-master, is not enough to charge the company with its receipt. (*Butler* v. *Hudson River R. R. Co.*, 3 E D. Smith, 571.) That a railroad company is liable for baggage delivered by an expressman. (See *Rogers* v. *Long Island R. R. Co.*, 1 Thomp. & Cook [N. Y.]; S. C. R., 396.)

Plaintiff purchased a ticket and had his baggage checked. It was received by the company and transported to place of destination, and deposited in the baggage-room. When demanded it could not be found, and no account given of the cause of its disappearance. *Held*, that without regard to the question whether the company became liable as a common carrier, it incurred, at least, the responsibility of a warehouseman, and that the evidence made out a *prima facie* case of negligence. (*Fairfax* v. *N. Y. C. R. R. Co.*, 67 N. Y. 11.)

Termination of liability as to baggage.

The strict liability of the carriers of passengers for the baggage of such passengers terminates within a reasonable time after the arrival of the baggage at the place of destination, where the carrier is ready to deliver the same to the

passenger, according to the terms of the contract. Where the passenger did not call for his trunk, but left it in the hands of the company over night, without any arrangement with them, and the same was destroyed by the burning of the depot before morning, *held*, that the company were not liable. (*Ct. of Appeals*, 1866, *Roth* v. *Buffalo and State Line R. R. Co.*. 34 N. Y., 548; see, also, *Heldridge* v. *Utica and Black River R. R. Co.*, 56 Barb., 191.)

When there is no delivery of baggage carried upon a railroad to the passenger, and no neglect to claim it or inquire for it, but on the contrary the company's agents agree to retain it until it can be sent for, the company' liability as a common carrier continues after the baggage is taken from the cars, and until it is delivered or tendered to the owner. (26 Wend., 591; 19 id., 234; id., 256; *Supreme Ct.*, 1867, *Curtis* v. *Avon, etc., R. R. Co.*, 49 Barb., 148.) In an action by a passenger against a railroad company, to recover for lost baggage, evidence to show that the passenger was lame and unable to take charge of his baggage personally is admissible, as tending to prove that he was guilty of no negligence in not calling for and taking charge of his baggage upon the arrival at his place of destination, and as furnishing a good reason for making an arrangement with the agents of the railroad company that it should remain in the custody of the company until called for. (*Id.*)

It seems, that an arrangement between a passenger and the baggage-master, at a station, that the baggage of the former may remain at the depot, and that the latter will see to it until it can be sent for, is binding upon the railroad company. (*Id.*) Although the proprietors of public conveyances are not responsible for injuries to the *persons* of passengers, unless they happen, from a want of such care and diligence as is characteristic of cautious persons, yet they are liable for the baggage of passengers, at all events, except such losses as arise from inevitable accident or the enemies of the country, where no notice is given. (*Supreme Ct.*, 1835, *Camden R. R. and T. Co.* v *Burke*, 13 Wend., 611, 629.) If the traveler neglects to present his check and claim his baggage within a reasonable time after the arrival of the boat at the end of the route, the carrier becomes a mere gratuitous bailee; and if the baggage is afterward destroyed by fire, without any negligence on the carrier's part, he is not liable for the value. (*Jones* v. *Norwich and N. Y. Trans. Co.*, 50 Barb., 193.)

The liability of a common carrier of passengers for the baggage of a passenger continues, in a modified degree, after the termination of the journey—during the delay of the passenger to call for his baggage—and the carrier is bound to exercise ordinary care in keeping it until it is called for or disposed of according to law. (*Burnell* v. *N. Y. C. R. R. Co.*, 45 N. Y., 184.) But a railroad company is not liable for a passenger's baggage lost by a connecting steamboat line, even though the company has given a check for the baggage to the terminus of the steamboat line, unless the company has some interest in or control over the carriage of passengers by such boat line. (*Green* v. *N. Y. C. R. R. Co.*, 12 Abb. Pr. [N. S.], 437.) The statute (*Laws* 1847, *chap.* 290, § 9) regulating the liability of a railroad company for baggage checked by it on a connecting road, cannot be extended so as to recover the case when the connecting road is a steamboat line. (*Id.*)

The responsibility of a railroad company as a common carrier for baggage continues until the owner has a reasonable time and opportunity to receive it. In order to release itself from this liability, it is its duty to have a baggage-master at hand to deliver baggage for a reasonable time after the arrival of a

train, and at reasonable hours thereafter. (*Dewey* v. *N. Y. and N. H. R. R. Co.*, 49 N. Y., 546.) In regard to duty of baggage-master and liability of company when passenger took off his check and left baggage with baggage-master, and it was delivered to one falsely claiming, to recover it see *Matteson* v. *N. Y. C. R. R. Co.*, 57 N. Y., 553.

A passenger delivered her checks to the baggage-master, and left trunks with him to keep a week or two. The baggage-master delivered the trunks to a stranger, and they were lost; *Held*, that it was a question for the jury whether there was a delivery of the trunks by the defendant to the plaintiff with a termination of responsibility. (*Matteson* v. *N. Y. C. R. R. Co.*, 66 N. Y., 381.)

Removal of baggage by passenger.

Common carriers of persons with baggage accompanying them, are responsible for such baggage, as carriers, for a reasonable time after its arrival at its destination. Passengers are not bound in all cases to remove their baggage at once (26 Wend., 591; 19 id., 291; *Supreme Ct.*, 1859, *Cary* v. *Cleveland and Toledo R. R. Co.*, 29 Barb., 35.) Where the evidence shows that it formed a part of the business of the defendants, as carriers of passengers, to take charge of articles left inadvertently in their care by passengers, the defendants must, in taking charge of property so left, be looked upon in the light of bailees for hire, who are bound to the exercise of ordinary care and diligence (26 Wend., 591; 7 Hill, 47; Ang. on Carr., §§ 75, 112, 131, 302; Edw. on Bailm , 35; *N. Y. Com. Pl.*, 1862, *Morris* v. *Third Av. R. R. Co.*, 23 How. Pr., 345). But they should not be held responsible for delivering it to a wrong person, if they have exercised all the care and vigilance that could reasonably be expected of them under the circumstances (*Id*). The delay of the owner to call for the baggage for several days after its arrival at the point of destination does not release the carrier from his obligation to deliver it to him on demand (*Id.*; *N. Y. Com. Pl.*, 1862, *Gilhooly* v. *N. Y. and Savannah Steam Nav. Co.*, 1 Daly, 197). An agent of the company, having charge of the depot and the freight therein, is the proper person to inquire of respecting lost baggage, and a conversation between the plaintiff and such person relative to lost baggage, is admissible as *res gestæ*. (*Curtis* v. *Avon R. R. Co.*, 49 Barb., 148.)

Sunday.

The existence of a statute prohibiting labor and travel on Sunday—*Held*, to have no application or effect, under the circumstances, upon the claim of a passenger arriving on a Sunday, to recover for lost baggage. (*Jones* v. *Norwich, etc., Trans. Co.*, 50 Barb., 193).

Traveler who retains custody of baggage.

A passenger left his overcoat, which he had kept in his own possession, in defendants' cars through forgetfulness. *Held*, that the company were not liable for its loss, it not having been delivered to them, and it being shown that after he left it they exercised ordinary care for securing it. Moreover, if the negligence of the passenger conduces to the loss of the goods, the carrier is not responsible (3 Esp., 74; Jer. Law of Carr., 55, 136; *Supreme Ct.*, 1844, *Tower* v. *Utica and Schenectady R. R. Co.*, 7 Hill, 47; and see *Blanchard* v. *Isaacs*, 3 Barb., 388). The traveler, a steerage passenger, on a voyage from Liverpool to New York, took his trunk to the steerage and placed it under his bed, fastening it to his berth, and kept it in his own exclusive possession and custody. *Held*, that as it appeared that he trusted to his own care and vigilance to pro-

tect him against its loss, the owners of the vessel were not liable as common carriers for its loss (*N. Y. Superior Ct.*, 1853, *Cohen* v. *Frost*, 2 Duer, 335; compare *Van Horn* v. *Kermit*, 4 E. D. Smith, 453). The carrier of passengers by steamboat is not exonerated from responsibility for the personal baggage of a passenger, by the fact that the passenger deposits it in the stateroom occupied by him, of which he has the key, and from which it is stolen (19 Wend., 236; 8 Co., 33; 4 Mau. & S., 310; 7 Hill, 47; *N. Y. Com. Pl.*, 1861, *Mudgott* v. *Bay State Steamboat Co.*, 1 Daly, 151). A mere supervision of one's baggage, or the means of entering the place of its deposit, is not sufficient to discharge the carrier. There must either exist the *animus custodiendi* on the part of the traveler to the exclusion of the carrier, or he must be guilty of such negligence as discharges the latter from his general obligation (2 Bos. & P., 416; 1 St., 694; *ib.*)

Non-payment of fare.

The passenger having been received on board is entitled to a safe-keeping of his baggage, although he may not have paid his passage money. (*N. Y. Com. Pl.*, 1855, *Van Horn* v. *Kermit*, 4 E. D. Smith, 453; *S. P.*, *Butler* v. *H. R. R. R. Co.*, 3 id., 571.) Carriers are liable, although they do not receive any other compensation for the transportation of the baggage than that which is paid for the conveyance of the passenger. (*Ct. of Errors*, 1841, *Powell* v. *Myers*, 26 Wend., 591; and see *Orange County Bank* v. *Brown*, 9 id., 85.)

Distinction between baggage and freight.

A package delivered by a traveler, to be carried on a railroad to his place of destination, is not necessarily to be considered baggage; and if it is not so represented by him, and not so put up as to deceive, and not received as baggage, it is to be deemed freight, and the company may be held liable for its loss. (*N. Y. Com. Pl*, 1854, *Butler* v. *Hudson R. R. R. Co.*, 3 E. D. Smith. 571.) Three large trunks, containing merchandise, were carried by a porter to a steamboat, and were received by a deck hand, who gave the porter a ticket, with his name on it (which ticket was delivered to the person who sent the trunks aboard), and the trunks were put in the baggage room. *Held*, that the transaction represented the trunks to have been delivered and received *as baggage*, and not as *freight*, and they were carried as such. (*Supreme Ct.*, 1855, *Berley* v. *Newton*, 10 How. Pr., 490.) Case when the articles lost had been purchased as necessaries by plaintiff for himself, wife and child. (*Curtis* v. *D., L. and W. R. R. Co.*, 74 N. Y., 115.) The company received the trunks of the passenger, with notice that they contained property other than the passenger's baggage, and charged and received an extra compensation for their transportation, *held*, that an agreement to carry the property as freight might be inferred. (*Sloman* v. *G. W. R. R. Co.*, 67 N. Y., 208.) When a railroad company receives the trunk of a passenger, after being advised that it contained articles of merchandise, in addition to ordinary baggage, and charges and receives for its transportation, because of extra weight, a sum in addition to the ordinary fine in case of failure to deliver, it is liable for the merchandise, as well as baggage. (*Perley* v. *N. Y. C. R. R. Co.*, 65 N. Y., 374.)

Notices of limitation of liability for baggage.

Notice that all baggage is at the risk of the owners, although it is brought home to the owner, does not excuse the carrier from losses arising from the acts of himself or his servants, nor from actual negligence, nor the inefficiency of his machinery or vehicles, though it cannot be discovered by the eye.

Supreme Ct., Camden R. R. and T. Co. v. *Burke*, 13 Wend., 611.) That mere notice, in the absence of an express agreement to exempt from liability is not enough, see note to section, *post*. A stipulation contained in a card delivered a check for baggage received for transportation by a baggage express company, in the words "Liability limited to $100, except by special agreement," will be deemed to extend only to the carrier's liability as an *insurer* of the goods, and imparts no exemption from liability for actual negligence. (*Supreme Ct.*, 1867, *Prentice* v. *Decker*, 49 Barb., 21.)

Palace Car Company.

Liability of palace car company for baggage. (*Welch* v. *Pulman Palace Car Co.*, 16 Abb. Pr. [N. S.], 352.)

Connecting roads.

The plaintiff purchased of the B. and D. R. R. Co., at W., a coupon ticket from W. to B. over several connecting railroads, the last of which was that of the defendant. She received a check for her baggage with the names of all the roads stamped upon it. On arriving at B. she demanded her baggage, but it could not be found, and no trace was found of it after it was checked. In an action to recover for the loss, *held*, that in the absence of proof that the baggage came into defendant's possession it was not liable; that the ticket and check furnished no evidence that the connecting roads were jointly engaged in the business of carrying passengers, but the facts were consistent with two theories: either that the B. and O. R. R. Co. made an entire through contract—it employing the other companies, or, what was more probable, that each company was the agent of the others—to sell tickets and check baggage for the others, and in either view the defendant would not be responsible without proof that the baggage came into its possession. (*Kessler* v. *N. Y. C. R R. Co.*, 61 N. Y., 538.)

§ **259.** *The same; checks, how to be made.*—It shall be the duty of every railroad company hereafter to furnish and attach checks to each separate parcel of baggage which they by their agents or officers receive from any person for transportation as ordinary or extraordinary baggage in their baggage cars accompanying their passenger trains, and they shall also furnish to such a person duplicate check or checks having upon it or them a corresponding number to that attached to each parcel of baggage; said checks and duplicates shall be made of some proper metallic substance, of convenient size and form, plainly stamped with numbers, and each check furnished with a convenient strap or other appendage for attaching to baggage, and accompanying it a duplicate, to be delivered to the person delivering or owning such baggage. And whenever the owner of said baggage or other person shall, at the place where the cars usually stop, to which said baggage was to be transported, or at any other regular stopping place, present said duplicate check or checks to the officer or agent of the railroad or any railroad over any portion of which said baggage was transported, they shall deliver it up to the person so offer-

ing the duplicate check or checks without unnecessary delay. And a neglect or refusal on the part of any railroad company, its officers or agents, to furnish and attach to any person's ordinary traveling baggage or extraordinary baggage, if conveyed by their passenger train, a suitable check or checks, and to furnish to such person proper duplicate or duplicates, shall forfeit and pay to such person or owner for every such refusal or neglect the sum of ten dollars, to be recovered in an action for debt. (*Laws of* 1847, *chap.* 272, § 6.)

§ **260.** *Disposition of unclaimed and perishable freight.*—Every railroad company which shall have had unclaimed freight, not perishable, in its possession for a period of one year at least, may proceed to sell the same at public auction, and out of the proceeds may retain the charges of transportation and storage of such freight, and the expenses of advertising and sale thereof; but no such sale shall be made until the expiration of four weeks from the first publication of notice of such sale in the State paper, and also in a newspaper published at or nearest the place at which such freight was directed to be left, and also at the place where such sale is to take place; and said notice shall contain a description of such freight, the place at which and the time when the same was left, as near as may be, together with the name of the owner or person to whom consigned, if known; and the expenses incurred for advertising shall be a lien upon such freight, in a ratable proportion, according to the value of each article or package or parcel, if more than one. (*Laws* 1854, *chap.* 282, § 10.)

In case such unclaimed freight shall, in its nature, be perishable, then the same may be sold as soon as it can be, on giving the notice required in the preceding section, after its receipt at the place where it was directed to be left. (*Laws* 1854, *chap.* 282, § 11.)

Such railroad company shall make an entry of the balance of the proceeds of the sale, if any, of each parcel of freight owned by or consigned to the same person, as near as can be ascertained, and at any time within five years thereafter shall refund any surplus so retained to the owner of such freight, his heirs or assigns, on satisfactory proof of such ownership. (*Laws* 1854, *chap.* 282, § 12.)

§ **261.** *Disposition of unclaimed freight and baggage.*—Every railroad company which shall have had unclaimed freight or baggage not perishable, in its possession for the period of at least one year, may proceed and sell the same at public auction, after giving notice to that effect in the

State paper once a week for not less than four weeks, and for a like period in a newspaper other than the State paper, published at the place designated for the sale, and also in one published in the city of New York. (Said notice shall contain, as near as practicable, a description of such freight or baggage, the place and time when left, together with the name of the owner of the freight, or person to whom consigned, if the same be known.) All moneys arising from the sale of freight or baggage as aforesaid, after deducting therefrom charges and expenses for transportation, storage, advertising, commissions for selling the property, and the amount previously paid for the loss or nondelivery of freight or baggage, shall be deposited by the company making such sale, accompanied with a report thereof, and proofs of advertisement, with the comptroller, for the benefit of the general fund of the State, and shall be held by him in trust for reclamation by the persons entitled, or who may become entitled, to receive the same. No sale as herein provided shall be valid unless a copy of the notice above specified shall be served upon the comptroller for at least two weeks prior to the time designated for such sale. (*Laws* 1857, *chap.* 444, § 3.)

In case such unclaimed freight or baggage shall, in its nature, be perishable, then the same may be sold as soon as it can be, at the best terms that can be obtained. (*Laws* 1857, *chap.* 444, § 4.)

§ **262.** *Description of unclaimed trunks and baggage to be entered in a book.*—The proprietor or proprietors of the several lines of stages, and the proprietors of the several canal boat lines, and the proprietors of the several steamboats, and the several incorporated railroad companies, and the keepers of the several inns and taverns within this State, who shall have any unclaimed trunks, boxes or baggage within his, their or either of their custody, shall immediately enter the time the same was left, with a proper description thereof, in a book to be by them provided and kept for that purpose. In case the name and residence of the owner shall be ascertained, it shall be the duty of such person who shall have any such property as above specified to immediately notify the owner thereof by mail. (*Laws of* 1837, *chap.* 300, § 1.)

§ **263.** *Description of property to be made and published.*—In case there shall not be any information obtained as to the owner, it shall be the duty of the person having the possession thereof to make out a correct written description of all such property as shall have been unclaimed for

thirty days, stating the time the same came into his possession, and forward said description to the editor of the State paper, whose duty it shall be, on the first Mondays in July, October, January and April in each year, to publish the same in the State paper once a week for three weeks successively. (*Laws of* 1837, *chap.* 300, § 2.)

§ **264.** *If not claimed for sixty days, to be opened and inventory to be made and sold at public auction.*—In case the said property shall remain unclaimed for sixty days after the said publication, it shall be the duty of the person or company having possession thereof to apply to a magistrate of the town or city in which said property is retained, in whose presence and under whose direction said property shall be opened and examined, and an inventory thereof taken by said magistrate; and if the name and residence of the owner is ascertained by such examination, it shall be the duty of the magistrate forthwith to direct a notice thereof to such owner by mail; and if said property shall remain unclaimed for three months after such examination, it shall be the further duty of the person or company having possession thereof to apply to a magistrate as aforesaid; and if such magistrate shall deem such property of sufficient value, he shall cause the same to be sold at public auction, giving six days' previous notice of the time and place of such sale; and from the proceeds of such sale he shall pay the charges and expenses legally incurred in respect to said property, or a rateable proportion thereof to each claimer, if sufficient for the payment of the whole amount; and the balance of the proceeds of such sale, if any, the said magistrate shall immediately pay to the overseers of the poor of said town or city, for the use of the poor thereof; and the said overseers shall make an entry of said amount, and the time of receiving the same, upon their official records, and it shall be subject, at any time within seven years thereafter, to be reclaimed by and refunded to the owner of such property, his heirs or assigns, on satisfactory proof of such ownership. (*Laws of* 1837, *chap.* 300, § 3.)

265. *Expense to be a lien on the property.*—The person making the entry of unclaimed property, as above specified, shall be entitled to twelve and a half cents for each trunk, box, bale, package or bundle so entered, and shall have a lien on the property so entered until payment shall be made, or in case any additional expense shall be incurred for printing, the lien shall continue until payment shall be made for such additional expense. (*Laws of* 1837, *chap.* 300, § 4.)

§ **266.** *Penalty.*—In case any person shall neglect or refuse to comply with the provisions of this act, he shall forfeit the sum of five dollars for each and every trunk, box or bundle of baggage so neglected, as above specified, to the benefit of any person who shall sue for the same in his own name in an action of debt in any court having cognizance thereof. (*Laws* 1837, *chap.* 300, § 5..

§ **267.** *Corporation liable as common carriers and the liability for loss of freight on connecting lines.*—Any railroad company receiving freight for transportation shall be entitled to the same rights and be subject to the same liabilities as common carriers. Whenever two or more railroads are connected together, any company owning either of said roads, receiving freight to be transported to any place on the line of either of the said roads so connected, shall be liable as common carriers for the delivery of such freight at such place. In case any such company shall become liable to pay any sum by reason of the neglect or misconduct of any other company or companies, the company paying such sum may collect the same of the company or companies by whose neglect or misconduct it became so liable. (*Laws* 1847, *chap.* 270, § 9.)

See section 251, *ante.*

Liabilities and duties of the contracting company and of the connecting lines.

The act of 1847 (Laws of 1847, chap. 270, § 9)—providing that where two or more railroads are connected, any company owning either of said roads, receiving freight to be transported to any place on the line of either of said roads so connected, shall be liable as common carriers for the delivery of such freight at such place—applies as well where one of the connecting roads is beyond the State as where all are within it (*Ct. of Appeals*, 1862, *Burtis* v. *Buffalo and State Line R. R. Co.*, 24 N. Y., 259; *Root* v. *Great Western R. Co.*, 2 Lans., 199; *Hart* v. *Rensselaer and Saratoga R. R. Co.*, 8 N. Y., 37). and to a foreign corporation, being one of such connecting roads (*Root* v. *Great Western R. Co.*, *supra*; *Cary* v. *Cleveland and Toledo R. R. Co.*, whether such company have a terminus within the State or not (*Id.*) The statute not only imposes the duty upon the company undertaking it, of delivering the goods at the place of destination, but enables it to make a special contract for their delivery in a limited time (*Burtis* v. *Buf. and S. L. R. R. Co.*, 24 N. Y., 269). *Held*, accordingly, that a company whose road terminated at the boundary of this State, where it connected with a chain of roads running through Pennsylvania, Ohio, etc., was liable under its special contract for the delivery of goods, in three days, at a point in Illinois, upon such chain of roads (*Id.*)

The company to which the goods are delivered may lawfully contract for the performance of the other lines running in connection with its own, as well as for its proper route; and there is no difference in principle, in this respect, between contracts for the carriage of persons and for transportation of property (4 Seld., 37; 6 Hill, 157; 8 Mees. & W., 421; 3 Eng. L. and Eq., 497; *Ct. of Appeals*, 1858, *Quimby* v. *Vanderbilt*, 17 N. Y. [3 Smith], 306; and see *Schroeder*

v. *Hudson R. R. Co.*, 5 Duer, 55). Where goods were delivered to one railroad company, and their receipt for them was delivered to the agent of two other companies, whose roads formed a part of a continuous route, and the agent gave a receipt for the goods, agreeing to transport them—*Held*, that the latter companies were liable for loss of the goods resulting from their being sent in another direction from the point at which they should have been taken under the engagement entered into by the agent, unless they could show that the miscarriage of the goods was under circumstances that would relieve them from responsibility (*N. Y. Com. Pl.*, 1863, *Le Sage* v. *Great Wes. R. Co.*, 1 Daly, 306). When goods are delivered to a railroad company, by a connecting railroad company, to be transported to the owners, and the same are received by such company for that purpose, it becomes its duty to send them off immediately; and it cannot justify the detention of the goods on the ground that, by its regulations, goods received from a connecting road are not to be forwarded until the receipt of a bill of back charges, and that no such bill accompanied the goods (*Ct. of Appeals*, 1864, *Michaels* v. *N. Y. Central R. R. Co.*, 30 N. Y., 564). A carrier, who undertakes to forward goods beyond the terminus of his own route, is bound by any instructions given by the owner, as to the selection of carriers beyond his route (*Ct. of Appeals*, 1865, *Johnson* v. *N. Y. C. R. R. Co.*, 33 N. Y., 610).

Where merchandise is delivered to one of several connecting railroad companies, under a contract with such company for its transportation to a point upon the road of another such company, the owner cannot maintain an action against the latter company founded upon the common law liability of carriers (*Supreme Ct.*, 1868, *Manhattan Oil Co.* v. *Camden, etc., R. R.*, 52 Barb., 72; S. C., 5 Abb. Pr. [N. S.], 289). The remedy is only upon the contract, and the latter company are entitled to the benefit of any exceptions in the contract made with the former (*Id.*) Where goods delivered to a steamboat company forming part of a continuous line, were marked "railroad line," the jury were instructed to determine, from the evidence as to the customary understanding of those words, whether they formed a part of the contract between the parties as to the forwarding of the goods (*Supreme Ct. Circuit*, 1845, *Read* v. *Ladd*, 1 Edm., 100). Where goods shipped for transportation must pass through the hands of several intermediate carriers before arriving at the place of their destination, the duty of each intermediate carrier is to transport the goods safely to the end of his route, and deliver them to the next carrier on the route beyond. An intermediate carrier, in such case, does not relieve himself from liability by simply unloading the goods at the end of his route, and storing them in his warehouse, without delivery or notice to, or any attempt to deliver to, the next carrier (*Ct. of Appeals*, 1866, *McDonald* v. *Western R. R. Corp.*, 34 N. Y., 497).

The defendant, a common carrier, received at Albany, from the Hudson River Railroad Company, a box of goods to be transported to Rochester, and delivered to the owners for hire. Instead of forwarding the box immediately, it detained the same in its freight-house at Albany, to await the rendering of a bill for back charges by the Hudson River Railroad Company. While so detained, the goods were injured by being wet by an unusual and extraordinary rise in the waters of the Hudson river. *Held*, that the detention of the goods was negligence on the part of the defendant; and that such negligence having concurred in and contributed to the injury to the goods, the defendant was precluded from claiming the exemption from liability, which the law would other-

wise extend to it; and was liable as a common carrier for the damages sustained by the plaintiffs; and that the only question to be considered by the jury was the amount of damages. (S. P., *Read* v. *Spaulding*, id., 630.) That a part owner of one of several lines for the transportation of passengers, running in connection over different portions of a route of travel, may contract as principal for the conveyance of a passenger over the whole route; and that such contract may be established by the circumstances, notwithstandtng the passenger receives tickets for the different lines, signed by their separate agents. (17 N. Y., 306; *Ct. of Appeals*, 1863, *Williams* v. *Vanderbilt*, 28 N. Y., 217.)

Under a contract to carry a passenger over a carrier's route, the loss of a particular vessel designated in the contract, although by the act of God, leaves the carrier under obligation to exercise diligence in providing another vessel for the carriage of the plaintiff. He was bound to use all the means, in endeavoring to supply another vessel, which a diligent, careful man exercises in regard to his own affairs. The promise to carry in a particular vessel is a minor part of the contract; and the fact that she is lost, does not wholly absolve the defendant from all duty under the contract. The non-performance of a contract is not excused by the act of God, where it may be substantially carried into effect, although the act of God makes a literal and precise performance of it impossible. (2 Pars. Contr., 3d ed., 185; 26 Me., 361 [*Id.*]).

Goods which were transported by a railroad company, to be delivered at the terminus to another carrier, were called for by the latter on the day after their arrival at the terminus, and the charges paid; but the company was not ready to make the delivery, and it was mutually agreed, for the convenience of both, that the goods should be delivered the next morning. During the night they were destroyed by fire in the warehouse. *Held*, that the liability of the railroad company, as carriers, had not terminated. (20 N. Y., 259; *Supreme Ct.*, 1866, *Fenner* v. *Buffalo and State Line R. R. Co.*, 46 Barb., 103.)

Where merchandise is delivered to one of several connecting railroad companies, under a contract with such company, for its transportation to a point upon the road of another such company, the owner cannot maintain an action against the latter company founded upon the common-law liability of carriers. (*Supreme Ct.*, 1868, *Manhattan Oil Co.* v. *Camden and Amboy R. R. and Transp. Co.*, 52 Barb., 72; S. C., 5 Abb. Pr. [N. S.], 289.) The remedy is only upon the contract, and the latter company are entitled to the benefit of any exceptions in it. (*Id.*)

The liability imposed by 2 R. S., 5th ed., 693, § 67—making companies owning connected roads liable as carriers—does not extend to charge one company for the act or neglect of another, which previously received the goods and injured them. It applies only to the company originally receiving and undertaking to convey the goods. (*Supreme Ct.*, 1864, *Smith* v. *N. Y. C. R. R. Co.*, 43 Barb., 225.)

(The section of the Revised Statutes above referred to, is Laws of 1847, chap. 270, § 9, given in the text.)

If a railroad company, receiving freight for transportation, intends to limit its liability to injuries occurring upon its own road, it should provide for such limitation, in its contract. (*Supreme Ct.*, 1856, *Foy* v. *Troy and Boston R. R. Co.*, 24 Barb., 382.) A railroad company may contract to transport and deliver goods to a point beyond its own limits. (*Supr. Ct.*, 1855, *Schroeder* v. *Hudson R. R. R. Co.*, 5 Duer, 55.)

A carrier received goods, to be carried to Albany, and to be forwarded thence to New York, with instructions to forward them by the P. line. On arrival of the goods at Albany, the proprietors of the P. line refused to receive them; and the carrier forwarded them by a freight barge, on board which they were lost. *Held*, that the carrier was liable for the loss. On the refusal of the steamboat proprietors to receive the property, the carrier should either have communicated the fact to the plaintiff, and awaited further instructions, or should have relieved himself from liability by depositing the goods for safe-keeping in a suitable warehouse. (9 Barr., 148; 20 N. Y., 259; 1 Den., 451.) (*Id.*) The facts in this case disclosed no such emergency as warranted the carrier in deviating from his instructions, on the ground that the safety of the property required it. (*Id.*)

Where it does not appear that the company received compensation for the entire distance, its liability as common carrier is terminated upon delivery of the goods at the end of its route to another carrier, and thereafter its liability, if any, is as a forwarder (*Hempstead* v. *N. Y C. R. R. Co.*, 28 Barb., 485; *Fenner* v. *Buffalo, etc., R. R. Co.*, 46 id., 103; *Dillon* v. *N. Y. and Erie R. R. Co.*, 1 Hilt., 231), unless it neglected to give necessary instructions, as to whom to deliver the property. (*Hempstead* v. *N. Y. C. R. R. Co., supra.* Where it receives compensation for the entire route, it is bound to perform the entire service. (*Hart* v. *Rensselaer, etc., R. R. Co.*, 8 N. Y., 37; *Wilcox* v. *Parmelee*, 3 Sandf., 61; *Cary* v. *Cleveland and Toledo R. R. Co.*, 29 Barb., 35; *Foy* v. *Troy and Boston R. R. Co.*, 24 id., 382.) Where three separate railroad companies, owning distinct portions of a continuous railroad between two termini, run their cars over the whole road, employing the same agents to sell passage tickets and receive luggage to be carried over the entire road, an action may be maintained against one of them for the loss of the luggage of a passenger received at one terminus to be carried over the whole road. *Ct. of Appeals*, 1853, *Hart* v. *Rensselaer and Saratoga R. R. Co.*, 8 N. Y. [4 Seld.], 37.) The New York Superior Court held, in *Schroeder* v. *Hudson R. R. R Co.* (5 Dyer, 55), that a railroad company can make a valid contract for the transportation of freight beyond the limits of its own road, as their limits are fixed by its charter.

The defendant undertook to carry goods from Rochester to Rome, and there deliver the same to the Rome and W. R. R. Co , to be conveyed to S. after which delivery to the latter company, the defendants were not to be responsible for them. There was a delay of twelve days in so delivering the goods; and on the day after they were so delivered, but before the same were delivered at S. by the latter company, the present action was commenced. *Held*, that the delivery to the Rome and W. R. R. Co. was equivalent to a delivery to the plaintiffs, and that such delivery having been made before suit brought, no right of action existed, except for the delay on the part of the defendant. (*Supreme Ct.*, 1858, *Briggs* v. *N. Y. C. R. R. Co.*, 28 Barb., 515.) By the delivery of the property by the first carrier, at the end of his route, to another carrier, according to the usual course of business, the liability of the first carrier is terminated, unless he omitted to give the necessary instructions to the latter carrier as to the delivery of the property; and in the absence of any proof upon that subject, it must be presumed that he accompanied the delivery with all such instructions as the law required to be communicated; and an action against him, as a common carrier, to recover damages for the loss of the

property, after he had so delivered it, cannot be sustained. His further liability, if any, is as a forwarder. (*Supreme Ct.*, 1858, *Hempstead* v. *N. Y. Cent. R. R. Co.*, 28 Barb., 485.) When goods are delivered to a carrier for transportation beyond the terminus of his line, and they are there delivered to another carrier to be forwarded, the latter is not liable for any damage to the goods, except upon proof that the injury occurred while they were in his custody. (6 Hill, 157; 1 E. D. Smith, 234.) And it makes no difference that he received freight as agent for the other lines in addition to his own charges for transportation. (*N. Y Com. Pl.*, 1856, *Hunt* v. *N. Y. and Erie R. R. Co.*, 1 Hilt , 228.) Where the company was to deliver the goods at its terminus to a second company, but on arrival at such place, it was mutually agreed for the convenience of both that the delivery should take place the following morning, and during the night they were destroyed by fire; *held*, that the liability of the company as common carrier had not terminated. (*Fenner* v. *Buffalo, etc , R. R. Co.*, 46 Barb., 103.) Where forwarders place goods in the vessel of a carrier, the carrier has a right, as against the owner, to do with the goods whatever the law authorizes common carriers to do, without reference to the contract of the owner with the forwarders. (*Supreme Ct., Sp. T.*, 1855, *Hersfield* v. *Adams*, 19 Barb., 577.) The second company is liable for a loss of property while in its charge (*Hart* v. *Rensselaer, etc., R. R. Co.*, 8 N. Y., 37; *McCormick* v. *Hudson R. R. R. Co.*, 4 E. D. Smith, 181; *Wing* v. *N. Y. and Erie R'way Co.*, 1 Hilt., 235), but is not liable for damage done to the goods before they came under its charge. (*Smith* v. *N. Y. Cent. R. R. Co.*, 43 Barb., 225; *Hunt* v. *N. Y. and Erie R. R. Co.*, 1 Hilt., 228.)

The last paragraph of the section only applies to the road which receives the goods; it does not extend to intermediate railroads. The statute was only intended as declaratory, and its language and purposes show that it does not refer to the various intermediate carriers and the route; hence, if a shipper makes a contract with the company which first receives the goods, limiting its liability, the statute cannot be resorted to for the purpose of determining the liability of the subsequent carriers of the goods. (*Root* v. *G. W. R. R. Co.*, 45 N. Y., 524; reversing, 2 Lans., 199.) Where a railroad company agrees to carry property beyond the terminus of its own road, and receives the goods under such an agreement, it is liable as a common carrier for the default of the road running in connection with it on the route to the place of delivery. (*Root* v. *Great West R. R. Co.*, 45 N. Y., 524; *Condict* v. *Grand Trunk R'way Co.*, 4 Lans., 107; *Vide Harte* v. *R. and S. R. R. Co.*, 4 Seld , 37; *Laws* 1847, *chap.* 270, § 9.)

Where a railroad company contracting to transport and deliver goods beyond its own line makes a provision excepting liability from certain specified hazards the connecting road which received the goods from the contracting road is entitled to the benefit of such exception (*Ætna Ins. Co* v. *Wheeler*, 49 N. Y., 620; citing *Magher* v. *Camden and Amboy Tr. Co.*, 45 N. Y., 514).

Carriers and their powers.

It seems that every person who undertakes to carry, for a compensation, the goods of all persons indifferently, is, as to liability, to be deemed a common carrier (*Bank of Orange* v. *Brown*, 3 Wend., 158). Railroad companies are responsible as common carriers (*Buffalo Superior Ct.*, 1866, *Heineman* v. *Grand Trunk R. R. Co.*, 31 How. Pr., 430). Where a railroad company receives, for transportation, property addressed to a person at a point beyond the terminus of its road, they must be understood, in the absence of any proof to the con-

trary, to have agreed to deliver the property in the same order and condition in which it was received, to the consignee (*Supreme Ct*, 1856, *Foy* v. *Troy and Boston R. R. Co.*, 24 Barb., 382.) Carriers whose route was a short one, received goods which were to be transported to a point far beyond their terminus, and which were addressed accordingly. *Held*, that the copy of the address, which was entered in the receipt they gave, was matter of description, and did not constitute an undertaking on their part to transport them beyond their own route (*Supreme Ct.*, 1856, *Wright* v. *Boughton*, 22 Barb., 561). Some questions have arisen in regard to the distinction between forwarders and common carriers. The statute indicates that railroad companies having connecting lines are liable as common carriers. As to forwarders and carriers distinguished, see *Place* v. *Union Exp. Co* (2 Hilt., 19). In *Teall* v. *Sears* (9 Barb., 317), the questions are discussed and the court (*Supreme Ct.*, 1850) *Held*, that if persons calling themselves forwarders so act and conduct their business as to lead the public to regard them as carriers and employ them as such, without intervention of their true character, the liability of a carrier attaches to them. So also. through an agreement to forward goods, marked for a particular destination, would be discharged by shipping them, by the usual or most direct conveyance, to the place designated, yet it is otherwise on an agreement to forward them to the place of their destination, the charge for freight for the whole distance being fixed and specified in the agreement. In such case, the parties making it are liable as common carriers for the safe carriage and final delivery of the goods at the place of their final destination, although it is at a point beyond the usual terminus of the carrier's route. But see 3 Sandf., 610, 19 Wend., 534; 4 Seld., 37; 2 Kern., 343; *N. Y. Com. Pl.*, 1856, *Krender* v. *Woolcott* (1 Hilt., 223).

The defendants received goods for transportation directed to a point beyond the terminus of their route, and known to be so by the shipper. At the time of receiving them, the agent of the company told the shipper that it would be unnecessary for him to have any one at the terminus to receive the goods, but that they would be shipped right through to the place of their ultimate destination. It did not appear that the company were to receive freight for the entire distance. *Held*, that the company were not liable, as common carriers, for the safe carriage and the delivery of the goods at their final destination. They were liable, as common carriers only, to the terminus of their road, and thereafter their liability was that of forwarders (6 Hill, 158; 16 Verm., 62; 18 id., 131; 22 Conn., 1; 1 Gray, 502; 1 Pars. on Cont., 661; *N. Y. Com. Pl.*, 1856, *Dillon* v. *N. Y. and Erie R R. Co.*, 1 Hilt., 231). This distinction in regard to the payment of freight enters as an element of the adjudicated cases; but see the language of the statute as given in the text

The defendant was a common carrier on the Erie canal, owning no vessels on Lake Erie, and contracted, for an entire compensation, "to forward" plaintiff's goods from New York city to Fairport, Ohio; those goods marked "steam" to go by steam, all other goods to be shipped by vessel. *Held*, that he was not a mere forwarder on the lake, but a common carrier for the whole distance. The fact that the compensation is entire, is ground for inferring that though the defendant carried with his own means of transportation only for a certain distance, yet that he made contracts with other carriers, and that they were partners *inter se* as to the carriage money (8 Mees & W., 421; *N. Y. Superior Ct.*, 1850, *Wilcox* v. *Parmelee*, 3 Sandf., 610; and see *Mercantile Mu-*

tual Ins. Co. v. *Chase*, 1 E. D. Smith, 115; see *Ætna Ins. Co.* v. *Wheeler*, 49 N. Y., 616.)

A bill of lading of gold delivered at San Francisco to a common carrier stated that it was shipped on the vessel at San Francisco, and that "on arrival at Panama, the same is to be forwarded across the isthmus, and to be reshipped by one of the United States Mail Steamship Company's ships to New York, * * * and to be delivered in like good order and condition at the port of New York, danger of the seas (land carriage and river navigation, thieves and robbers) excepted." *Held*, that the carrier did not cease to be such as to the transportation across the isthmus, and become a mere bailee for hire, chargeable only on proof by the shipper that the loss arose from his negligence, or that of his servants. The duty assumed by him was the duty of a common carrier throughout; and to exonerate himself from liability for a loss, he was bound to show that it occurred from one or more of the causes within the exception dangers of the seas, dangers of land carriage and river navigation, and dangers from thieves and robbers. (*N. Y. Superior Ct.*, 1861, *Simmons* v. *Law*, 8 Bosw., 213.)

A carrier on the Erie canal was also engaged in transporting property for hire west of Buffalo, upon the lakes, and made a contract to carry from Albany to Milwaukee. *Held*, that his contract was that of a common carrier for the whole distance, though he had no interest in any vessel on the lakes. He was engaged in the business of transportation, and was interested in the freight, and whether he used his own boats or vessels, or employed the vessels of other persons, to carry for him, on some part, or even all of the route, can be a matter of no consequence. (19 Wend., 329; 9 Barb., 317; *Supreme Ct.*, 1854, *Moore* v. *Evans*, 14 Barb., 524; and see *Harmony* v. *Bingham*, 1 Duer, 209.) A railroad company, whose ordinary business was the transportation of property upon its railroad, for hire, agreed with the plaintiff to furnish the motive power to draw his cars, laden with his property, over its railroad, the plaintiff being bound to load and unload the cars, and to furnish the brakemen to accompany them on the road, who were to be under the control of the defendant's conductor. *Held*, that the company was liable as a common carrier for an injury to the cars of the plaintiff, and his property therein, not caused by inevitable accident or the public enemies. (*Supreme Ct.*, 1862, *Mallory* v. *Tioga R. R Co.*, 39 Barb., 488.) A common carrier is not clothed by law with the powers of a general agent, broker, factor or commission merchant, and is not a general agent for the sale of goods intrusted to him. *So held*, of a canal-boatman. (*Supreme Ct.*, 1830, *Arnold* v. *Halenbake*, 5 Wend., 33; and see Laws of 1830, 203, chap. 179, § 6; same statute, 3 Rev. Stat. [5th ed.], 77.)

A carrier who has a lien for advances made by him upon goods consigned to him for further transportation has a special property sufficient to enable him to maintain an action for recovery of their possession against any one not claiming rightfully under the owner. (1 East, 4; 7 id.; 4 Johns., 116; 12 Pick., 297: *Ct. of Appeals*, 1864, *Fitzhugh* v. *Wiman*, 9 N. Y. [5 Seld.], 550.) A common carrier has no lien upon goods for damages arising from the neglect of the consignee to take them away within a reasonable time after notice to him of their arrival. The inconvenience or expense thus occasioned constitutes a claim in the nature of demurrage. There is a breach of contract simply, for which the party must seek his redress in the ordinary manner; he cannot enforce it by a detention of the goods. (*Ct. of Appeals*, 1868, *Crommelin* v. *N. Y. and H.*

R. R. Co., 4 Keyes, 90.) Though, where goods are transported by separate carriers, forming a connecting line, a carrier who pays freight due to a carrier on a former part of the line has a lien upon the goods therefor, yet he has no lien for more than was actually due; and if he pays more than that, the loss is his own. (1 Doug., 1; *Supreme Ct.*, 1862, *Travis* v. *Thompson*, 37 Barb., 236.)

It seems, that common carriers in whose possession goods transported by them are left remaining in their vehicles, by the delay of the consignee to receive them, do not acquire, under such an implied agreement, a lien on the goods for such compensation. (*Crommelin* v. *N. Y. and H. R. R.*, 10 Bosw., 77.) A common carrier, who has contracted to carry goods to a specified point, is not justified in storing the goods at an intermediate point, because he considers the further carriage thereof would be unsafe. If he have any doubts about the safety of any portion of the route, he should inform the consignor thereof and notify him that, unless the goods are called for at an intermediate point, he will store them there. (*N. Y. Superior Ct.*, 1864, *Van Winkle* v. *Adams Express Co.*, 3 Robt., 59.) The carrier cannot dispute title of those whom he recognizes as owners by his contract. (*Supreme Ct., Sp. T.*, 1855, *McGaw* v. *Adams*, 14 How. Pr., 461.) A carrier cannot recover freight on that part of his cargo which is destroyed by the act of God. (*Supreme Ct.*, 1865, *Price* v *Hartshorn*, 44 Barb., 655.)

Parties doing business as forwarders and also as carriers, agreed orally with the owners to transport merchandise to be delivered to them from time to time; and subsequently, on receiving a portion thereof to be transported under this agreement, they gave a receipt, stating that the same was received *to be forwarded*. *Held*, that they were responsible as carriers, and not as forwarders. The receipt did not exclude evidence of the agreement under which it was given, and the words "to be forwarded" should not, in such case, be construed in a technical sense. (*Ct. of Appeals*, 1856, *Blossom* v. *Griffin*, 13 N. Y. [3 Kern.], 569; see, also, as to this point, *Scovill* v. *Griffith*, 12 N. Y. [2 Kern.], 509.)

The general liability of the company as a carrier of property.

A common carrier is liable, as such, as soon as he receives the goods for carriage, notwithstanding he has not commenced his journey, or given bills of lading. (*Ct. of Appeals*, 1859, *Lakeman* v. *Grinnell*, 5 Bosw., 625.) A common carrier of property is responsible for all loss or damage, except that which is caused by the act of God or the public enemy. (*Supreme Ct.*, 1813, *Elliott* v. *Russell*, 10 Johns., 1; 1814, *Kemp* v. *Coughtry*, 11 id., 107; and see *Dorr* v. *N. J. Steam Nav. Co.*, 11 N. Y. [1 Kern.], 485; *Miller* v. *Steam Nav. Co.* [6 Seld.], 431; *Camden, etc., R. R. Co.* v. *Burke*, 13 Wend., 611; *Same* v. *Belknap*, 21 id., 354; *Roth* v. *Buffalo, etc., R. R. Co*, 34 N. Y., 648; *Jones* v. *Norwich, etc., Transp. Co.*, 50 Barb., 193; *Glasco* v. *N. Y. C. R. R. Co.*, 36 id., 557; *Cary* v. *Cleveland, etc., R. R. Co.*, 29 id., 35; *Heineman* v. *Grand Trunk R. R. Co.*, 31 How. Pr., 430.) A common carrier is liable for the loss of goods, even by the act of God, if he has by his own fault—*e. g.*, by unreasonable delay in their transportation—exposed them to the cause of loss. (6 King, 716; 1 Conn., 492; *N. Y. Superior Ct.*, 1859, *Read* v, *Spaulding*, 5 Bosw., 395.) In an action against a carrier to recover for goods lost, a request to charge the jury that the fact that the loss was occasioned by *an inevitable accident*, against which defendant could not have guarded by the exercise of due diligence and precaution, discharged the defendant, was *held*, properly refused. A common carrier is an insurer

against all losses, except such as are directly produced by divine interposition or attacks by public foes. (1 Ld. Raym., 546; 2 id., 909; 5 Bing., 217; 19 Wend., 241; 21 id., 198; 4 Taunt., 126; 4 Doug., 287; 1 T. R., 27; Ang. Carr., § 166; Story Bailm., § 512; Abb. Shipp., pt. 3, ch. 4, § 1; *Supreme Ct.*, 1858, *Merritt* v. *Earle*, 31 Barb., 38.) It cannot limit his liability by a regulation to the effect that all claims for damages through loss or injury to the property transported, must be made within ten days after delivery of the goods at the station. (*Browning* v. *Long Island R. R. Co.*, 2 Daly, 117.) The exemption of a carrier from the performance of his duty by the act of God, extends no further than is necessary for the purpose of justice. The carrier must fulfil his obligation as nearly as the act of God will allow. (1 Pars. on Cont., 184; 26 Me., 368; 1 Plow., 284; *Supreme Ct.*, 1859, *Williams* v. *Vanderbilt*, 29 Barb., 491.)

While the goods were still in the carrier's custody, in his boats, a fire broke out in the city, and extended to and destroyed the boats and the goods. *Held*, that the carrier was liable for the value of the goods. A loss arising from an accidental fire, or conflagration of a city, without any default whatever on the part of the carrier, furnishes no excuse for the carrier, for it does not fall within the exception as an act of God. (2 Kent's Com., 602; Story on Bail., §§ 507, 511, 528; 5 T. R., 389; 4 Bing., 314; 19 Wend., 234; *Ct. of Appeals*, 1853, *Miller* v. *Steam Nav. Co.*, 10 N. Y. [6 Seld.]. 431; affirming S. C., 13 Barb., 361; to the same effect is *Gould* v. *Chapin* [*Supreme Ct.*, 1851], 10 Barb , 612.) The freezing of perishable articles by reason of an unusual intensity of cold, is not such an intervention of the *vis major* as excuses the carrier, if the accident might have been prevented by the exercise of due diligence and care on his part. Doing what is usual is not sufficient to exempt him from a charge of negligence. He must show that he has done what was necessary to be done under all the circumstances. (*N. Y. Com. Pl.*, 1856, *Wing* v. *N. Y. and Erie R. R. Co.*, 1 Hilt., 235.) And the mere fact that the plaintiff furnished the vehicles and brakemen necessary for the loading, unloading and transportation of his property, on the road of the company, while the company furnished the motive power, does not render it less liable as a common carrier. (*Mallory* v. *Tioga R. R. Co.*, 39 Barb., 488.)

Privity of contract not necessary.

An action can be maintained by the owner of goods, against a carrier in whose custody they are injured, although there is no privity of contract between the owner and the carrier, and notwithstanding the contract was, in fact, made between the carrier and another carrier, who undertook the carriage of the goods for the whole distance, and received freight therefor. (6 How. [U. S.], 380; 6 Binn., 128; 2 Kern., 342; 2 Greenl. Ev., § 210; *N. Y. Com. Pl.*, 1855, *Wing* v. *N. Y. and Erie R. R. Co.*, 1 Hilt., 235.) Where the carrier takes goods for one having a lien upon them, agreeing, as a part of his undertaking, to collect the amount due on delivering them, but neglects to do so, it is no defense to an action against him that the goods were damaged on the voyage by the act of God, to an amount exceeding that of the lien, provided the goods were still of sufficient value to satisfy it. (*Supreme Ct.*, 1848, *Lee* v. *Salter*, Hill & D. Supp., 163.) As to whether the general owner of property can maintain an action against a carrier, who receives it from a forwarder, under contract with the latter to transport to the owner, and who fails to deliver it, whereby it is lost. (See *Green* v. *Clark*, 13 Barb., 57; S. C. on appeal, 12 N. Y. [2 Kern.], 343.) The common law rule of liability does not extend to the

carriage of animals. (*Crogin* v. *N Y. C. R. R. Co.*, 51 N. Y., 61; and see 49 N. Y., 204.)

The liability of a common carrier for the loss, by negligence, of goods in trusted to his care for transportation, is not a liability founded upon contract. No debt arises from the negligent loss of goods by a common carrier. He is not an insurer of the safe delivery of goods notwithstanding he has contracted safely to carry them from one part to another. He is not required to make a delivery where he has been overtaken by an inevitable accident. He is held liable for loss by negligence, not from any contract against negligence, but because such a loss arises from a breach of duty imposed by the trust or agency which he has assumed. The loss in such case does not arise from any contract, but from the negligence of the defendant in respect to his trust or agency. The negligence is the cause of action, and it is in the nature of a tort, not much less culpable than it is for one carelessly to injure or destroy the property of another (*Supreme Ct.*, 1866, *Atlantic Mut. Ins. Co.* v. *McLoon*, 48 Barb., 27). The law adjudges a common carrier responsible for loss of goods, irrespective of any question of negligence or fault on his part, if the loss does not occur by the act of God or the public enemies. With these exceptions, the carrier is an insurer against all losses (*Ct. of Appeals*, 1864, *Merritt* v. *Earle*, 29 N. Y., 115). The expression "act of God," as used in the law of carriers, includes those losses and injuries which are occasioned exclusively by natural causes, such as could not be prevented by human care, skill or foresight. All the cases agree in requiring the entire exclusion of human agency from the cause of the injury or loss If the loss or injury happen in any way through the agency of man, it cannot be considered the act of God; nor even if the act or negligence of man contributes to bring or leave the goods of the carrier under the operation of natural causes that work their injury, is he excused. In short, to excuse the carrier, the "act of God," or *vis divina*, must be the sole and immediate cause of the injury. If there be any co-operation of man, or any admixture of human means, the injury is not, in a legal sense, the act of God (21 Wend., 190; 31 Barb., 38; Abbott on Shipp.; 3 Esp., 127; 1 T. R., 27; 1 Harp., 568; 4 Harr., 448; 4 Bing., 607; 4 Zabr., 697; Edw. on Bail., 454; Ang. on Carr., § 156; per Wright, J., *Ct. of Appeals*, 1864, *Michaels* v. *N. Y. C. R. R. Co.*, 30 N. Y., 564). A common carrier is relieved from liability for the loss of goods undertaken to be transported by him, by any fraud or imposition practiced upon him by the owner of such goods, in respect to their value or nature. So that where a case containing very valuable articles is prepared so as to resemble those in which articles of little value are usually carried, so that the carrier is thereby imposed upon as to such value, he is not liable for the loss of its contents, even though he has not limited his liability by any notice—citing many authorities (*N. Y. Superior Ct.*, 1868, *Warner* v. *Western Trans. Co.*, 5 Robt., 490). Even though fraud be in all cases a question of intent, an acknowledgment by a plaintiff that cases of hers containing valuables, before being placed in the hands of a common carrier to be transported by him, were disguised with the intent that no one should suspect they contained anything valuable, may exonerate the carrier; for if unexplained, it is conclusive evidence of such a legal fraud as to exempt him from liability. (*Id.*)

Any person holding himself out to the world as a carrier to a certain place; whose custom it is to carry goods to that place; who tells a consignor and his agent that he carries to that point, and charges freight thus far, is liable for any

neglect to carry the goods the whole distance; unless at the time he expressly limits his liability to an intermediate point (*N. Y. Superior Ct.*, 1864, *Van Winkle* v. *Adams Exp. Co.*, 3 Robt., 59). In an action against a common carrier for goods delivered to him to be transported, etc., the right of the true owner may be set up by the carrier as a defense against the shipper or bailor, where the property has been taken by legal process in a suit instituted for such purpose. The common carrier is exonerated from his obligation to his bailor where the property of the latter is taken from him by legal process and where the carrier immediately notifies him of such taking (*Ct. of Appeals*, 1867, *Bliven* v. *H. R. R. R. Co.*, 36 N. Y., 403). In an action alleging as the cause of action the conversion of plaintiff's trunk by the defendants as common carriers, the plaintiff cannot recover without some proof of an absolute appropriation of it by the defendants to their own use, or, what is equivalent, parting with it to others without plaintiff's authority. If he relies on mere nondelivery and loss, he must state the cause of action accordingly, as would have been done in a special action on the case, or assumpsit for a breach of the undertaking to carry (*N. Y. Superior Ct.*, 1868, *Tolando* v. *National Steam Nav. Co*, 5 Robt., 318; S. C., less fully reported, 4 Abb. Pr., 316, and 35 How. Pr., 496).

The fact that the contract for the transportation of property by a carrier was made, and the property delivered to the carrier, on Sunday, does not exempt the carrier from his liability for the loss. 1. A contract is not void, under our Sunday laws, because it is made on Sunday. To render it invalid, it is necessary that the contract should require the work or labor agreed for to be performed on Sunday. 2. To entitle the plaintiff to recover against the carrier, it is immaterial whether the contract is good or bad. It is enough that the defendant, being a common carrier, had in his custody, for transportation, the plaintiff's property, and, by his neglect or violation of duty, it was lost. The liability of a common carrier does not rest on his contract, but is a liability imposed by law. It exists independently of the contract, having its foundation in the policy of the law, and it is upon this legal obligation that he is charged as carrier for the loss of the property intrusted to him. (Edw. on Bailm., 466; 2 Wend., 338; 19 id., 230; 1 Chitty R., 1; *Ct. of Appeals*, 1864, *Merritt* v. *Earle*, 29 N. Y., 115.) The obligations of carriers of goods are absolute, and their liability does not depend upon their being negligent. (S. & R. on Negligence, 291.) For the liability of the company for cattle accompanied by a drover, see *Striger* v. *Erie R'way Co.* (5 Hun, 345).

Delivery to the company.

In order to maintain an action against a railroad company as a carrier for injuries to goods entrusted to the defendants for transportations, it must be established that the property was *actually delivered* to them, by being placed in such a position that it might be taken care of by the agent having charge of the business and under their immediate control. To show that such agent was notified does not make out a valid acceptance and delivery. The place of delivery is important, and due care must be used to leave the property where it is not exposed to danger. (*Ct. of Appeals*, 1868, *Grosvenor* v. *N. Y. C. R. R. Co.*, 39 N. Y., 34; S. C., 5 Abb. Pr. [N. S.], 345.) A railroad company, to whom goods are delivered and placed in their cars, are liable for them, though the delivery may have been to an agent of an express company, which had an arrangement with the railroad company not known to the owner. (*N. Y. Com.*

Pl., 1853, *Langworthy* v. *N. Y. and H. R. R. Co.*, 2 E. D. Smith, 195.) Mere delivery of goods by depositing them at a railroad station, without giving the agents of the company distinct directions, *held*, not sufficient to put the company in default for not carrying them safely. (*Supreme Ct.*, 1853, *Spad* v. *H. R. R. R. Co.*, 16 Barb., 383.) Where goods are delivered to a carrier, marked for a particular destination, without any directions as to their transportation and delivery, save such as may be inferred from the marks, the carrier is only bound to transport and deliver them according to the established usage of the business in which he is engaged, whether the consignor knew of the usage or not. (*Ct. of Errors*, 1843, *Van Santvoord* v. *St. John*, 6 Hill, 157; reversing S. C., 25 Wend., 660; *Supreme Ct.*, 1858, *Hempstead* v. *N. Y. C. R. R. Co.*, 28 Barb., 485. There must be a delivery, and the delivery must be to one authorized to receive the goods. Where the package was delivered to the driver of a coach, who apprised the party that he had no authority to enter it on the way bill, but consented to carry it on to the next agent and have it entered, and nothing was paid for its transportation, *held*, no delivery to the carrier. The driver was the agent of the party who delivered to him the goods. (*Supreme Ct.*, 1848, *Blanchard* v. *Isaacs*, 3 Barb., 388.)

An agent, who is the general agent of a railroad company, who are carriers beyond as well as upon their own road, with authority to receive freights, and to sign receipts therefor, may bind the company by a receipt for freight to be carried beyond their own road, though he has no express authority to do so. (*N. Y. Superior Ct.*, 1855, *Schroeder* v. *Hudson R. R. R. Co.*, 5 Duer, 55.) Where, according to the usual custom and understanding of parties, a delivery on the dock, near a boat, is a good delivery so as to charge the carrier, it must always be accompanied with express notice; otherwise, he is not answerable. (*Supreme Ct.*, 1827, *Packard* v. *Getman*, 6 Cow., 757.) Goods delivered for transportation to a railroad company at one of their freight-houses, at the usual place for transacting such business, and to persons authorized as agents to receive them, and placed in the freight-house by the company's agents, for its convenience, and for the purpose of facilitating the transportation of them at the earliest practicable period, are to be regarded as held by the company as carriers, and not as warehousemen. It makes no difference that the company's agent neglected the usage and duty which required him to give a receipt and enter the transaction upon the company's books. (*Supreme Ct*, 1866, *Coyle* v. *Western R. R. Corp.*, 47 Barb., 152.) A common carrier, having received goods for transportation, and given a bill of lading therefor, specifying the name of the consignee to whom the goods are to be delivered, and containing a copy of the mark, is not excused from their loss by the fact that they were not sufficiently marked. (*N. Y. Com. Pl.*, 1856, *Krender* v. *Woolcott*, 1 Hilt., 223.)

Plaintiff delivered packages to the agent of a railroad company, directed to "B., care of U., Troy," and U. was an agent of the same company. No instructions were given, except by this direction. The company carried the package to Troy, and delivered it to U. *Held*, that their contract was performed, and they were not liable for a subsequent loss. (*Supreme Ct.*, 1858, *Bristol* v. *Rensselaer and Saratoga R. R. Co.*, 9 Barb., 158.) The plaintiff sent goods to the office of a common carrier, and an arrangement was there made for their transportation, but the receipt given simply specified the receipt of the goods, describing them as marked with the consignee's address. *Held*, that evidence of these facts was evidence of a contract to transport the goods, and

the carrier was liable for injuries to them. Either the receipt, accompanied by the delivery, was equivalent to such a contract, or if not, then there was no written contract, and evidence of the parol arrangement to send them was admissible with the receipt. (*Ct. of Appeals*, 1853, *McCotter* v. *Hooker*, 8 N. Y. [4 Seld.], 497.)

A carriers' receipt for household furniture specified, among other things. "1 cradle." The cradle had a carpet wrapped around it, was bound with cords, and contained a valise, with wearing apparel in it. The agent who gave the receipt was informed what the cradle contained. *Held*, that the carriers were bound to carry not only the cradle, but also the goods then in it, and were liable for the loss of the goods. (*Supreme Ct.* 1858, *Harmon* v. *N. Y. & Erie R. R. Co.*, 28 Barb., 323.) Mere carriers of property from one given place to another —*e. g.*. from New York to San Francisco—cannot be compelled, against their will, to become carriers from intermediate places. Therefore, when property is alleged to have been delivered to their agent, at an intermediate point, his authority to receive it at that place, is a proper inquiry upon the trial of an action against the carriers for an omission to deliver the property. (*Supreme Ct.*, 1854, *Thurman* v. *Wells*, 18 Barb., 500.)

Delivery by the company.

The carrier's undertaking to transport the goods, necessarily includes the duty of delivering them in safety. (*Supreme Ct.*, 1835, *De Mott* v. *Laraway*, 14 Wend., 225.) An action does not lie against carriers by steamboat, for loss of goods, occurring after landing them upon the wharf and the lapse of a reasonable time for the consignee to send for and remove them, where, by the settled usage of business between the parties, the consignees were accustomed to send for their goods at the wharf, and no negligence on defendants' part is shown. (*Supreme Ct.*, 1868, *Ely* v. *New Haven Steamboat Co.*, 53 Barb., 207; S. C., 6 Abb. Pr. [N. S.], 72.) If the consignee's place of business was closed on the day of arrival, the carriers are excused from giving him notice of the arrival. (*Id.*) It makes no difference that such day was the fourth of July. (*Id.*) Ordinarily, the address of a package to the care of any one, is an authority to the carrier to deliver it to such person; but when the person to whom it is thus addressed is the agent and principal representative of the carrier himself, at the point where the carriage is to terminate, it may be regarded as a mere expansion of the ordinary direction to have it stopped at the place on the route where that agent is in charge of the business. *So held*, where a package delivered to common carriers for transportation along their route, on its way to a consignee, upon a lateral route branching off from that of the carriers, was addressed to the care of the agent of the carriers at the place where the carriage by them was to terminate. (*Ct. of Appeals*, 1858, *Russell* v. *Livingston*, 16 N. Y., [2 Smith], 515.)

A delivery upon the wharf will not discharge the carrier, unless notice be given to the consignee, and the liability of the carrier continues until the consignee has had reasonable time, after notice, to remove the goods. (3 Comst., 322.) The reason of this rule equally applies where the carrier, after the arrival of the vessel, sends the goods by a carman to the particular place designated on the parcel, at the port of destination. It makes no difference whether the cost of the transportation from the vessel to the particular place designated is paid by the person who receives the goods or by the carrier; the liability of the carrier continues until the person who receives them has notice. (15 Johns.,

39; 2 B. & P., 430; 1 Denio, 45; *N. Y. Com. Pl.*, 1853, *Barclay* v. *Clyde*, 2 E. D. Smith, 95.) The fact that a carman is exclusively employed by a merchant in carrying goods according to his orders, does not make him a general agent for receiving goods without orders. (*Supreme Ct.*, 1818, *Ostrander* v. *Brown*, 15 Johns., 39.) Where goods are intrusted to a common carrier, accompanied with a bill and instructions not to deliver the goods unless paid therefor by the consignee, he is liable to the consignor for making a delivery without exacting payment. By thus assuming to act with the goods as his own, he is answerable for their value, but he may discharge himself from liability by procuring their return. (*N. Y. Com. Pl.*, 1858, *Tooker* v. *Gormer*, 2 Hilt., 71.) The carrier, having brought the goods to their place of destination, was engaged in transferring them from the barge to a float, preparatory to making a delivery from that craft to the consignee, who had a boat ready to take them. *Held*, that defendant had not changed its character of common carrier to that of a warehouseman by that act. Instead of being engaged in storing goods, it was placing them in a situation to deliver them according to its contract, and the defendant was at no time discharged of the responsibility which it had assumed as a common carrier. (*Ct. of Appeals*, 1853, *Miller* v. *Steam Nav. Co.*, 10 N. Y. [6 Seld.], 431; affirming, 13 Barb., 361.)

In delivering the property from a boat, the owner being present, the carrier used the machinery of another, and it broke, by which the goods were damaged—*Held*, that the carrier was liable. He was responsible for the sufficiency of the tackle, though it did not belong to him. (*Supreme Ct.*, 1835, *Parsons* v. *Hardy*, 14 Wend., 215.) A common carrier of money, from bankers in the interior to a bank in New York city, having no notice of the ownership, except what is implied from the address of the package, is authorized to treat the consignee as entitled to control the manner of its delivery. Any delivery which discharges the carrier, as between him and the consignee, is good, as against the consignor. (*Ct. of Appeals*, 1861, *Sweet* v. *Barney*, 23 N. Y., 335.) Accordingly, where an express company intrusted with a package of money addressed "People's Bank, 173 Canal street, New York," by the direction of the bank delivered the package in a distant part of the city, to its agent, from whom it was stolen—*Held*, that the consignor, to whom the package belonged, could not maintain an action for its non-delivery. (*Id.*) The duty of a carrier of goods is discharged by delivering them either to the person to whom they are directed or to some one authorized by him to receive them. And the consignee, if not presumptively the owner of the goods, so far as the consignors are concerned, is at least to be treated as their agent. (*N. Y. Superior Ct.*, 1864, *Platt* v. *Wells*, 2 Robt., 101.) Damages for *non-delivery* of the freight entrusted to it, or the value of the goods at the place of destination, at the time they *should* have been delivered, less the charges for transportation. (*Davis* v. *N. Y. and Erie R. R. Co.*, 1 Hilt., 543; *Rice* v. *Ontario Steamboat Co.*, 56 Barb., 384.)

Where goods are conveyed to the place of destination, and the consignee is dead, absent, or refuses to receive them, or is not known, and cannot, after due effort, be found, the carrier discharges himself from all further responsibility by placing them in store with some responsible third person in that business at the place of delivery, for and account of the owner (*Supreme Ct.*, 1845, *Fisk* v. *Newton*, 1 Den., 45; and see *Ostrander* v. *Brown*, 15 Johns., 39; so also where the consignee neglects or refuses to remove the goods within a reasonable time fixed for their removal (*Cook* v. *Erie R. R. Co.*, 58 Barb., 312). The consignee

in New York was a clerk, having no place of business of his own, and the carrier was not informed of his occupation or address, and his name was not in the city directory, and the carrier, on reasonable effort, could not find him—*Held*, that the carrier's responsibility ceased on his storing the goods with a storehouse-keeper in good credit, on account of the owner; and that he was not liable, on the insolvency of the storehouse-keeper occurring some months afterwards. (*Supreme Ct.*, 1845, *Fish* v. *Newton*, 1 Den., 45.) Where the consignee is absent from the terminus of the carrier's route, and has no agent to whom delivery can be made or notice given, the carrier may terminate his liability as carrier by depositing the merchandise in a warehouse; although it is otherwise of an intermediate carrier, whose duty it is to deliver to the next carrier on a road beyond. (*Ct. of Appeals*, 1867, *Northrup* v. *Syracuse, etc., R. R. Co.*, 5 Abb. Pr. [N. S.], 425.) The goods were taken to be delivered at N. to T., a transient person, who had no agent there; and the master, not being able to find T. at N., in good faith, and in conformity with usage delivered them there to a third person for him, and this person, through a mistake, delivered them to a different person than T. *Held*, that the carrier's duty was discharged, under such circumstances, by delivery to a responsible third person; though it would be otherwise if T. had been resident or had had an agent at N. (*Supreme Ct.*, 1801, *Mayell* v. *Potter*, 2 Johns. Cas., 371.) What is a reasonable time for the consignee to remove the goods after notice of their arrival, is a question of fact for the jury. (*Cary* v. *Cleveland and Toledo R. R. Co.*, 29 Barb., 35.) Where the carrier did not bring the goods to the terminus at which he undertook to deliver them, and had no office or agent there, he was held liable, although the plaintiff had made no demand of them at that place. (*N. Y. Superior Ct.*, 1855, *Schroeder* v. *Hudson River R. R. Co.*, 5 Duer, 55.)

It is the duty of the carrier to seek the person to whom the delivery is to be made, and make its tender; and from this duty he can only be discharged by a special contract, or by proof of an opposite usage. (17 Wend., 305; 2 Johns. Cas., 371; 1 Denio, 45; 3 Comst, 322; *N. Y. Superior Ct.*, 1855, *Schroeder* v. *Hudson R. R. R. Co.*, 5 Duer, 55.) Where carriers offer the thing carried to the consignee, and he refuses to receive it, they discharge their contract as carriers by placing it upon storage; and their omission to notify the owner, within a reasonable time, of the refusal of the consignee, and that they had stored it with a warehouseman, does not render them liable, unless it is at least shown that they knew who was the owner. (*N. Y. Com. Pl.*, 1861, *Williams* v. *Holland*, 22 How. Pr., 137.)

The carrier, upon his arrival, reported himself ready to deliver his cargo, but the consignee was not ready to receive it, and the carrier's vessel, after waiting several days for an opportunity to discharge her cargo, was, while thus waiting, carried away by a freshet, and capsized, and her cargo lost, though had the consignee been ready the cargo would have been delivered before the freshet. *Held*, that the carrier's liability, as such, was terminated by his readiness to deliver and his notice thereof; and that thereafter he was liable only as a bailee; he could recover freight notwithstanding the loss. (11 Mass., 229; 16 Johns., 356; 4 Dall., 455; 26 Wend., 507; 15 Johns., 89; 10 Barb., 612; *Supreme Ct.*, 1853, *Clendaniel* v. *Tuckerman*, 17 Barb., 184.) The company has no lien upon the goods for the inconvenience or expense occasioned by the neglect of the consignee to take them away, within a reasonable time after notice to him of their arrival. It must deliver up the goods on demand, and may

seek its remedy on breach of contract. (*Crommelin* v. *N. Y. and Harlem R. R. Co.*, 4 Keyes, 90.) On the wharf, at the end of the voyage, is not a good delivery, without, at the least, giving notice to the consignee. A delivery implies mutual acts of the carrier and the consignee. (*Supreme Ct.*, 1818, *Ostrander* v. *Brown*, 15 Johns., 39; *Ct. of Appeals*, 1850, *Price* v. *Powell*, 3 N. Y. [3 Comst., 322; and see *Fisk* v. *Newton*, 1 Denio, 45; *Gibson* v. *Culver*, 17 Wend., 305; *Packard* v. *Getman*, 4 id,, 613.)

The rule that the carrier must store the property when the consignee refuses to receive it, is inapplicable when the carrier continues to act under the direction of the shipper. (*Supreme Ct.*, 1853, *Ide* v. *Sadler*, 18 Barb., 32.) The defendants, as carriers, transporting live-stock, met with an accident for which they were not liable under their contract, by which the animals were killed. *Held*, that they were not liable for not delivering the carcasses. (*Supreme Ct.*, 1864, *Lee* v. *Marsh*, 43 Barb., 102; S. C, less fully, 28 How. Pr., 275.) The company is responsible for the delivery to the actual consignee. (*Price* v. *Oswego and Syracuse R. R. Co.*, 58 Barb., 599); though it is exonerated from its obligations, where the goods have been taken from it by legal process, provided it immediately gave proper notice of such taking. (*Bliven* v. *Hudson River R. R. Co.*, 36 N. Y., 403.)

A traveler, intending to proceed in the next boat, delivered his baggage to the agent of the carriers, at their office, where they were in the habit of receiving baggage in advance for the boat, and the agent received it with knowledge of the purpose of the delivery. *Held*, that it was in their possession as common carriers, and they were answerable in that character for its safe keeping. (*Supreme Ct.*, 1839, *Camden R. R. & T. Co.* v. *Belknap*, 21 Wend., 354.) That where, by the custom of the place, notice must be given to the consignee, the carrier is not exonerated until the consignee has had reasonable time to remove the goods. (*Price* v. *Powell*, 3 N. Y. [3 Comst.], 322.) As to what is a ratification of the act of the carrier in delivering goods to wrong party, see *Green* v. *Clark*, 5 Denio, 497. Interference, by exercising dominion or giving directions, might, under circumstances, be evidence of an acceptance, but never an acceptance itself. (*Supreme Ct.*, 1840, *Bowman* v. *Teall*, 23 Wend., 306.) A right of action for injury caused by the carrier's negligence, is not barred by subsequent acceptance of the injured property, though this is matter in mitigation of the damages. After an injury has been committed, the cause of action cannot be discharged by any act of the plaintiff short of a release, or acceptance of something in satisfaction. (*Id.*)

Where carriers of passengers, by a general regulation, make it the duty of their agents to take charge of property inadvertently left in their cars, and provide at their depot a place for its safe keeping, where the owner may apply for it, they must, in taking charge of property so left, be looked upon in the light of bailees for hire, who are bound to the exercise of ordinary care and diligence. (26 Wend., 591; 7 Hill, 47; Ang. on Carr., §§ 75, 131, 112, 302; Edw. on Bailm., 35, 36; *N. Y. Com. Pl.*, 1862, *Morris* v. *Third Av. R. R. Co.*, 1 Daly, 202.) The plaintiff left a satchel in defendants' car, which the conductor took charge of, and upon the return-trip placed it in the care of the receiver of the road, by whom it was delivered to a person who had no right or claim to it. *Held*, that the defendants were liable as for a conversion. (*Id.*) Though *prima facie*, the carrier is bound to deliver the goods to the consignee personally. (Story on Bailm., 346; 2 Kent, 604; 3 Wils., 425; Owen, 57; 1 McClel. & Y., 129), he

may establish a usage to leave goods to be called for. (*Supreme Ct.*, 1837, *Gibson.* v. *Culver*, 17 Wend.,,305.) Where a carrier receives goods addressed to a place beyond the terminus of his own route, and the carrier is a mere forwarder of goods when they are to be sent beyond such route, he discharges his duty as carrier by transporting them to the terminus of his own route, and there delivering them to a responsible carrier, according to the usage of business, that they may be forwarded. (4 T. R., 581; *Ct. of Errors*, 1843, *Van Santvoord* v. *St. John*, 6 Hill, 157; reversing S. C., 25 Wend., 660.)

In an action against a carrier, under a complaint which alleges that, before the arrival of the goods at their original destination, the consignee had left that place, and the carrier was directed to forward the goods from thence to him at another place, but that he neglected so to do, and so negligently acted that the goods were lost,—evidence that when the property had reached its destination the consignee's agent demanded a delivery of it, which was refused by reason of the negligence of the defendant, the carrier,—will sustain a recovery, there being no objection taken at the trial to the variance. (*Ct. of Appeals*, 1867; *Rosebrooks* v. *Dinsmore*, 5 Abb. Pr. [N. S.], 59; S. C. less fully reported, 36 How. Pr., 138, reversing 4 Robt., 672.) An objection to the variance, if taken at the trial, might be obviated by amendment. (*Id.*) In an action against a common carrier for non-delivery of goods, the fact that the damage was caused solely by the wilful refusal of the carrier's servants to do their duty, is no defense. (17 N. Y., 362; *Ct. of Appeals*, 1859, *Blackstock* v. *N. Y. & Erie R. R. Co.*, 20 N. Y., 48.) Carrier's liability discussed, and the effect of a delivery by him to other carriers considered. (*Mallory* v. *Burrett*, 1 E D. Smith, 234.) Where no time is named within which goods are to be forwarded, nor is it provided that they shall be forwarded without delay, carriers are entitled to such time as is reasonable according to the ordinary course of the business in which they are engaged. (*Supreme Ct.*, 1866, *Stedman* v. *Western Transportation Co.*, 48 Barb., 97.) Goods received by the defendants, as common carriers, from the plaintiffs, at Boston, to be transported to the west, arrived at the railroad depot at East Albany on the 27th and 28th of June, 1861, and were stored in the warehouse of the railroad company, where they remained until the 5th day of July, when the warehouse and its contents were destroyed by fire. The defendants had no direct notice of the arrival of the goods, but they were left to be called for in the usual course of business, which was for the defendants to send a boat for them once a week, or once every two weeks, or as often as there were enough to send a boat for. *Held*, that the delay in the transportation of the goods was not unreasonable, but in accordance with the usual course of business, and not beyond the ordinary time allowed for that purpose. And that there was no rule requiring the defendants to act immediately, and transport what goods were on hand, without regard to the quantity or the expense caused by thus deviating from their usual custom and practice. (*Id.*) A carrier is not bound to deliver to a party to a bill of lading, any more than he actually received on board his vessel, irrespective of the statement of the bill. As between the parties, the bill is a mere receipt. (3 Sandf., 7; 1 Mood. & R., 106; Abbott on S., 324; 5 Seld., 529; *Supreme Ct.*, 1860, *Meyer* v. *Peck*, 33 Barb., 532.) Otherwise where the bill of lading is held by a *bona fide* purchaser. (*N. Y. Superior Ct.*, 1860, *Byrne* v. *Weeks*, 4 Bosw., 372.) But mere delay in delivery of the goods by the company is not conversion, and the owner can only recover for the damages which grow out of the delay. (*Briggs* v. *N.*

Y. C. R. R. Co., 28 Barb., 515.) Where goods are taken from a carrier by an officer, without authority, the carrier should follow them, or hold the officer responsible. (1 Camp., 451.) He cannot recover freight unless he effects a delivery to the consignee. (*N. Y. Com. Pl.*, 1858, *Rowland* v. *Miln*, 2 Hilt., 150.) A carrier may justify the non-delivery of goods intrusted to him, by showing that they were taken from him by authority of law, under process issued against the real owner, and that the consignor was not the owner. (*Supreme Ct.*, 1862, *Van Winkle* v. *U. S. Mail Steamship Co.*, 37 Barb , 122.)

Liability for goods delivered by mistake. (*Bush* v. *Romer*, 2 Sup. Ct. [T. & C., 597.) Extent of duty as to giving consignee notice of arrival. (*Pelton* v. *Rensselaer, etc., R. R. Co.*, 54 N. Y., 214.) Liability for goods stored and lost, because consignee refuses to receive. (*Landsberg* v. *Dinsmore*, 4 Daly, 490.) Duty of carrier to deliver and to care for goods until reasonable time and proper weather for consignee to remove. (*McAndrew* v. *Whittock*, 52 N. Y., 40.) Delivery to stranger of goods ordered in a fictitious name. (*Price* v. *Oswego, etc., R. R. Co.*, 50 N. Y , 213 . When bound to notify consignor of consignee's delay to take and pay charges. (*Grossman* v. *Fargo*, 6 Hun, 310.) A right of action against the company for not transporting and delivering goods, is assignable so as to authorize the assignee to sue in his own name. (*Smith* v. *N. Y. and N. H R. R. Co.*, 28 Barb , 605; *Foy* v. *Troy and Boston R. R. Co.*, 24 id., 382.) A complaint against the company for non-delivery or loss of goods, must allege (1) that the company was a common carrier; (2) that it received plaintiff's goods; (3) that, for the compensation paid (4), it undertook to carry and deliver them, and (5) the non-delivery. (*Bristol* v. *Rensselaer, etc., R. R. Co.*, 9 Barb., 158.)

A carrier is not justified by the inability or refusal of the consignee to receive the goods in leaving them exposed on a wharf, but it is his duty to *secure* them for the owner. (*Ostrander* v. *Brown and ano.*, 15 John's R. 39.) Platt, J., in delivering the opinion of the court in the case above cited, said: "A *tender* merely of the goods to the consignees without their acceptance, would not be a performance of the carrier's duty in such a case. Suppose the consignees had been dead or absent, or had refused to receive the goods in store, what would have been the carrier's duty. Certainly he would have no right to leave them on the wharf or in the street without protection. He would not be justified in abandoning the goods. He had notice that S. & B. were the owners, and if M. & O. (the consignees) would not take charge of the goods as consignees, he ought to have secured them on his vessel or in some other place of safety, and that would have entitled him to his freight with all extra charges."

A common carrier is absolutely liable for the safety of the goods, and is responsible for injuries or losses arising from the acts of others, without any fault or neglect on his part; the exceptions according to the usual language are, "the acts of God, the public enemies, or the fault of the party complaining." And this liability continues until actual delivery of the goods to the consignee, or, if the course of business be such that the delivery is not made to the consignee, his liability remains until *notice* of the arrival of the goods be given, and when the liability has attached it does not cease until a delivery of the goods by the carrier, according to the usage of business. (*Gibson* v. *Culver*, 17 Wend., 305; Edwards on Bailments, 508; *Banes* v. *Folley*, 5 Barr, 2711; *Rushforth* v. *Hadfield*, 7 East R., 224; *Groff* v. *Bloomer*, 9 Barr, 114; *Davis* v. *Michigan Co.*, 22 Ill., 280.)

Delay in transportation by the company.

It is the duty of carriers to know the conditions and possibilities of transportation upon the routes they use before entering into a contract to deliver within a specified number of days, and a detention caused by a disarrangement and want of facilities on such road which is not sudden or temporary, but existed for some time prior to making the contract, is not to be deemed a delay beyond their control, or arising from unavoidable casualty. (*N. Y. Com. Pl.*, 1858, *Place* v. *Union Express Co.*, 2 Hilt., 19.)

In respect to the time of delivery, common carriers are responsible only for the exertion of due diligence. In this respect they stand on the same ground as other bailees. They may excuse delay in the delivery by accident or misfortune, although not inevitable or produced by the act of God. (*Supreme Ct.*, 1835, *Parsons* v. *Hardy*, 14 Wend., 215; to the same effect, *Ct. of Appeals*, 1855, *Wibert* v. *N. Y. and Erie R. R. Co.*, 12 N. Y. [2 Kern.], 245; followed, *N. Y. Superior Ct.*, 1857, *Conger* v. *Hudson R. R. R. Co.*, 6 Duer, 375; and see *Blackstock* v. *N. Y. and Erie R. R. Co.*, 1 Bosw., 77; *Dows* v. *Cobb*, 12 Barb., 310; see, also, *Jones* v. *N. Y. and Erie R. R. Co.*, 29 id., 633.) When the goods are actually delivered at the place of destination, and the complaint is only of late delivery, the question is simply one of reasonable diligence, and accident or misfortune will excuse him, unless he expressly contracted to deliver within a limited time. (14 Wend., 215; 12 N. Y., 99; *Ct. of Appeals*, 1855, *Wibert* v. *N. Y. and Erie R. R. Co.*, id , 245; reversing, 19 Barb., 36; compare *Kent* v. *Hudson R. R. Co.*, 22 Barb., 278.) Under a special contract to deliver within a stipulated time, the carrier is liable for a delay, though it was caused by unavoidable accidents. (*N. Y. Superior Ct.*, 1852, *Harmony* v. *Brigham*, 1 Duer, 209; affirmed, 12 N. Y. [2 Kern.], 99.)

A railroad corporation is liable as a common carrier for delay in delivering goods, although the delay was caused purely by the act of their employees—*e. g.*, by a general strike of the engineers, etc. The fidelity of their servants is at the risk of the employers. (*N. Y. Superior Ct.*, 1857, *Blackstock* v. *N. Y. and Erie R. R. Co.*, 1 Bosw., 77.) The delinquent servants in such a case are responsible to their employer, and the employer, and he only, is responsible to the injured person. Thus where out of 168 engineers in the employment of a railroad company, 140 suddenly and by concert abandoned their engines for the purpose of compelling the company to rescind a reasonable regulation. *Held*, that although the superior officers were without fault, the corporation was responsible for the damages caused by a delay in transporting property, which resulted from the strike. (*Id.*) If the accident which caused the delay happened through the fault of another company, and without any concurring fault or neglect on the part of the defendants, then, as to them, the accident was inevitable, in the sense that excuses the delay; and the defendants, not having stipulated by their contract to deliver within any limited time, are not responsible for damages resulting from such delay. (*N. Y. Superior Ct.*, 1857, *Conger* v. *Hudson R. R. Co.*, 6 Duer, 375.)

The undertaking and duty of a common carrier are not only to carry and deliver safely the goods intrusted to him, but also to carry and deliver them within a reasonable time; but the first duty is absolute, the second merely relative, and dependent on the circumstances of the case. (14 Wend., 217; 2 Kern., 99, 245; 19 Barb., 36; *N. Y. Superior Ct.*, 1857, *Conger* v. *Hudson R. R. R. Co.*, 6 *Duer*, 375.) The mere omission of a common carrier to transport and deliver

property to the consignee within a reasonable time, is not a conversion or equivalent to it. (6 Hill, 588.) Though he is liable for damages caused by such omission, the owner cannot, on the sole ground of unreasonable delay in the conveyance and delivery of the property, refuse to receive it and recover its value as for a conversion. (*Ct. of Appeals*, 1855, *Scovill* v. *Griffith*, 12 N. Y. [2 Kern.], 509.)

Where two kinds of property—one perishable and the other not—are delivered to a carrier at the same time by different owners, for transportation, if the carrier cannot carry all the property, he may give preference to the perishable property over that which is not perishable; and if either must wait, it should be the latter. (*Supreme Ct.*, 1866, *Marshall* v. *N. Y. C. R. R. Co.*, 45 Barb., 502.) A provision in a carrier's agreement to transport goods, that he shall not be liable for decay, means decay within the proper time for transportation—*i. e.*, the time fixed in the contract, or, if none is fixed, a reasonable time. If the goods deteriorate by reason of his delay he is liable. (*N. Y. Com. Pl.*, 1858, *Place* v. *Union Express Co.*, 2 Hilt., 19.) Where the contract specifies the time and fixes the rate of damages for delay, such damages are not the whole extent of liability where there is injury by reason of delay. (*Id.*)

In an action against a carrier of passengers for failure to carry the plaintiff from New York to San Francisco, *via* Nicarauga, as agreed, the time the plaintiff lost by reason of his detention on the Isthmus; his expenses there, and of his return to New York; the time he lost by reason of sickness, caused by delay in an unhealthy climate, after he returned to New York; and the expenses of such sickness, so far as the same were occasioned by the defendant's negligence, or breach of duty, were legitimate damages, which he is entitled to recover. (*Van Buskirk* v. *Roberts*, 31 N. Y., 661.) The party contracting for the transportation of passengers is liable for damages arising from unreasonable delay along the route, occasioned by the fault or neglect of those legitimately engaged in the line of transportation. Thus, a party who has engaged transportation over the line from New York to San Francisco, and who is unreasonably detained at Panama by the default of the transportation company, and is thereby specially damaged, as by sickness, loss of journey, etc., may maintain his action for damages consequently sustained. (*Ct. of Appeals*, 1864, *Van Buskirk* v. *Roberts*, 31 N. Y., 661.)

In an action against a carrier of passengers to recover damages for a failure to carry the plaintiff within the appointed time to the place for which he had taken passage, by reason whereof he did not perform his errand there, and was detained at expense and to the injury of his business at home, he must produce some evidence that if he had arrived at the appointed time he might have done his errand and would have promptly returned, or that he could not, with due effort, accomplish his errand by reason of his delay in arriving. Nor can the plaintiff, in such action, recover his expenses and the damages to his business during a sojourn of several days, without some proof as to the time when he first ascertained that he could not accomplish his errand, and might, therefore, return. (*N. Y. Superior Ct.*, 1862, *Benson* v. *New Jersey R. R. and Trans. Co.*, 9 Bosw., 412.) The fact that his errand was to receive a loan of money, previously promised to him, and that, not receiving it, he was without money for the expenses of returning until he received it from home, is not enough to

show a necessity for delaying his return, if he made no effort to borrow, and does not show that there was any difficulty in his doing so. (*Id.*)

The freight of the plaintiff was delivered to the company during a winter month, in which a larger amount of freight than usual had been received by them, and the amount so received accumulated beyond the then capacity of the defendants' road to transport without delay, although their road was in good condition, and they ran as many freight trains as could be run with safety; and in consequence of such accumulation, the transportation and delivery of the plaintiff's freight was delayed five days, but it was delivered as soon as other freight received at the same time. *Held*, that there being no express contract as to time, and no culpable want of diligence on the part of the defendants, they were not liable in damages for the delay. (1 Vent., 190, 238; 1 Ld. Raym., 646, 652; Stor. on Bailm., § 508; 14 Wend., 215; 12 N. Y., 99; *Ct. of Appeals*, 1855, *Wibert* v. *N. Y. and Erie R R. Co.*, 12 N. Y. [2 Kern.], 245.)

The design of section 36 of the general railroad act is to bring the companies under the general principle of common carriers, with such variations as the nature of the business requires—*e. g.*, as to regular times of starting, and taking all kinds of property. The act allows a company a reasonable time after property is offered for transportation, to set it in motion. What is a reasonable time must depend upon existing circumstances. In absence of any cause for delay it should be sent immediately forward. If on account of temporary unusual accumulation of business the goods are delayed several days to take their turn, the company are not liable, provided they maintain sufficient accommodation for the general traffic under ordinary circumstances. (*Id.*)

A railroad company on receiving perishable property for transportation and payment of freight, is bound to forward it immediately to its destination. If it has not the means of transportation, it is its duty to refuse to receive the property. In the absence of a legal excuse, therefore, it is answerable for any duty beyond the time ordinarily required for transportation over its road. (*Sec.* 35, *chap.* 140, *Laws* 1850; *Wilbert* v. *N. Y. and Erie R. R. Co.*, 12 N. Y., 245, distinguished; *Tierney* v. *N. Y. C. R. R. Co.*, 76 id., 305.)

When the liability of the company changes from that of a common carrier to that of a warehouseman.

The carrier at common law is an insurer of the goods as against all accidents and perils, except such as result from the act of God or a public enemy. A warehouseman is only responsible for ordinary care, and is merely responsible for loss or injury resulting from his own default or negligence. (*Ct. of Appeals*, 1862, *Ladue* v. *Griffith*, 25 N. Y., 364.) The liability of a warehouseman as fixed and determined by the law, is less strict than that of a carrier, for while the carrier is absolutely liable (with the exceptions of the acts of God or public enemies), the warehouseman is bound to reasonable diligence and the exercise of ordinary care in the custody of the goods, and unless guilty of negligence in the want of ordinary care in their custody is not liable for their loss. (10 Metcalf, 472; Edwards on Bailments, 517–284; *Burnell* v. *N. Y. C. R. R. Co.*, 45 N. Y., 184.)

How the responsibility changes from that of a carrier to that of a warehouseman.

It is true that a railway company may act in relation to the same goods, both as a carrier and as a warehouseman, but the liability of carrier does not end

merely because the train has reached its destination. (*Marshall* v. *American Express Co.*, 7 Wis., 43.) Goods cannot be thrown down in a station house or on a platform at their destination, in the name and nature of a delivery. The responsibility of a carrier lasts until some other responsibility begins, and if one who has received goods as a carrier, sets up the less responsibility of a warehouseman, he must show affirmatively that the first named and greater responsibility has given place to that less onerous, a fact to be shown only by some delivery or tender, or notice of or storing them away at the owner's charge, which shall prove the change of relation and liability. (Part 1, vol. 1, Smith's Lead. Cas., ed. of 1866, p. 394; *Chicago and R. J. R. R. Co.* v. *Warren*, 16 Ill., 505; *et vide Steamboat Sultana* v. *Chapman*, 5 Wis., 455; *Milwaukie* v. *Fairchild*, 6 id., 403; *Rowland* v. *Mil.*, 2 Hilt., 153; *Redmond* v. *L. N. Y. and P. R. R. Co.*, 46 N. Y., 578.)

In *Hyde* v. *Trent Nav. Co.*, 5 T. R., 389, it was held that when the goods have arrived at the end of their transit, it seems that the carrier is bound to keep them a reasonable time at his own risk for the owner, and it would seem during the period for which he keeps them under an obligation to do so, springing out of his receipt of them as a carrier, he is subject to the same liability as during their transit, and after that period his extraordinary liability as a common carrier is at an end, and he remains liable to the same extent as ordinary depositees. (See 8 M. and W., 258.) When a person is both carrier and warehouseman, it is well settled that, if the deposit of the goods in the warehouse is a mere accessory to the carriage, and not subject to any particular order of the owner; or, if they are deposited for the purpose of being carried further, the responsibility of the party having them in charge is that of a carrier. (Aug., § 133; 13 N. Y. [3 Kern.], 569, 572.) But when goods are deposited in a warehouse, subject to the further order of the owner, the case is otherwise. (4 T. R., 581.) (*Id.*)

A common carrier upon the canal received on board his boats a quantity of flour, in barrels, agreeing to deliver the same, in good order, to the consignees at New York, and to let it remain on board ninety days after its arrival in New York without extra charge; and upon the flour arriving at New York the consignees refused to receive it. *Held*, that when the flour reached its destination in good order, and a delivery was tendered to the consignees, their refusal to receive it put an end to the plaintiff's responsibility as *carrier*, and from that time he held it as the *bailee* of the owner, and was required to exercise ordinary care, only, in its protection; and was not liable for an injury to it which occurred without fault on his part. (*Ct. of Appeals*, 1863, *Hathorn* v. *Ely*, 28 N. Y., 78.) It would not be a reasonable construction of the contract upon which the carrier received the flour, to hold that he was to remain an insurer of its safety for ninety days after the duty of carrying it should be completed; in case the owner elected to have it remain that length of time upon the boats. Its fair interpretation is, that when the duty of carrying should terminate, an election by the owner to postpone the delivery for ninety days, would convert the carrier into a mere bailee. When, therefore, the flour reached its destination in good order, and a delivery was tendered to the consignees, their refusal to receive it put an end to the plaintiff's rerponsibility as carriers, and from that time he held it as the bailee of the owner. He had a right to treat the refusal of the consignees as equivalent to an election on the part of the owner to have the flour remain on the boats during the ninety days. (*Id.*)

Where a carrier receives goods upon an engagement to deliver them to another carrier for further transportation, he remains liable as carrier, so long as he retains the custody of the goods as such. (*Ct. of Appeals*, 1859, *Goold* v. *Chapin*, 20 N. Y., 259; compare, however, *Johnson* v. *N. Y. C. R. R. Co.*, 31 Barb., 196.) To exonerate him from liability he must, in some way, clearly indicate that he renounces the relation of carrier—*e. g.*, by depositing them in warehouse. Delivering them on board a float used exclusively for goods in transportation by the carrier, is not such an act. The fact that he notifies the second carrier to take goods, and such second carrier neglects, unreasonably, to do so, and meantime the goods are destroyed by fire, without fault of the first carrier, does not excuse him. (*Ct. of Appeals*, 1859, *Goold* v. *Chapin*, 20 N. Y., 259.)

Where a party, who is both a carrier and a warehouseman, receives goods into his warehouse to be transported by him, so that the deposit in the warehouse is a mere accessory to the carriage, his responsibility as a carrier begins from the time they are received. (Ang. on C., §§ 75, 131, 133; 5 T. R., 389; *Blossom* v. *Griffin*, 13 N. Y. [3 Kern.], 569.) One who carried on business both as carrier and as warehouseman—*Held*, presumptively liable under the circumstances of the case, as *carrier*, and not as warehouseman only. (*Ct. of Appeals*, 1852, *Ladue* v. *Griffith*, 25 N. Y., 364.) Where goods are allowed by a carrier to remain on his vehicle after their arrival, at the request of the consignee, for the purpose of being sold therefrom in parcels, he is no longer responsible for them as a carrier, but only as a warehouseman. *So held*, where the consignee was captain of the boat for that voyage only. (*Supreme Ct.*, 1861, *Laber* v. *Taber*, 35 Barb., 305.) As to the liability of the carrier being changed to that of a warehouseman after notification had to the consignee. (See *Grossman* v. *Fargo, Pres't, etc.*, 6 Hun, 310.)

Special contracts made with carrier limiting his liability, and effect of notice of limitation of carrier's liability.

(1. *Notice not effectual.*)

It was originally said that if a carrier may limit his responsibility by notice, the notice must be brought directly home to the owner of the property. (*Supreme Ct.*, 1838, *Hollister* v. *Nowlen*, 19 Wend., 234.) But it was subsequently held by the Court of Appeals that a common carrier cannot screen himself from liability by notice, whether brought home to the owner or not. Notice is no evidence of assent on the part of the owner, and he has a right to repose on the common-law liability of the carrier, who cannot relieve himself from such liability by any act of his own. (19 Wend., 234; *Supreme Ct.*, 1838, *Cole* v. *Goodwin*, id., 251; followed in 1839, *Camden Co.* v. *Belknap*, 21 id., 354; see, also, *Clark* v. *Faxton*, id., 153; *Hollister* v. *Nowlen*, 19 id., 234; *Powell* v. *Myers*, 26 id., 591; *Alexander* v. *Greene*, 3 Hill, 9; 7 id., 533; *Dorr* v. *N. J. Steam Nav. Co*, 11 N. Y. [1 Kern.], 485.) So also, it is settled, in this State, that a common carrier of property cannot limit his liability, in part or in whole, by mere notice, even if the notice is brought home to the owner. Such notice is of no avail unless the owner assents to its terms. (*N. Y. Superior Ct.*, 1859, *Nevins* v. *Bay State Steamboat Co.*, 4 Bosw., 225.)

(2. *But an express agreement limiting the carrier's liability is valid.*)

It was originally held in this State that a common carrier cannot restrict his liability by a special receipt, excepting casualties by fire. (19 Wend., 281; *Su-*

preme Ct., 1842, *Gould* v. *Hill*, 2 Hill, 623; overruled, see *infra*.) But it was subsequently held that it is competent for the carrier of goods and the owner, by express agreement, to limit the liability of the carrier. (Alleyn, 93; 1 Vent., 190, 238; Peake N. P., 150; 4 Burr., 2301; 1 Stark., 186; 2 Taunt., 271; 8 Mees. & W., 448; 4 Co., 84; 16 Penn., 67; 5 Rawle, 179; 6 Watts & S., 495; 6 How., 382; Story on Bailm., § 549; Chitt. on Cont., 152; 2 Kent's Com., 606; Angell on Carriers, §§ 59, 220, 221; *Ct. of Appeals*, 1854, *Dorr* v. *N. J. Steam Nav. Co.*, 11 N. Y. [1 Kern.], 485; to the same effect, *Supreme Ct.*, 1851, *Parsons* v. *Monteath*, 13 Barb., 353; 1852, *Moore* v. *Evans*, 14 id., 524.) These cases overrule *Gould* v. *Hill*, *supra* (2 Hill, 623), where the contrary doctrine was held. (See, also, *Wells* v. *Steam Nav. Co.*, 2 N. Y. [2 Comst.], 209, where *Gould* v. *Hill* was questioned.) So, also, common carriers of goods may, by express stipulation, limit their liability for the loss of goods occurring from even the negligence of their agents and servants, or wholly exempt themselves from such liability; and the acceptance by the bailor from the bailee in the ordinary course of business, of a receipt for the goods, containing such a stipulation, will bind him, to the extent of its express terms, but no further. (*Supreme Ct.*, 1867, *Prentice* v. *Decker*, 49 Barb., 21.) It must be considered as settled in this State, that common carriers may limit their liability for negligence in almost any respect by express contract, for such a consideration as will be satisfactory to the passenger or freighter, and that such contracts are not against public policy. (11 N. Y., 485; 24 id., 181; 25 id., 442; *Supreme Ct.*, 1864, *Lee* v. *Marsh*, 43 Barb., 102; S. C., less fully, 24 How. Pr., 275.)

A common carrier may, by an express special contract, limit or restrict his common-law liability as an insurer for the safe transportation of goods. A common carrier has, in truth, two distinct liabilities; the one for losses by accident or mistake, where he is liable by the custom of the realm or the common law, as an insurer; the other, for losses by default or negligence, where he is answerable as an ordinary bailee. He may, by express special contract, restrict his liability as insurer, and protect himself 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. (*N. Y. Superior Ct.*, 1850, *Dorr* v. *N. J. Steam Nav Co.*, 4 Sandf., 136; S. C., 8 N. Y. Leg. Obs, 345; see a further decision in this case, 11 N. Y. [1 Kern.], 485; 1851, *Stodard* v. *Long Island R. R. Co.*, 5 Sandf., 180.) It is settled that a common carrier may, by special contract, restrict or modify his common-law liability as an insurer of goods received for transportation. (*Ct. of Appeals*, 1859, *Mercantile Mut. Ins. Co.* v. *Calebs*, 20 N. Y., 173; *N. Y. Com. Pl.*, 1862, *Meyer* v. *Harnden's Express Co.*, 24 How. Pr., 290.)

If persons who, having lawful possession of goods, deliver them to a carrier by the owner's direction, for transportation, make a special contract with the carrier restricting his liability, the contract is valid as to the carrier, and protects him, at least unless there is ample proof that they had no authority to make such contract. (*N. Y. Com. Pl.*, 1862, *Meger* v. *Harnden's Express Co.*, 24 How. Pr., 290.) A special contract, not to be liable for ordinary neglect, is valid on behalf of a common carrier of passengers. (*N. Y. Superior Ct.*, 1859, *Boxcell* v. *Hudson R. R. R. Co.*, 5 Bosw., 699; S. C., 10 Abb. Pr., 442.)

(3. *Agreement cannot take away all liability.*)

A contract which should excuse the carrier from liability for damage or loss arising from his own fraud, or gross negligence, would not be enforced. It

would be *contra bonos mores*, and void. (*Supreme Ct.*, 1865, *Parsons* v. *Monteath*, 13 Barb., 353: S. P., *Ct. of Errors*, 1844. *Alexander* v. *Greene*, 7 Hill, 533, *Ct. of Appeals*, 1853, *Welles* v. *Steam Nav. Co.*, 8 N. Y. [4 Seld.], 375; but see *Welles* v. *N. Y. C. R. R. Co*, 26 Barb., 641.) The agreement between an express company and a railroad company for the transportation of freight forwarded by the former over the road of the latter, provided that the former agreed to be alone responsible for any and all losses or damage to goods transported for them by the latter, and they would advertise and give proper notice accordingly. *Held*, that the railroad company 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. (*N. Y. Superior Ct.*, 1851, *Stoddard* v. *Long Island R. R. Co.*, 5 Sandf., 180.)

Who may make the agreement.—That giving one directions to send goods by a specified carrier, authorizes him to enter into any contract with the carrier, limiting the carrier's responsibility, which the latter may require. (*N. Y. Com. Pl.*, 1862, *Moriarty* v. *Harnden's Express*, 1 Daly, 227.) A carrier receiving goods for carriage will not be required to examine the authority of the person presenting them to make a contract limiting his responsibility. (*Id.*)

Free Ticket.—A contract between a railroad company and a passenger carried gratuitously, whereby the passenger agrees that the company shall not be liable for losses occasioned by the negligence of its agents, is valid, and applies, whatever may be the degree of negligence by which the accident was caused. (*Ct. of Appeals*, 1862, *Wells* v. *N. Y. C. R. R. Co.*, 24 N. Y., 181; *Perkins* v. *N. Y. C. R. R. Co.*, id. 196.) That such a contract is not valid in case of a passenger who even indirectly pays compensation for being carried. (*Perkins* v. *N Y. C. R. R. Co.*, 24 N. Y., 196; *Smith* v. *N. Y. C. R. R. Co.*, id., 222; affirming S. C., 29 Barb., 132.) When a special contract is made with a carrier, he becomes as to that transaction an ordinary bailee and private carrier for hire. (11 N. Y. [1 Kern.], 490; *N. Y. Com. Pl*, 1862, *Moriarty* v. *Harnden's Express*, 1 Daly, 227.)

Single package.—Under an agreement exonerating a carrier from liability for more than a certain amount upon a single package, each package among a number inclosed in a box, which the carrier knows to contain such packages, is to be regarded as an independent package. (*N. Y. Superior Ct.*, 1859, *Read* v. *Spaulding*, 5 Bosw., 395.)

Place of demand.—A reservation in an express company's contract that all claims for damages are to be presented at the New York office for settlement, does not make such presentation of them a condition precedent to the company's liability. Their readiness at that office goes only in defense to interest and costs, and not to the cause of action. (*N. Y. Com. Pl.*, 1858, *Place* v. *Union Express Co.*, 2 Hilt., 19.)

Insurance.—Persons may contract as they please in reference to the transportation of goods. So, also, the carrier may make an agreement with the owner, that in case of loss or damage to the goods for which the carrier is liable, he shall have the benefit of any insurance effected by or on account of the owner. (*Ct. of Appeals*, 1859, *Mercantile Mut. ins. Co.* v. *Calebs*, 20 N. Y., 173.)

Want of ordinary care.—An agreement between a carrier of persons and a passenger, providing that the latter should take "the risk of injury from whatever cause," does not exempt the carrier from liability for the want of ordinary

care. (6 How. [U. S.], 383; 1 Am. Railw. Cas., 172; 7 Hill, 533; 8 N. Y., 375; 14 Barb., 524; *Supreme Ct.*, 1859, *Smith* v. *N. Y. C. R. R. Co.*, 29 Barb., 132; compare *Boswell* v. *Hudson R. R. R. Co.*, 5 Bosw., 669; S. C., 10 Abb. Pr., 442.)

Risk of the owner.—Under an express contract that the goods are to be carried "at the risk of the owner," the carrier incurs only the liability of an ordinary bailee. (*Supreme Ct.*, 1852, *Moore* v. *Evans*, 14 Barb., 524; compare *Alexander* v. *Greene*, 3 Hill, 8; 7 id., 533; *Wells* v. *Steam Nav. Co.*, 8 N. Y. [4 Seld.], 375.)

Owner's risk.—As to the extent of the liability of a carrier, under a contract for the transportation of goods "at owner's risk"—see *French* v. *Buffalo, etc., R. R. Co.* (4 Keyes, 108.)

Effect of exception in receipt.—The bill of lading acknowledged the receipt, in good order, of the property, with a promise to deliver in like good order, "damages of the railroad, fire, leakage, and all unavoidable accidents," excepted. The written contract, pursuant to which the goods were sent, and the receipt given, provided that the carrier should deliver them within a certain time. *Held*, that the exception in the bill of lading related only to the condition of the goods at the time of the delivery, and not to a delay in the delivery by the carrier. (*N. Y. Superior Ct.*, 1852, *Harmony* v. *Bingham*, 1 Duer, 200; affirmed, 12 N. Y. [2 Kern.], 09.)

Effect of contract.—A contract between a carrier and a passenger, that in consideration of an abatement in whole or in part of the legal fare, the latter will take upon himself the risk of damage from the negligence of agents and servants, for which the carrier would otherwise be liable, is valid, and will modify the legal liability of the carrier. Public policy is satisfied by holding a carrier bound to take the risk when the passenger chooses to pay the established fare. If he voluntarily and for any valuable consideration waives the right to indemnity, the contract is binding. (*Ct. of Appeals*, 1862, *Bissell* v. *N. Y. C. R. R. Co.*, 25 N. Y., 442; reversing S. C., 20 Barb., 602.) This principle applied in a case where a cattle-dealer paid no independent consideration for the conveyance of himself, but accompanied his cattle, under a contract stating them to be carried at a reduced rate, and providing that "the persons riding free to take charge of the stock, do so at their own risk of personal injury from whatever cause." (*Id.*)

Effect of stipulation.—Where the contract between a carrier and the shipper contains special provisions limiting the carrier's liability, the effect is that so far as the contract is special the common-law liability is qualified; in all other respects it remains. In any contract of transportation there are certain qualifications of the carrier's liability, which exist whether expressly mentioned or left unnoticed. The law provides that if the loss occur from the act of God or the public enemies, the carrier is not liable. Neither these exceptions nor other express ones destroy the general effect of the contract of the carrier. They simply limit or qualify it. His general liability exists, and if the loss arises from any cause excepted either by the rules of law or the qualification of the contract, he is so far relieved from liability, but no farther. (4 Kern., 570; 29 N. Y., 115; 4 Mees. & W., 749; Story on Bail., § 557; Angell on Com. Car., § 220; 30 N. Y., 630; 1 Kern., 485; *Ct. of Appeals*, 1866, *Simmons* v. *Law*, 3 Keyes, 217.)

Enlarging liability.—A carrier may, by express contract, assume and take upon himself all perils of navigation, including those attendant upon storms and tem-

pests; and in that case he will become, by his agreement, an insurer of the property against those perils (*Supreme Ct.*, 1865, *Price* v. *Hartshorn*, 44 Barb., 655.) But where a carrier, by the bills of lading, agreed to deliver the property at the place of destination without delay—damage or deficiency in quantity specified, if any, to be deducted from the freight by the consignees—*Held*, that the carrier did not by this contract increase his ordinary common-law liability, and become the insurer of the property, while under his control, against all possible contingencies; and that he was excused from delivering that part of the cargo which was destroyed by inevitable necessity arising from the act of God. (*Id.*)

Carrier cannot refuse to bear risk.—It seems, that a common carrier is bound by law to bear these extraordinary risks attached to his calling, for all who may choose to employ him, upon the terms of paying him his reasonable compensation therefor. This is the utmost extent of the rule. Those who undertake the employment can neither refuse to carry nor impose any terms in limitation of this responsibility upon those who employ them. It by no means follows, however, that if one voluntarily chooses to employ them upon other terms, he may not do so; this would be a needless restriction of the employer's right, which the rule never contemplated and which no policy requires. (*N. Y. Com. P.*, 1850, *Mercantile Mut. Ins. Co.* v. *Chase*, 1 E. D. Smith, 115.)

(4. *Special contracts.*)

What amounts to special contract. (*Falkenor* v. *Fargo*, 35 Super Ct. [3 J. & S], 302.) Exemption must be explicitly expressed to relieve from negligence (*Magnen* v. *Densmore*, 38 Super. Ct., 248.) Notice at head of receipt distinguishable from contract. (*Fiebel* v. *Livingston*, 64 Barb., 179.) Restrictive contract binding, though consignor was unable to read. (*Id.*) Right to make special contract, and effect of general words of exemption. Contract must be in clear and unambiguous terms, and the rule that the language of contracts, if ambiguous, is to be construed against the party using it, should be rigidly applied to such contracts. (*Edsall* v. *Camden and Amboy R. R. Co.*, 50 N. Y , 661; see *Penn* v. *Buffalo and Erie R. R. Co.*, 49 id., 204.) Clause requiring presentation of claim for loss (*Knoll* v. *U. S. and B. S. S. Co.*, 33 Super. Ct., 423.) Contracts for connecting lines (see *Irvin* v. *N. Y. C. R. R. Co.*, 50 N. Y., 653) in which defendant, and others were associated as "the White Line," and by the terms of the contract the defendant limited his liability. Connecting railroad entitled to benefit of special contract with contracting railroad. (*Ætna Ins. Co.* v. *Wheeler*, 49 N. Y., 620; *Moghed* v. *C. and A. R. R. Co.*, 45 id., 514; see *Nicholas* v. *N. Y. C. R. R. Co.*, 4 Hun, 329,) where it is said that it is well-settled in this State and country that a common carrier may, by express contract, limit his common-law liability as an insurer in respect to property received by him for transportation as against, all loss and damage however occasioned, except as against his own personal negligence or fraud. (Citing many cases in the reporter's foot-note, and see cases cited and collected in *Railway Co.* v. *Lockwood*, 17 Wall., 366 [U. S. Sup. Ct])

Where general words in the contract of a common carrier, limiting his liability, may operate without including the negligence of the carrier or his servants, it will not be presumed that they were intended to include it. Every presumtion is against such an intention, and the contract will not be construed as exempting from liability for negligence unless it is expressed in unequivocal terms. (*Mynard* v. *S. B. and N. Y. R. R. Co.*, 70 N. Y., 180.) Thus, when in the contract of shipment, the carrier, a railroad corporation, in considera-

tion of a reduced rate was relieved from all claims for any damage or injury "from whatever cause arising;" *held*, that the exemption did not include a loss arising from the carrier's negligence, and that for such a loss it was liable. (*Id.*)

§ **268.** *Amount of railroad fare.*—The corporation has power "to regulate the time and manner in which passengers and property shall be transported, and the compensation to be paid therefor, but such compensation for any passenger and his ordinary baggage shall not exceed three cents per mile." (*Laws* 1850, *chap.* 140, § 28, *sub.* 9, *as amended by Laws of* 1880, *chap.* 133, § 2, *sub* 9.)

§ **269.** *Legislature may alter and reduce rate of freight and fare.*—The Legislature may, when any such railroad shall be opened for use, from time to time, alter or reduce the rate of freight, fare or other profits upon such road; but the same shall not, without the consent of the corporation, be so reduced as to produce with said profits less than ten per centum on the capital actually expended; nor unless, on an examination of the amounts received and expended, to be made by the state engineer and surveyor and the comptroller, they shall ascertain that the net income derived by the company from all sources for the year then last past shall have exceeded an annual income of ten per cent upon the capital of the corporation actually expended. (*Laws* 1850, *chap.* 140, § 33.)

§ **270.** *Fare on narrow gauge railroads.*—Such railroad company * may charge and receive, when its road is not more than twenty-five miles in length, not exceeding five cents per mile; when its road is more than twenty-five and not more than forty miles in length, not exceeding four cents per mile; and when its road is more than forty miles in length, not exceeding three cents per mile, for each passenger and his ordinary baggage transported on said road, provided that nothing relating to fares in this section shall apply to railroad companies now incorporated, or to any railroad now in operation, or to any railroad or part thereof located or to be located in the county of Kings or within the limits of an incorporated city. (*Laws* 1871, *chap.* 560, § 6; *Laws* 1877, *chap.* 103, § 2, *as amended* by *Laws* 1879, *chap.* 293, § 6, *sub. nom.*; *chap.* 560, *Laws* 1850.)

§ **271.** *Fare on sleeping cars.*—Such patentee, or his legal representatives, may charge for the use of said car (*sleeping car*), in all cases, to each person occupying the same fifty cents, which sum shall entitle such passenger to

* Narrow gauge railroads.

the use of a *berth* for one hundred miles; and his said patentee, or his legal representative, may charge at and after the rate of three mills for each additional mile, but in no case shall the charge exceed eighty cents. (*Laws* 1858, *chap.* 125, § 1.)

(For sleeping cars on railroads, see management of road, section 226, *ante*.)

§ **272.** *Fare on rope or cable stationary power railroads.*—Companies formed under the provisions of this supplementary act may fix and collect rates of fare on their respective roads, not exceeding five cents for each mile or any fraction of a mile, for each passenger, and with right to a minimum fare of ten cents. (*Laws* 1866, *chap.* 697, § 3.)

The act above refered to is the act for constructing, maintaining and operating railroads by means of a propelling rope or cable attached to stationary power. (*Laws* 1866, *chap.* 679, supplementary to the general railroad act.)

§ **273.** *Fare on certain surface railroads.*—Any surface steam railroad company created by the laws of this state, whose main line does not exceed fifteen miles in length, and does not enter or traverse the limits of any incorporated city, may collect and receive fare at the rate of five cents each from any and all passengers traveling upon its road a distance of one mile or less; but nothing herein contained shall be deemed to authorize such railroad company to collect or receive fare from passengers traveling upon its road or any connecting line a distance of more than one mile at a greater rate than is now allowed by law for each mile or fraction thereof traveled by them. (*Laws* 1881, *chap.* 470, § 1.)

§ **274.** *Extortion by railroad companies in regard to fares.*—Any railroad company which shall ask and receive a greater rate of fare than that allowed by law, shall forfeit fifty dollars, which sum may be recovered, together with the excess so received, by the party paying the same; but it shall be lawful, and not construed as extortion, for any railroad company to take the legal rate of fare for one mile for any fractional distance less than a mile. (*Laws* 1857, *chap.* 185, § 1.)

The penalty imposed by 1 Laws of 1857, 432, ch. 185, upon railroad companies, for exacting excessive fare,—is incurred where the conductor, in a case not covered by Laws of 1857, ch. 228, exacts five cents in addition to the regular fare, because the passenger has not purchased a ticket before entering the car. (*Ct. of Appeals*, 1863, *Chase* v. *N. Y. C. R. R. Co.*, 26 N. Y., 523.) The construction of the provisions of the statutes above mentioned considered. (*Id.*) The provision of the general railroad act of 1857 (*Laws of* 1857, 432),—restricting fares to three cents per mile,—does not apply to horse-railroads in cities.

(*N. Y. Com. Pl.*, 1866, *Hoyt* v. *Sixth Avenue R. R. Co.*, 1 Daly, 528; *Moneypenny* v. *The Same*, 35 How. Pr., 452; 4 Abb. Pr. [N. S.], 357; 7 Robt., 328.) A railroad company is responsible for the act of a conductor employed by it, in exacting illegal fares, although he has no orders to do so. (14 How. U. S., 468; *Supreme Ct.*, 1851, *Porter* v. *N. Y. C. R. R. Co.*, 34 Barb., 353.) Defined to be the price of passage, or the sum paid or to be paid for carrying the passenger. (*Chase* v. *N. Y. C. R. R. Co.*, 26 N. Y., 523.) Where a passenger pays his fare to a certain point, and, getting out of the train before reaching his destination, resumes his journey in another train, the conductor of which, with a knowledge of the facts, does not require any additional fare, the railroad company is estopped from disputing, in an action for negligence upon such journey, his right to be there. (*Supreme Ct.*, 1860, *Edgerton* v. *N. Y. and Harlem R. R. Co.*, 35 Barb., 193; id., 389.)

Under the act of Congress, approved February 25, 1862, authorizing the issue of United States notes, and declaring that they shall "be lawful money, and a legal tender for all debts, public and private, within the United States, except duties on imports, and interest," etc., a railroad company is bound to accept United States notes issued in pursuance of that act, at the value expressed on the face of them, in payment of fare upon its railroad, when demanded in advance of transportation on such road. (*Supreme Ct.*, 1867, *Lewis* v. *N. Y. C. R. R. Co.*, 49 Barb., 330.) If the company exact payment of the legal fare of a passenger, in advance, in gold or silver coin of the United States, or the market value of such coin in United States notes, they are guilty of extortion, and liable to the penalty imposed by the act of March 27, 1857, for asking and receiving a greater rate of fare than that allowed by law. (*Id.*)

The New York Central Railroad is bound by the statute (*Laws of* 1857, 488, ch. 228) to keep its ticket-office open for one hour previous to the actual departure of each train, irrespective of the time fixed by is time tables for such departure. (*Supreme Ct.*, 1861, *Porter* v. *N. Y. C. R. R. Co.*, 34 Barb., 353.) In case the ticket-office is not thus kept open, a passenger who applies for a ticket while the office is closed, cannot be charged extra fare for want of a ticket. (*Id.*) Under Laws of 1857, ch. 228,—which authorizes the Central Railroad Company to demand five cents extra fare from a passenger who neglects to purchase a ticket, the extra fare can only be demanded when the passenger fails to purchase his ticket at an established ticket-office that is open. If the ticket-office is not open, no ticket can be procured, and no right exists to demand the extra fare. (*Ct. of Appeals*, 1864, *Nellis* v. *N. Y. C. R. R. Co.*, 30 N. Y., 505; S. C., 1863, *Chase* v. *N. Y. C. R. R. Co.*, 26 id., 523.)

§ **275.** *Ejection of passenger, when declared not unlawful.*—To use, or attempt or offer to use, force or violence upon or towards the person of another is not unlawful in the following case: When committed by a carrier of passengers, or the authorized agent or servents of such carrier, or by any person assisting them at their request in expelling from a carriage, railway car, vessel or other vehicle, a passenger who refuses to obey a lawful or reasonable regulation prescribed for the conduct of passengers, if such vehicle has first been stopped, and the force or violence used is not more than sufficient to expel the offending pass-

enger with a reasonable regard to his personal safety. (*Penal Code*, § 223, *subd.* 5.)

(See provisions of the Penal Code in the next succeeding section.)

Although a railroad passenger, by refusing to pay fare, has rendered himself liable to be put off the car in a proper manner, yet the fact that he resists an attempt to put him off in a manner dangerous to life, does not entitle the company to defend an action for his injuries sustained, on the ground that the injured party was himself chargeable with negligence. The wrong upon the part of the agents of the company in such case is not mere negligence, but is an unlawful and intentional assault and battery. (*Ct. of Appeals*, 1861, *Sandford* v. *Eighth Ave. R. R. Co.*, 23 N. Y., 343; reported below, 7 Bosw., 122.) Where a person in attempting to enter a railroad car without a ticket, was assaulted by the brakeman stationed there to see that passengers had procured tickets before entering the cars; *held*, that it was a joint trespass for which an action against the company or its employee would lie jointly or severally (*Priest* v. *Hudson R. R. R. Co.*, 40 How. Pr., 456), and is barred by the two years statute of limitation. (*Id.*)

In a civil action against a railroad company for the unlawful expulsion of a passenger from one of their cars by a conductor, if the expulsion was committed by a conductor within the instructions of the company, but was in manner unjustifiable, the company are liable for any circumstances of aggravation, excessive violence, etc., which attended it. (*Ct. of Appeals*, 1861, *Sandford* v. *Eighth Ave. R. R. Co.*, 23 N. Y., 343.) The driver of a city railroad car has authority to eject a person from the platform of the car, when, in his judgment, such person is there without right, or contrary to the regulations of the company. (*Meyer* v. *Second Ave. R. R. Co.*, 8 Bosw., 305.) But a passenger on a railroad carried off from his intended journey by mistake—*Held*, in fault under the circumstances, for not accepting a return passage offered him; and therefore liable to be ejected from the cars. (*Parker* v. *N. Y. C. R. R. Co.*, 599.) The servants of the company are limited to the use of just so much force as may effect the lawful expulsion, and no more; and the company is liable for any circumstances of aggravation, or excessive violence, which may attend a forcible expulsion committed within the instructions of the company. (*Sanford* v. *Eighth Ave. R. R. Co.*, *supra*; *Hibbard* v. *N. Y. and Erie R. R. Co.*, 15 N. Y., 455.)

A conductor on a railroad has authority to eject a passenger from the car, not only for misconduct which is such as to disturb the peace and safety of the other passengers, but as well for noisy and disgraceful conduct, such as grossly profane or indecent language. So he may for refusal to comply with a reasonable requirement as to the collection of tickets. (*Supreme Ct.*, 1857, *People* v. *Caryl*, 3 Park. Cr., 326; compare, also, *Page* v, *N. Y. C. R. R. Co.*, 6 Duer, 523.) A conductor or collector, who does not wear a badge on his hat or cap indicating his office, is not entitled to demand or receive from the passenger, his fare or ticket. (*Laws* 1850, *chap.* 140, § 30.) That a passenger, when he refuses to exhibit his ticket, may be ejected from the cars of the company. (See *Vedder* v. *Fellows*, 20 N. Y., 126; *Hibbard* v. *N. Y. and Erie R. R. Co.*, 15 id., 455; *Northern R. R. Co.* v. *Page*, 22 Barb., 130; *Willetts* v. *Buffalo, etc., R. R. Co.*, 14 id., 585; *Walker* v. *Dry Dock, etc., R. R. Co.*, 33 How. Pr., 327 *Barker*; v. *Coffin*, 31 Barb., 556.)

Passengers right to resist being put off. (*English* v. *D. and H. C. Co*, 4 Hun, 683.) In the above case it was held that the conductor was in the wrong and that the plaintiff had a right to resist the wrong, and that whatever consequences followed such resistance were chargeable to the defendant so long as the conductor was engaged in putting plaintiff off the cars. (see, also, *Sanford* v. *Eighth Ave. R. R. Co.*, 23 N. Y., 343; and *Hamilton* v. *Third Ave. R. R. Co.*, 35 Supr. Ct. R. 118.) But where a railroad conductor acting in what he believes to be the performance of his duty to the company removes a passenger who refuses to produce a ticket or to pay fare although the removal be unlawful the company is liable only to compensatory damages (*Townsend* v. *N. Y. C., etc., R. R. Co.*, 56 N. Y., 259; citing, *Hibbard* v. *N. Y. and Erie R'way Co., supra; Hamilton* v. *Third Ave. R. R. Co*, *supra;* and distinguishing, *Coldwill* v. *N. J. Steamboat Co.*, 47 N. Y., 282), and holding that a corporation is liable to punitory damages for its own torts and breaches of duty but not for the wrongful act of its servant if free from any wrong of its own. As to the liability for brakesman's ejecting fron ladies' car. (See *Peck* v. *N. Y. C. R. R. Co.*, 4 Hun, 236.) Company held liable for act of baggage-master in putting trespasser off the car. (*Rounds* v. *Del., L. and W. R. R. Co.*, 3 Hun, 329.) In this case the baggage-master knocked and pushed the plaintiff off the platform, and he fell under the cars and was run over; held, that the act, and not the manner in which it was performed, determines its relation to the service in which he was employed. As to ejection of passenger who was sent by conductor into palace car and refused to pay extra fare there. (*Cox* v. *N. Y. C., etc., R. R. Co.*, 6 Supm. Ct. [T. & C.], 409, *note.*) Duty of conductor to receive fare, if offered to be paid by passenger or others in his behalf. (*O'Brien* v. *N. Y. C. R. R. Co.*, 80 N. Y., 236.) Where, in an action against a railroad company for unlawfully ejecting a passenger from its cars, the case as made by the plaintiff is one where punative damages may be allowed, evidence on the part of the conductor that, at the time he ejected plaintiff, he believed that plaintiff had not surrendered a ticket entitling him to be carried; also, that he believed it to be his duty to put plaintiff off if he did not pay his fare, is competent upon the question of damages. (*Yates* v. *N. Y. C. R. R. Co.*, 100.) A passenger who is lawfully upon a railroad train, and has paid his fare, has the right to offer such resistance to any attempt on the part of the conductor to remove him therefrom as may be necessary to prevent his being ejected, and, if in consequence of his resistance, extraordinary force becomes necessary, and is used to remove him, and he is injured thereby, he can recover of the corporation for such injury. (*English* v. *D. and H. R. R. Co.*, 66 N. Y., 454.) A passenger has the right to resist an attempt to eject him from a train for non-payment of fare, made while the train is in motion, so that his being put off would subject him to great peril. (*Id.*)

§ **276.** *Ejection of passenger for non payment of fare.* —If any passenger shall refuse to pay his fare, it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place, or near any dwelling-house, as the conductor shall elect, on stopping the train. (*Laws* 1850, *chap.* 140, § 35.)

§ **277.** *Payment of canal tolls repealed.*—It shall not be necessary for any railroad company in this State to pay any sums of money into the treasury of this State on account of the transportation of property on any railroad on and after the first day of December, in the year eighteen hundred and fifty-one. (*Laws* 1851, *chap.* 497, § 1.)

It shall not be necessary after the said first day of December next for any railroad company to make to the comptroller monthly statements of the property carried on its railroad. (*Id.*, § 2.)

All acts and parts of acts requiring the payment of State tolls by any railroad company for the transportation of property on any railroad are, after the said first day of December next, so far as they conflict with this act, hereby repealed. (*Id.*, § 3.)

That the repeal is not unconstitutional, see *People* v. *N. Y. C. R. R. Co.*, 24 N. Y., 485. For the previous act repealing canal tolls on neat cattle, animals, and fresh meat transported by railroads, see Laws 1850, chapter 268, § 1. See. also, chapter 270, Laws 1847, for former act in relation to railroad freight and canal tolls. The effect of the above section is to repeal section 29 of the general railroad act.

Section 29 of the general railroad act of 1850, was as follows: Whenever the railroad of any company formed under this act shall run parallel or nearly parallel to any canal of this State, and within thirty miles of such canal, the company owning such railroad shall pay to the canal fund on all property transported upon its railroad other than the ordinary baggage of passengers, the same tolls upon that portion of the road running parallel to the canal, that would have been payable to the State if such property other than baggage had been transported on any such canal; and every such company shall make returns, at such times and in such manner as the commissioners of the canal fund shall prescribe, of all the property transported on its railroad, except ordinary baggage of passengers; and the said commissioners are authorized and required to prescribe the manner in which tolls so payable to the canal fund by such company, shall be collected and paid, and to enforce the collection and payment thereof, and to make such regulations as they shall deem proper for that purpose; and every such company that shall neglect or refuse to comply with any such regulations, shall forfeit to the people of this State the sum of five hundred dollars for every day it shall so neglect or refuse; and in every case of such forfeiture, it shall be the duty of the attorney-general to prosecute such company for the penalty in the name of the people. (*Laws* 1850, *chap.* 140, § 29.)

§ **278.** *Statutatory provisions affording the same facilities to passengers or property transported by steamboat on the Hudson river, as is afforded by railroad.*—The proprietors of any steamboat, or line of steamboats, navigating the Hudson river, are hereby authorized and empowered to furnish tickets upon being paid therefor, for the transportation of passengers from any station on the

line of any railroad terminating at the city of Albany or Troy, for the conveyance of such passengers from the city of Albany or Troy to the city of New York on their said steamboats. On such tickets being furnished to any such railroad company, it shall be their duty to require their ticket agent, at any station or line of their road, to sell such tickets, and to any passenger who shall make application therefor, at a price which shall be equal to the amount of fare charged upon such road to the city of Albany or Troy, with the addition of such price as shall be fixed by the proprietor of such steamboat for the transportation of such passenger from Albany or Troy to New York. (*Laws* 1868, *chap.* 573, § 1.)

§ **279.** *Steamboat baggage checks to be furnished railroad baggage-masters.*—The proprietors of said steamboat or line of steamboats, are also authorized and empowered to furnish baggage checks for the transportation of any passenger's baggage through to the city of New York by the way of their said steamboats, and on such checks being furnished to the baggage-master, at any station on the line of said railroads, it shall be his duty to check baggage on the application of any passenger through to the city of New York, which baggage upon its arrival at the city of Albany or Troy, shall be delivered up to the authorized agent of any steamboat or line of steamboats, to be transported from the railroad to the steamboat on which such passenger contemplates going, without the check being removed from such baggage. And said baggage shall be transported from railroad station to steamboat landings, and from steamboat landing to railroad station by said steamboat owners, free of charge. (*Laws* 1868, *chap.* 573, § 2.)

§ **280.** *Railroad companies to furnish passenger tickets to steamboat agents.*—It is hereby made the duty of every railroad company, which terminates in the city of Albany or Troy, on application being made therefor by the proprietor of any steamboat, or line of steamboats, navigating the Hudson river, to furnish them with tickets for the transportation of passengers from the city of Albany or Troy to any point on the line of their respective roads, to be sold by such steamboat proprietors in their respective offices, and to receive and transport the baggage of any passenger which shall be checked through to any point beyond the city of Albany or Troy; such tickets to be sold and paid for to the railroad or steamboat company, which shall furnish the same at the price charged by such company for the convey-

ance of such passenger to the place which such ticket purports to carry him. The object and intent of this act being to compel railroad companies to furnish the same facilities to passengers going to or from the city of New York by boat as is afforded those who go by the railroad. (*Laws* 1868, *chap.* 573, § 3.)

§ **281.** *Railroad companies to receive freight marked via steamboat.*—If any freight shall be delivered at any station on the line of any railroad which terminates in the city of Albany or Troy for transportation to the city of New York, which is marked to go to New York *via* boat, or any particular line of boats, it shall be the duty of the railroad company, to whose agent such freight shall be delivered, to receive the same and transport it with all convenient speed to the city of Albany, and on its arrival there the company, over whose road the same has been transported, shall forthwith cause to be notified the agent of the steamboat line by which it is directed to be sent, and shall deliver the same to such agent, with the bill of charges thereon due such railroad company, for the payment of which charges the proprietor or proprietors of such steamboat line shall be responsible. But the railroad company transporting such freight shall not charge for its transportation over its road, any greater sum than they charge for carrying the same kind of freight the same distance over their road if the same were transported from Albany or Troy to New York by railroad, and any freight delivered by the authorized agent of any steamboat or steamboat company, for transportation over any railroad, which shall have been brought from New York by boat, shall be transported by such railroad company to its place of destination for the same price as it would be if brought from New York by railroad. (*Laws* 1868, *chap.* 573, § 4.)

§ **282.** *Penalties for refusal by railroad companies to sell tickets and furnish check.*—Any railroad company in this State, whose agent or servants shall neglect or refuse to sell tickets or furnish a check, as is provided for in this act, when the same shall have been furnished them, shall be liable to the same penalty as is provided for in section thirty-seven of the act passed April second, eighteen hundred and fifty, entitled "An act to authorize the formation of railroad corporations and to regulate the same," and no fare or toll shall be collected or received from any passenger whose application for such ticket or check shall have been refused, for riding over the road of said company, and in addition thereto the said railroad corporation shall be

liable to a penalty of two hundred and fifty dollars, to be recovered in the name of the proprietor or proprietors of any steamboat line navigating the Hudson river, in any court of competent jurisdiction, for each day they shall neglect or refuse to comply with the provisions of this act, unless such neglect or refusal is caused by a failure on the part of such steamboat proprietor or proprietors to furnish tickets and checks as herein provided for. (*Laws* 1868, *chap.* 573, § 5.)

§ **283.** *Foregoing provisions not applicable to Hudson River or New York and Harlem Railroad companies.*—The provisions of this act, so far as relates to the sale of tickets and furnishing of checks, shall not apply to either the Hudson River or New York and Harlem Railroad companies. (*Laws* 1868, *chap.* 573, § 6.)

§ **284.** *Company may restrict its liability for injuries to passengers.*—In case any passenger on any railroad shall be injured while on the platform of a car, or on any baggage, wood, or freight car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside of its passenger cars then in the train, such company shall not be liable for the injury; provided said company at the time furnished room inside its passenger cars sufficient for the proper accommodation of the passengers. (*Laws* 1850, *chap.* 140, § 46.)

If the notices authorized by Laws of 1850, 234, ch. 140, § 46, relative to standing on platforms, were posted up, and there was at the time sufficient room inside of the passenger-cars for the proper accommodation of the passengers, the mere fact that the conductor did not object to the plaintiff standing on the platform, would not justify the presumption that the company assented to waive a protection given to them by the statute, which these notices expressly declared they should claim, and on which they informed all passengers the company would insist. (*N. Y. Supr. Ct.*, 1857, *Higgins* v. *N. Y. and Harlem R. R. Co.*, 2 Bosw., 132) Though otherwise, where the passenger was compelled by the conductor to stand upon the platform of a crowded car, and was injured in consequence. (*Sheridan* v. *Brooklyn, etc., R. R. Co.*, 36 N. Y., 39.) A railroad company is not excused from liability for injuries suffered by a passenger standing on the platform of a car, if there was no vacant seat therein. *Supreme Ct.*, 1860, *Willis* v. *Long Island R. R. Co.*, 32 Barb., 398.) A passenger is not bound to go from one car to another to look for a seat, while the train is in motion, nor to ask the conductor for a seat, nor to ask any one to make room for him. It is the duty of the conductor to attend to these matters without request. (*Id.*) It is not negligence, on the part of a passenger, to go from car to car, while the train is in motion, in search of a seat. (*McIntyre* v. *N. Y. C. R. R. Co.*, 37 N. Y., 278; S. C., 35 How. Pr., 36; affirming S. C., 47 Barb., 515.) Sufficient accommodation, under this section, implies not only space enough within the cars to contain the passengers, but also the means of sitting

in the usual manner during the journey. (*Willis* v. *Long Island R. R. Co.*, *supra*.)

A passenger in selecting his seat, if lawfully in the one selected, owes no duty to a railroad company to select one with a view to diminish the hazards that may attend an act of gross negligence on the part of their agents in the running of the trains; nor does any indiscretion in selecting it, exonerate the company from liability for injuries resulting from a collision caused by the gross negligence of their agents. If a collision thus occurs, a passenger who is injured by it may recover, if, as between him and the company, it was lawful for him to be where he was at the time of the collision, as his being there did not tend directly or remotely to produce the act or occurrence which caused the injury. *So held*, of a passenger, who with the assent of the conductor, took his seat in the baggage-car. (*N. Y. Supr. Ct.*, 1853, *Carroll* v. *N. Y. and New Haven R. R. Co.*, 1 Duer, 571; S. C., 11 N. Y. Leg. Obs., 144.) A notice to the effect, that no passenger should be "permitted to ride in that portion of any baggage car, which is used for storing and distributing baggage," will not exempt the company from liability to a passenger injured by a collision, while riding in that part of the car used as a post-office, with the knowledge and consent of the conductor. (*Carroll* v. *N. Y. and N. H. R. R. Co.*, 1 Duer, 571.) It is not negligence in a passenger to ride in a common box-car, without springs, if the railroad company provide no better accommodation in the same train. Nor is the company exempt from liability for injuries to a passenger so riding, by virtue of the general railroad law. (*Supreme Ct.*, 1861, *Edgerton* v. *N. Y. and Harlem R. R. Co.*, 39 N. Y., 227; and see *Same* v. *Same*, id., 193.) A notice to passengers not to stand on the platform, posted outside of a car, is not sufficient to protect the carrier from liability, by virtue of the general railroad act, unless it is shown to have come to the knowledge of the person injured on such platform. (*Supreme Ct.*, 1860, *Clark* v. *Eighth Avenue R. R. Co*, 32 Barb., 657.)

One who is a wrongdoer on the train cannot recover for injuries. Thus when the company by its printed rules prohibited its engineers from allowing any one, not in its employ, to ride upon the engines, and plaintiff, though informed of the rule, prevailed on the engineer to admit him, and he rode upon the engine without the knowledge of the conductor, and paying no fare. *Held*, that the engineer's consent conferred no right, and that the plaintiff could not recover damages of the company for injuries sustained while riding in that place. (*Supreme Ct.*, 1856, *Robertson* v. *N. Y. and Erie R R. Co.*, 22 Barb., 91.)

§ 285. *Carriers refusing to receive guests and passengers.*—A person who, either on his own account or as agent or officer of a corporation, carries on business as innkeeper, or as common carrier of passengers, and refuses, without just cause or excuse, to receive and entertain any guest, or to receive and carry any passenger, is guilty of a misdemeanor. (*Penal Code*, § 381.)

The fact that a man is intoxicated does not alone deprive him of the right to ride on a railroad car, nor does it free the company from its duty to render him, as a passenger, due care. It is the duty of a carrier of passengers to ob-

serve the same care to a drunken as a sober passenger. (*Milliman* v. *N. Y. C. R. R. Co.*, 66 N. Y., 642.)

§ **286.** *Protection of civil and public rights.*—No citizen of this State can, by reason of race, color or previous condition of servitude, be excluded from the equal enjoyment of any accommodation, facility or privilege furnished by innkeepers, or common carriers, or by owners, managers or lessees of theaters or other places of amusement, by teachers and officers of common schools and public institutions of learning, or by cemetery associations. The violation of this section is a misdemeanor, punishable by a fine of not less than fifty dollars, nor more than five hundred dollars. (*Penal Code*, § 383.)

See chapter 186, Laws of 1873, to same effect.

§ **287.** *Certain railroad superintendents empowered to take possession of milk cans.*—The several superintendents of the milk departments of the New York and Harlem, Hudson River, and Erie Railroad companies, when thereto authorized by the owner thereof, are empowered to collect, gather and take into possession from any person or persons or wherever illegally found, any marked cans of milk-dealers wrongfully taken; and, in case of resistance, may call to their aid the assistance of any constable or public officer to carry out the requirements of this act. (*Laws of* 1865, 473, *chap.* 295, § 3.)

See section one of the above act, as to in what cases persons are forbidden to use milk cans having owner's name stamped thereon, and section two of the same act as to what shall be presumptive evidence on which a magistrate may issue a warrant, and fixing penalties for violation of the act.

CHAPTER 17.

OF IMMIGRANTS, TRANSPORTATION OF, SALE OF TICKETS TO, AND LAWS FOR THE PROTECTION OF.

§ **288.** *Company to make annual statement of rate of fare to be charged immigrants and second class passengers.*—It shall be the duty of all companies, associations and persons, hereafter undertaking to transport or convey, or engaged in transporting or conveying by railroad, steamboat, canal boat or propeller, any immigrant, second class, steerage, or deck passenger, from the city, bay or harbor of New York, to any point or place, distant more than ten miles therefrom, or from the cities of Albany, Troy and Buffalo, the town or harbor of Dunkirk, or the Suspension Bridge, to any other place or places, to deliver to the mayors of the city of New York, Albany, Troy and Buffalo, on or before the first day of April in each or every year, a written or printed statement of the price or rates of fare, to be charged by such company, association or person, for the convenience of such immigrants, second class, steerage and deck passengers respectively, and the price per hundred pounds for the carriage of the luggage, and the weight of luggage to be carried free of such passengers from and to each and every place, from and to which any such company, association or person, shall undertake to transport and convey such passengers; and such prices or rates shall not exceed the prices and rates charged by the company, association or person, after the time of delivering such statement to the said mayors; and such statement shall also contain a particular description of the mode and route by which such passengers are to be transported and conveyed,

specifying whether it is to be by railroad, steamboat, canal boat or propeller, and what part of the route is by each, and also the class of passage, whether by immigrant trains, second class, steerage or deck passage. In case such companies, association or person, shall desire thereafter to make any change or alteration in the rates or prices of such transportation and conveyance, they shall deliver to the said mayors respectively a similar statement of the prices and rates as altered and changed by them; but the rates and prices so changed and altered, shall not be charged or received until five days after the delivery of the statement thereof, to the said mayors respectively. (*Laws* 1855, *chap.* 474, § 1.)

§ **289.** *Immigrant tickets.*—Every ticket, receipt or certificate which shall be made or issued by any company, association or person, for the conveyance of any immigrant, second class, steerage or deck passengers, or as evidence of their having paid for a passage, or being entitled to be conveyed from either or any of the points or places in the first section of this act mentioned to any other place or places, shall contain or have indorsed thereon, a printed statement of the names of the particular railroad or railroads, and of the line or lines of steamboats, canal boats and propellors, or of the particular boats or propellors, as the case may be, which are to be used in the transportation and conveyance of such passengers, and also the price or rate of fare charged or received for the transportation and conveyance of any such passenger or passengers with his or their luggage. (*Laws* 1855, *chap.* 474, § 2.)

The place or places mentioned in the foregoing section are as follows: From the city, bay or harbor of New York, to any point or place, distant more than ten miles therefrom, or from the cities of Albany, Troy and Buffalo, the town or harbor of Dunkirk, or the suspension bridge, to any other place or places. (*Laws* 1855, *chap.* 474, § 1; see the last preceding section.)

Seetions seven, eight and nine of chapter 218, Laws 1853, apply only to the selling of immigrant passage tickets, *i. e.*, tickets used between New York and some other port, and do not apply to railroad transportation.

§ **290.** *Rate of fare for transportation of immigrant; immigrant to be furnished with seat, etc.*—It shall not be lawful for any person or persons to demand or receive, or bargain for the receipt of any greater or higher price or rate of fare for the transportation and conveyance of any such immigrant, second class, steerage, or deck passengers with their luggage, or either, from either or any of the points or places in the first section of this act mentioned, to any other point or place, than the prices or rates contained

in the statements, which shall be delivered to the mayors of the cities of New York, Albany, Troy and Buffalo, and said commissioners respectively, as in the said first section provided for, or the price or rates which shall be established and fixed for the transportation and conveyance of such passengers and their luggage, or either, by the proprietors or agents of the line or lines, or means of conveyance by which such passenger or passengers and their luggage are to be transported or conveyed. In all cases each immigrant over four years of age conveyed by railroad, shall be furnished with a seat with permanent back to the same, and when conveyed by steamboat, propellor or canal boat, shall be allowed at least two and one-half feet square in the clear on deck. Such deck shall be covered and made water-tight over head, and shall be properly protected at the outsides either by curtains or partitions, and shall be properly ventilated. (*Laws* 1855, *chap.* 474, § 3.)

(For the places referred to in the foregoing section, see section one of the same act, *ante*, § 288.)

§ **291.** *Penalty for violation of foregoing provisions.*—Any company, association, person or persons violating or neglecting to comply with any of the provisions of the first or second sections of this act, shall be liable to a penalty of two hundred and fifty dollars for each and every offense, to be sued for and recovered in the name of the people of this State; and every person violating any of the provisions of the third section of this act shall be deemed guilty of a misdemeanor, and on conviction thereof, the person offending may be punished by a fine of two hundred and fifty dollars, or by imprisonment not exceeding one year, or by both fine and imprisonment, in the discretion of the court; one-half of which fines when recovered shall be paid to the informer and the other half into the county treasury where the action shall be tried or the conviction had. (*Laws of* 1855, *chap.* 474, § 4.)

(See preceding sections for sections one and two of this act.)

§ **292.** *Proceedings on arrest of the offender.*—It shall be the duty of every magistrate who shall issue a warrant for the apprehension of any person or persons for violating the provisions of the third section of this act, within twenty-four hours after such person or persons shall have been taken and brought before him, to take the testimony of any witness who may be offered to prove the offense charged, in the presence of the accused, who may, in person or by counsel, cross-examine such witness. The testimony so taken shall be signed by the witness, and be certified by the mag-

istrate, and in case such magistrate shall commit the accused to answer the charge, he shall immediately thereafter file the testimony so taken with the district attorney of the county in which the offense was committed, to be used on the trial of or any further proceedings against the accused; and the testimony so taken shall be deemed valid and competent for that purpose, and be read and used with the like effect as if such witness were orally examined on such trial or proceedings. After the testimony of any witness shall be so taken, he shall not be detained, nor be imprisoned, or compelled to give any recognizance for his future appearance as a witness on any trial or proceeding thereafter to be had in the premises. (*Laws* 1855, *chap.* 474, § 5.)

(See section three of this act, *ante*, 290.)

§ **293.** *Sale of immigrant tickets in the city of New York.*—It shall not be lawful for any railroad company, or for any agent, employee or other officer of any railroad company, or for any other person, to sell, offer for sale, or otherwise dispose of any ticket or tickets, or written or printed instruments, or instruments partly written and partly printed, for the transportation or conveyance on or by any railroad or steamboat, of any immigrant or deck or steerage or second class passenger, arriving at the port of New York from a foreign country, at any place or places in the city of New York, except such as may be designated by the commissioners of emigration; which place or places may from time to time, as they may deem best, be changed by the said commissioners, provided, however, that nothing herein contained shall prevent any railroad company from selling tickets to any persons at the rates of fare charged for first class passengers, nor from selling tickets at the principal ticket offices of such company, to immigrants and other second class passengers, provided such company has, at the same time, an agent who shall sell tickets at the place designated by the said commissioners for selling tickets to immigrants. The commissioners of emigration shall furnish every railroad company of this State desiring such privilege to have an agent at each and every place so designated by them to sell tickets to immigrants and other second class passengers, but if any such agent shall be found by said commissioners to have been guilty at any time, while acting as an agent, of defrauding immigrants, or of any other wrongful or disgraceful conduct, they shall exclude such agent, and it shall be the duty of the railroad company to appoint another agent in his place. (*Laws* 1868, *chap.* 793, § 1.)

§ **294.** *Proceedings upon violation of foregoing provision.*—Whenever any person or persons may be complained of, and arrested for violating any of the provisions of this act, or of any act for the benefit or protection of immigrants or passengers arriving at the port of New York, or about to depart therefrom, it shall be the duty of the magistrate before whom such complaint is made, to take and reduce to writing, in the presence of the person or persons complained of, the evidence of any witness which may be offered, either on behalf of the prosecution or of the person complained of, allowing the opposing party an opportunity to cross-examine the witness, and the depositions so taken shall be subscribed respectively by the witnesses making the same, and certified by the magistrate; and when so taken and certified the said deposition shall be filed in the office of the clerk of the court of oyer and terminer, in and for the city and county of New York; and upon the trial of any party accused, in whose presence any such deposition shall have been taken upon any complaint or charge made against him, relative to the same transaction, such deposition may be read by either party with the same effect as if the same witness were sworn, and his testimony taken in open court upon such trial, provided it shall appear thereby that the witness at the time the deposition was taken, was a resident of this State on his way to some other State, territory or province or country, or a resident of another State, territory or province, or an immigrant from a foreign country; and provided further that it shall not be shown to the court, that the witness at the time of the trial is within its jurisdiction. (*Laws* 1868, *chap.* 793, § 2.)

(See preceding section.)

§ **295.** *Punishment for violation of foregoing provisions.*—Any person violating any provision of this act shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by a fine of not less than three hundred, and not more than one thousand dollars, or by imprisonment of not less than three months, or by both said fine and imprisonment. (*Laws* 1868, *chap.* 793, § 3.)

(See last two sections, *ante.*)

§ **296.** *Restrictions upon soliciting immigrants as passengers, before landing.*—Any runner, or person acting for himself, or for and on behalf of or connected with any steamboat, railroad, or forwarding company, or emigrant boarding-house, who shall solicit or book any passengers emigrating to the United States, and arriving at the port of New York, before such passenger shall have left the vessel

in which he has so arrived, or who shall enter or go on board any ship or vessel, so arriving with emigrant passengers, prior to the landing of such passengers therefrom, and also any person, company or corporation having employed such person for the purpose of soliciting and booking such passengers prior to their leaving the vessel in which they may arrive, shall be severally subject to a penalty of one hundred dollars for each offence, to be sued for and recovered in the same manner, and subject to the same provisions of law as enacted in respect to other penalties imposed by the several acts regulating the powers and duties of the commissioners of emigration. Any person violating the provisions of this section may also be indicted for a misdemeanor, which violation shall be held and taken to be a misdemeanor, and he shall, on conviction, be punished by fine not exceeding one hundred dollars, or imprisonment for sixty days. (*Laws* 1853, *chap.* 619, § 1.)

§ **297.** *Sales of passenger tickets at excessive rates, &c.* —*A person who*—1. Sells, or causes to be sold, a passenger ticket, or order for such ticket on any railway, vehicle or vessel, to any immigrant passenger at a higher rate than one and a quarter cents per mile; or, 2. Takes payment for any such ticket or order for a ticket under a false representation as to the class of the ticket, whether immigrant or first class; or, 3. Directly or indirectly, by means of false representations, purchases or receives from an immigrant passenger any such ticket; or, 4. Procures or solicits any such passenger having such a ticket, to exchange the same for another passenger ticket; or, 5. Solicits or books any passenger arriving at the port of New York from a foreign country, before such passenger has left the vessel on which he has arrived, or enters or goes on board any vessel arriving at the port of New York from a foreign country, having immigrant passengers on board, for the purpose of soliciting or booking such passengers, and a person or agent of a corporation employing any person for the purpose of booking such passengers before leaving the ship, is guilty of a misdemeanor. (*Penal Code*, § 626.)

Section 726 of the Penal Code provides that nothing in that Code shall affect any act relating to immigrants or other passengers in vessels coming from foreign countries, except as persons in the above section 626 of that Code.

CHAPTER 18.

OF RAILROAD TICKETS, STEALING AND FORGING THE SAME, AND REGULATIONS CONCERNING RAILROAD TICKETS.

Preliminary note.—(See section 278, *ante, et seq.*, for chapter 573, Laws of 1868, in regard to railroad companies furnishing tickets to agents for steamboats on the Hudson river. A regulation made by a railroad corporation requiring passengers to exhibit their tickets whenever requested by the conductor, and directing the ejection from their cars of those who should refuse to do so, is a reasonable and proper one. The passenger is bound to conform to such regulation, and forfeits his right to be carried further by his refusal to comply with it. (*Ct. of Appeals*, 1857, *Hibbard* v. *N. Y. and Erie R. R. Co.*, 15 N. Y. [1 Smith], 455.) As to when the conductor and not the corporation is liable for ejection. (*Id.*; see *Townsend* v. *N. Y. C. R. R. Co.*, 56 N. Y., 295.) The words "*good this trip only*," upon a passage ticket, will not limit the undertaking of the company to any particular day, or any special train of cars. They do not relate to *time* but to *journey*; and if the ticket has not been previously used it entitles the holder to a passage on a subsequent day, as well as on the day it bears date. (*Supreme Ct.*, 1857, *Pier* v. *Finch*, 24 Barb., 514; and see *Northern R. R. Co.* v. *Page*, 22 id., 130.) When he commences his trip, and becomes a passenger, then the ticket is good for that trip and no other, and if the passenger refuses to obey any such regulations, the company is justified in collecting

his fare again, or in putting him off the cars, upon his refusing to pay it. (*Id.*)

It is a reasonable regulation that passengers choosing to stop and lie over must procure their tickets to be so indorsed as to make them a voucher to the conductor having charge of a subsequent train. (*Supreme Ct.*, 1858, *Beebe* v. *Ayres*, 28 Barb., 275.) It is a reasonable regulation that the coupons annexed to the ticket are not good unless detached by the conductor. (*Walker* v. *Dry Dock, etc., R. R. Co.*, 33 How. Pr., 327.) A regulation adopted by a railroad company requiring passengers to surrender their tickets during the trip, is a reasonable regulation. (4 Cush., 608; S. C., 1 Law R. [N. S.], 461.) And where the defendant purchases his ticket with knowledge of this custom, he is bound to surrender it or pay his fare again; and, if he refuses, the company having carried him may recover the fare from him again in an action for the purpose. (*Supreme Ct.*, 1856, *Northern R. R. Co.* v. *Page*, 22 Barb., 130.) A regulation of a railroad company requiring way-passengers on a railroad to surrender their tickets before reaching the station nearest to that of their destination, without receiving any check or other evidence of the payment of fare, is reasonable and valid. (*Ct. of Appeals*, 1859, *Vedder* v. *Fellows*, 20 N. Y., 126.) Ordinary passenger tickets are merely receipts for the passage money, or tokens to facilitate the conductor in recognizing the persons entitled to passage, and are not contracts within the rule excluding parol evidence to vary a written agreement, (*Quimby* v. *Vanderbilt*, 17 N. Y., 306.)

When a passenger, carried beyond his destination, was desired by the conductor to remain in the train until it reached a station at which it would meet a return train that would take him back, and he did so, and at the station, in endeavoring to get into the return train, was injured, without negligence on his part. *Held*, that his having no return ticket did not, under the circumstances, prevent his recovering. (*Hulburt* v. *N. Y. C. R. R. Co.*, 40 N. Y., 145.) Passenger's mistake in paying fare without securing ticket. (*Weaver* v. *Rome, W., etc., R. R. Co.*, 3 Supr. Ct. [T. & C.], 270.) Lay over ticket not renewed by being punched by baggage master. (*Wentz* v. *Erie R'way Co.*, 3 Hun, 241.) Regulation that ticket must be produced or fare paid may be enforced by conductor, though another conductor took and did not return the ticket. (*Townsend* v. *N. Y. C. R. R. Co.*, 56 N. Y., 295; 4 Hun, 217.) Validity of regulations limiting time for use of tickets. (*Elmore* v. *Sands*, 54 N. Y., 512.) Effect of selling coupons for connecting roads. (*Kessen* v. *N. Y. C. R. R. Co.*, 7 Lans., 62.) Passenger cannot choose between alternate routes. (*Bennett* v. *N. Y. C. R. R. Co.*, 5 Hun, 599.) Right to stop over, and effect of endorsement of leave to stop over. (*Dewy* v. *N. Y. C. R. R. Co.*, 5 Daly, 50; *Hamilton* v. *N. Y. C. R. R. Co.*, 51 N. Y., 100.) For the wrongful act of the conductor of a former train in taking up the passenger's ticket the company is liable, but it does not justify the passenger in violating the company's lawful regulation upon another train to produce his ticket or pay his fare. (*Townsend* v. *N. Y. C. R. R. Co.*, *supra.*) When a railroad passenger ticket, by its terms, limits the time within which it is to be used, it does not exonerate the holder from the payment of fare if he take passage on the road after the expiration of the time, and in case of his refusal to pay, the conductor has a right to eject him from the train. (*Hill* v. *S. B. and N. Y. R. R. Co.*, 63 N. Y., 101.) An indorsement upon the ticket by a conductor, showing it had been used to an intermediate station before the expiration of the time specified, or an allowed use of it for a portion of the distance thereafter, with an endorsement showing it, is not such a waiver of the condition as allows a further use of the ticket. (*Id.*)

§ **298.** *Sale of railroad tickets by unauthorized persons.*—No person other than the agents or employees of railroad, steamboat or steamship companies of this State, duly appointed by them for that purpose, by a proper authority in writing, shall offer for sale, or sell within this State, any ticket or tickets or any printed or written instrument issued by or purporting to have been issued by any railroad, steamboat or steamship company in this state or elsewhere, for the transportation of any passenger or passengers, upon any such railroad, steamboat or steamship, or any instrument wholly or partly printed or written, delivered for the purpose or upon the pretense of the procurement to such passenger or passengers, of any such ticket or tickets, or in any other manner charge, take or receive any money as a consideration or price for such passage or for the procurement of such passage ticket or tickets; and no ticket or tickets or other evidence as aforesaid, shall be sold or offered for sale by the said agents or employees, except at the offices designated for that purpose by the said companies respectively or at offices conveniently located by agents or other duly organized railway companies, and at prices not exceeding their regular established rates. (*Laws* 1857, *chap.* 470, § 1, *as amended by chap.* 820, *of the Laws of* 1868.)

The amendment of 1868 is in the following words, and does not apply to the city and county of New York, or the county of Kings. Section one of an act entitled "An act to prevent frauds in the sale of tickets to passengers upon railroads, steamboats and steamships," passed April fifteenth, eighteen hundred and fifty-seven, is hereby amended by adding thereto, after the word respectively, "or at offices conveniently located by agents or other duly organized railway companies," *provided that nothing in this amendment shall apply to the city and county of New York, or the county of Kings.* (*Laws* 1868, *chap.* 320.)

§ **299.** *Proceedings against such offenders.*—Whenever any person or persons shall be complained of and arrested for violating any of the provisions of the first section of this act, it shall be the duty of the magistrate, before whom such complaint is made, to take and reduce to writing, in the presence of the person or persons complained of, the evidence of any witness which may be offered, either on behalf of the prosecution or the party accused, and the depositions so taken shall be respectively subscribed by the witnesses making the same, and certified by the magistrate; and when so taken and certified, the said depositions shall be filed in the office of the clerk of the county in which the same shall be taken. Upon the trial of any person or persons charged with any offense under the provisions of this

act, the testimony taken as aforesaid may be read by either party, with the like effect as if the said witness or witnesses were sworn in open court upon said trial, provided it shall appear therein that the witness or witnesses were, at the time of taking the same, residents of another State, territory or province, or are emigrating from a foreign country, or are residents of this State, and on their way to some other State, territory or province. (*Laws* 1857, *chap.* 470, § 2.)

§ **300.** *Punishment of violators of foregoing provisions.*—Any person violating the provisions of this act shall, upon conviction, be deemed guilty of a misdemeanor, and be punished by a fine of not less than one hundred dollars, or by imprisonment of not less than three months, or by both such fine and imprisonment. (*Laws* 1857. *chap.* 470, § 3.)

(For provisions concerning immigrant tickets, see the preceding chapter.)

§ **301.** *Larceny of railroad tickets.*—Every person who shall be convicted of stealing, taking and carrying away any railroad passenger ticket or tickets, prepared for sale to passengers, previous to or after the sale thereof, being the personal property of any railroad company, or of any other corporation or corporations, or of any person or persons, shall be adjudged guilty of grand or petit larceny, as prescribed in the next following section. (*Laws* 1855, *chap.* 499, § 1.)

§ **302.** *Punishment of offenders.*—If the price or prices authorized to be charged for such ticket or tickets, on a sale thereof, shall exceed the sum of twenty-five dollars, such price or prices shall be deemed the value of such ticket or tickets, and the offense of stealing, taking and carrying away the same, shall be adjudged grand larceny, and the person convicted of the same shall be imprisoned in a State prison for a term not exceeding five years; but if such price or prices shall only amount to twenty-five dollars or under, the offense of stealing, taking and carrying away such ticket or tickets, shall be adjudged guilty of petit larceny, and the person convicted of the same shall be punished by imprisonment in the county jail not exceeding six months, or by a fine not exceeding one hundred dollars, or by both such fine and imprisonment. (*Laws* 1855, *chap.* 449, § 2.)

§ **303.** *Stealing of railroad tickets is larceny.*—All the provisions of this chapter (*chap.* 4, *title* 15, *larceny, Penal Code*) apply to cases where the property taken is an instrument for the payment of money, an evidence of debt, a pub-

lic security or a passage ticket, completed and ready to be issued and delivered by the maker thereof to any person as a purchaser or owner. (*Penal Code*, § 536.)

§ **304.** *Value of, how ascertained.*—If the thing stolen is a ticket proper, or other writing, entitling or purporting to entitle the holder or purchaser thereof to a passage upon a railway car, vessel or other public conveyance, the price at which a ticket entitling a person to a like passage is usually sold is deemed the value thereof. (*Penal Code*, § 546.)

§ **304**(*a*). *Forged and counterfeit railroad tickets.*—Every person who shall be convicted of having forged, counterfeited or falsely altered any railroad ticket mentioned or referred to in either of the preceding sections of this act, or of having sold, exchanged or delivered for any consideration, any such forged or counterfeited railroad tickets, knowing the same to be forged or counterfeited, with intent to injure or defraud, or of having offered any such forged or counterfeited railroad ticket for sale, exchange or delivery, for any consideration, with the like knowledge and intent, or of having received any such forged or counterfeited railroad ticket upon a sale, exchange or delivery, for any consideration, with the like knowledge and intent, shall be adjudged guilty of forgery in the third degree, and shall be punished in like manner as is prescribed by law in cases of conviction of forgery in the third degree. (*Laws* 1855, *chap.* 499, § 4.)

See sections 301, 302.

§ **305.** *The same.*—Every person who shall have in his possession any such forged or counterfeited railroad ticket as mentioned or referred to in the next preceding section, knowing the same to be forged, counterfeited or falsely altered, with intention to injure or defraud by uttering the same as true or false, or by causing the same to be uttered, or by the use of the same to procure a passage in the cars of the railroad company by which such ticket purports to have been issued, shall be subject to the punishment provided by law for forgery in the fourth degree. (*Laws* 1855, *chap.* 499, § 5.)

§ **306.** *What deemed railroad tickets within meaning of foregoing provisions.*—Railroad passenger tickets of any railroad company, as well before the same shall have been issued to its receivers or other agents for sale as after, and whether indorsed by such receivers or other agents or

not, are to be deemed railroad tickets within the meaning of this act. (*Laws* 1855, *chap.* 499, § 3.)

§ **307.** *Tickets for sleeping cars.*—All the tickets issued for the use of the sleeping cars shall have plainly written or printed thereon "sleeping car," and all persons using a sleeping car shall be furnished with such tickets. (*Laws* 1855, *chap.* 125, § 2.)

New York Central Railroad may demand five cents, in addition to usual rate of fare, from passenger entering car without having purchased a ticket. (*Laws* 1857, *chap.* 228, § 2.)

For act in relation to keeping offices open during certain hours for the sale of tickets by the New York Central Railroad Company, see chapter 228 of the Laws of 1857.

§ **308.** *Free passes.*—Chapter seven hundred and ninety-eight, of the laws of eighteen hundred and sixty-six, entitled "An act prohibiting the issue of Free Passes on the railroads of this State," is hereby repealed. (*Laws* 1867, *chap.* 4, § 1.)

Acceptance of a railway ticket bearing an indorsement that the person "accepting this ticket" agrees that the company shall not be liable for certain losses, constitutes a contract on the part of the passenger with the company, qualifying the carrier's common-law liability. The passenger will be presumed to have known the contents of the ticket at the time of acceptance. *So held*, in the case of a free ticket. (*Ct. of Appeals*, 1862, *Wells* v. *N. Y. C. R. R. Co.*, 24 N. Y., 181; affirming S. C., 26 Barb , 641; *Perkins* v. *N. Y. C. R. R. Co.*, 24 N. Y., 196; compare *Smith* v. *N. Y C. R. R. Co.*, id., 222; *Barker* v. *Coflin*, 31 Barb., 556; to the contrary [citing 17 N. Y., 306], N. Y. *Superior Ct.*, 1859, *Nevins* v. *Bay State Steamboat Co.*, 4 Bosw., 225.)

Company may contract with holder of free pass to exempt itself from liability for negligence.

In *Bissell* v *N. Y. Cent. R. R. Co.*, 25 N. Y., 442, plaintiff, who was a shipper of cattle, was furnished with a ticket headed "Cattle dealer's ticket on passenger train," by which the defendant directed its conductors to pass Taylor and Bissell, owners of two cars of live stock, from Buffalo to Albany. On the back of the ticket was printed "Notice: The owner of stock receiving this ticket assumes all risk of accident, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence by the agents or otherwise, for any injury to the person, or injury to the stock of said owners, shipped by stock on freight trains." The court held that a common carrier, in consideration of an abatement in whole or in part of his legal fare, may lawfully contract with a passenger that the latter will take upon himself the risk of damage from the negligence of agents and servants for which the carrier would otherwise be liable. Public policy is satisfied by holding a railroad corporation bound to take the risk, when the passenger chooses to pay the fare established by the Legislature. If he voluntarily, and for any valuable consideration, waives the right to indemnity, the contract is binding. If he paid

as passenger the usual fare, without reduction, on account of his engagement to assume such a risk the contract, it seems, would not be binding as without consideration (reversing, 29 Barb., 602).

In *Wells* v. *N Y. C. R. R.*, 26 Barb., 641, the plaintiff received a free ticket from the defendants, entitling or permitting him to ride on their cars at his own pleasure, with an endorsement on it, by which "he expressly agreed that the company should not be liable, under any circumstances, whether of negligence by their agents or otherwise, for any injury to his person, or for any loss or injury to his property." *Held*, that this contract was not unlawful. It is fully binding, to the extent of exempting the defendants from all loss, or liability to loss, or damage from injuries resulting from mere *negligence* of any degree. Carriers of passengers are not obliged to carry any person, without compensation, at their own risk. They have a right so far to restrict their liability, in such a case, as to contract with the passenger that he shall take his own risk, in respect to loss or damage from injuries resulting from mere negligence. They may contract for exemption from loss arising from the negligence of their servants or agents (see 4 Seld, 381); and where there is a special agreement to that effect, carriers are not liable for any injuries, except such as are the result of fraudulent, wilful, or reckless misconduct on their part, or on the part of their officers or agents. (*Supreme Ct.*, 1858, *Wells* v. *N. Y. C. R. R. Co.*, 26 Barb., 641.) *Perkins* v. *The N. Y. C. R. R. Co.*, 24 N. Y., 196, contained the same indorsement upon a free pass; *held*, that in respect to a gratuitous passenger, the company may contract for exemption from liability for any degree of negligence in its servants, other than the board of directors or managers, who represent the corporation itself for all general purposes. Whether the corporation is liable to a free passenger so contracting, for negligence in the construction of its road, *quære*. (See *Id.*)

Mere notice of exemption from liability, without a contract, not enough.

The cases of Bissell, Wells and Perkins, cited above, were held to be *contracts*, made between the carrier and the passenger; but it was said in the Perkins case that the law is well-settled in this State that common carriers cannot limit their liability by *a mere notice*. (See, also, *Hollister* v. *Nowlen*, 19 Wend., 234; *Cole* v. *Goodwin*, id., 251.) So, also, in *Rowson* v. *The Pennsylvania R. R. Co.*, 2 Abb. Pr. (N. S., 220), it was held that although common carriers may, by positive contract, limit their liability, they cannot do so by a mere notice, whether placed on a ticket or elsewhere, even where the notice is brought to the knowledge of the persons with whom they deal.

Holder of free pass may recover if no contract for exemption from liability.

If the passenger is riding upon a free ticket, and the company is carrying him gratuitously, the company is liable for injuries sustained by him. They were not bound to carry him gratuitously, but, having undertaken to carry him, they must do it carefully as with other passengers. (*Perkins* v. *N. Y. C. R. R. Co.*, 24 N. Y., 200; *Nolton* v. *Western R. R. Co.*, 15 id., 444.) In regard to the question as to how far agreement to exempt carrier from liability is effectual, see note to section 267, *ante*. As to the effect of a drover's pass to travel at his own risk, and his injury, before starting, by stick thrown from engine, see *Poucher* v. *N. Y. C. R. R. Co.*, 49 N. Y., 263.)

§ 309. *Sale of passage tickets forbidden except by agents.* —No persons shall issue or sell, or offer to sell, any passage

ticket, or an instrument giving or purporting to give any right, either absolutely or upon any condition or contingency, to a passage or conveyance upon any vessel or railway train, or a berth or state-room in any vessel, unless he is an authorized agent of the owners or ensignees of such vessel, or of the company running such train, except as allowed by section six hundred and twenty-two; and no person is deemed an authorized agent of such owners, consignees or company, within the meaning of this chapter, unless he has received authority in writing therefor, specifying the name of the company, line, vessel or railway for which he is authorized to act as agent, and the city, town or village together with the street and street number, in which his office is kept, for the sale of tickets. (*Penal Code*, § 615.)

The provisions of this section and of the subsequent sections of the Penal Code given below, are drafted from chapter 103 of the Laws of 1860, which applies only to sales of tickets upon steamboats, steamships and other vessels. The section referred to in the text bears reference to this section of the Penal Code.

§ **310.** *Sales by authorized agents restricted.*—No person except as allowed in section six hundred and twenty-two shall ask, take or receive any money or valuable thing as a consideration for any passage or conveyance upon any vessel or railway train, or for the procurement of any ticket or instrument giving or purporting to give a right, either absolutely or upon a condition or contingency, to a passage or conveyance upon a vessel or railway train, or a berth or state-room on a vessel, unless he is an authorized agent within the provisions of the last section; nor shall any person, as such agent, sell or offer to sell any such ticket, instrument, berth or state-room, or ask, take or receive any consideration for any such passage, conveyance, berth or state-room, excepting at the office designated in his appointment, nor until he has been authorized to act as such agent according to the provisions of the last section, nor for a sum exceeding the price charged at the time of such sale, by the company, owners or consignees of the vessel or railway mentioned in the ticket. But a person who shall have purchased a ticket in good faith for his own passage, and shall have been prevented from using the same, may sell the ticket at any price not greater than the regular rate established therefor, to another purchaser in good faith, for his own use. (*Penal Code*, § 616.)

§ **311.** *Unauthorized persons forbidden to sell certificates, receipts, etc., for the purpose of procuring tickets.*—No person other than an agent appointed, as provided in

section 615, shall sell, or offer to sell, or in any way attempt to dispose of any order, certificate, receipt or other instrument for the purpose, or under the pretense, of procuring any ticket or instrument mentioned in section 615, upon any company or line, vessel or railway train therein mentioned. And every such order sold or offered for sale by any agent, must be directed to the company, owners or consignees at their office. (*Penal Code*, § 617.)

§ **312.** *Punishment for violation of the preceding sections*—A person guilty of a violation of any of the provisions of the preceding sections of this chapter, is punishaable by imprisonment in a State prison not exceeding two years, or by imprisonment in a county jail not less than six months. (*Penal Code*, § 618.)

The chapter above referred to is chapter 12 of title 15 of the Penal Code.

§ **313.** *Conspiracy to sell passage tickets in violation of law.*—All persons who conspire together to sell or attempt to sell, to any person, any passage ticket, or other instrument mentioned in sections six hundred and fifteen and six hundred and seventeen, in violation of those sections, and all persons who, by means of any such conspiracy, obtain, or attempt to obtain, any money or other property, under the pretense of procuring or securing any passage or right of passage in violation of this chapter, are punishable by imprisonment in a State prison not exceeding five years. (*Penal Code*, § 619.)

§ **314.** *Conspirators may be indicted.*—Persons guilty of violating the last section may be indicted and convicted for a conspiracy, though the object of such conspiracy, has not been executed. (*Penal Code*, § 620.)

§ **315.** *Offices for unlawful sale of passage tickets, declared disorderly houses.*—All offices kept for the purpose of selling passage tickets in violation of any of the provisions of this chapter, and all offices where any such sale is made, are deemed disorderly houses; and all persons keeping any such office, and all persons associating together for the purpose of violating any of the provisions of this chapter, are punishable by imprisonment in a county jail for a period not exceeding six months, and not less than three months. (*Penal Code*, § 621.)

§ **316.** *Owners, pursers, etc., allowed to sell tickets.*—The provisions of this chapter do not prevent the actual owners or consignees of any vessel, from selling passage

tickets thereon; nor do they prevent the purser or clerk of any vessel from selling in his office on board of such vessel, any passage tickets upon such vessel. (*Penal Code*, § 622.)

§ **317.** *Station masters, conductors, etc., allowed to sell tickets.*—The provisions of this chapter do not prevent the station master or other ticket agent upon any railway, from selling in his office at any station on such railway, any passage tickets upon such railway; nor do they prevent any conductor upon a railway from selling such tickets upon the trains of such railway. (*Penal Code*, § 623.)

§ **318.** "*Company*" *defined.*—The term "company," as used in this chapter, includes all corporations, whether created under the laws of this State, or of the United States, or of those of any other State or nation. (*Penal Code*, § 627.)

CHAPTER 19.

OF EMPLOYEES OF RAILROAD CORPORATIONS.

§ 318(*a*). *Employees to wear badge of office.*—Every conductor, baggage master, engineer, brakeman, or other servant of any railroad corporation employed in a passenger train, or at stations for passengers, shall wear upon his hat or cap a badge, which shall indicate his office, and the initial letters of the style of the corporation by which he is employed. No conductor or collector, without such badge, shall be entitled to demand or receive from any passenger any fare or ticket, or to exercise any of the powers of his office; and no officer or servant without such badge, shall have authority to meddle or interfere with any passenger, his baggage or property. (*Laws* 1850, *chap.* 140, § ~~30.~~ 27)

§ 318(*b*). *Employees to provide and wear uniform.*—It shall be the duty of every railroad company operating a railroad in this State by the power of steam, to designate and prescribe such peculiar uniform or external apparel, to be worn by its officers, agents and employees, engaged in or about its passenger offices or stations, or on or about its trains upon its tracks, as shall plainly, to all travelers, distinguish all such persons; and such uniform or apparel shall also plainly indicate or distinguish the position or rank of the wearer in the employment of such company. It shall be the duty of every such person to provide and wear such apparel or uniform when employed as aforesaid. And every such company that shall fail to designate and

prescribe such apparel or uniform, and to also cause the same to be generally worn by all such persons, from and after six months from the passage of this act, shall forfeit to the people of this State and be liable to pay to the treasurer of this State, on the first day of January next following the expiration of said six months, and on every first day of January thereof, the sum of ten thousand dollars. It shall be the duty of the attorney-general of this State, in the name of the people thereof, to sue for and recover said penalties for the benefit of the State. And in case of the refusal or omission of any person aforesaid to wear such uniform or apparel, as contemplated by this act, or to obey any reasonable rule or regulation of any such company relative to the same, or the wearing thereof, it shall be the right and duty of every such company to deduct and retain the amount of five per cent of the agreed or accustomed compensation of such delinquent person, during the period of any such neglect or refusal. And every person who shall advise or use any persuasion to induce any person being an officer, agent or employee of any such company, to leave the service of such company by reason of any such apparel or uniform being required to be worn, or refuse to wear the same, or any part thereof, every person who, without authority, shall wear such uniform or apparel, and every person being an officer or agent in any company aforesaid, who shall use any inducement with any person aforesaid to come into the employment of any other such company, by reason of any apparel or uniform so required or designated to be worn, shall severally, by reason thereof, be guilty of a misdemeanor and be liable to be punished for such offense. (*Laws* 1867, *chap.* 483, § 1.)

Each and every violation of this act by any railroad company or corporation, shall, on conviction, be punished by a fine of not less than fifty dollars nor nore than five hundred dollars, to be sued for and collected in the name of the people of the State of New York by the attorney-general, and the moneys, when collected, to be paid into the general fund of the State. (*Laws* 1867, *chap.* 483, § 2.)

This act shall not operate or be constructed to exempt railroad companies or corporations from liability for damages to persons who may be injured or sustain loss or damage by or through any neglect to comply with the provisions of this act. (*Laws* 1867, *chap.* 483, § 3.)

§ **319.** *Inducing employee to leave service on account of uniform, a misdemeanor.*—A person who advises or induces any one, being an officer, agent or employee of a railway

company, to leave the service of such company, because it requires a uniform to be worn by such officer, agent or employee, or to refuse to wear such uniform, or any part thereof, is guilty of a misdemeanor. (*Penal Code*, § 425, *subd.* 1.)

§ **320.** *Same, and to go into service of other company, a misdemeanor.*—Any person who uses any inducement with a person employed by a railway company, to go into the service or employment of any other railway company, because a uniform is required to be worn, is guilty of a misdemeanor. (*Penal Code*, § 425, *subd.* 2.)

§ **321.** *Wearing uniform without authority, a misdemeanor.*—A person who wears the uniform designated by a railway company, without authority, is guilty of a misdemeanor. (*Penal Code*, § 425, *subd.* 3.)

§ **322.** *Engineers must be able to read time-tables and hand-writing.*—No person shall be employed as an engineer by any officer or agent acting for or in behalf of either of the railroads of this State, who cannot read the printed time-tables and ordinary hand-writing. (*Laws* 1870, *chap.* 636, § 1.)

No person shall run an engine on a regular or special train upon either of the railroads of this State who cannot read printed time-tables and ordinary hand-writing. (*Laws* 1870, *chap.* 636, § 2.)

Any person offending against the provisions of this act shall, upon conviction thereof, be deemed guilty of a misdemeanor, and punishable for each offense by a fine not exceeding one hundred dollars, or six months' imprisonment in a county jail, in the discretion of the court having cognizance of the offense. (*Laws* 1870, *chap.* 636, § 3.)

§ **323.** *Employment of engineer who cannot read, a misdemeanor.*—A person who, as an officer of a corporation, or otherwise, knowingly employs as an engineer or engine driver to run locomotives or trains on any railway in this State, a person who cannot read the time-tables and ordinary hand-writing, is guilty of a misdemeanor. (*Penal Code*, § 418.)

§ **324.** *Person acting as engineer who cannot read, a misdemeanor.*—A person who, being unable to read the time-tables of the road and ordinary hand-writing, acts as engineer or runs a locomotive or train on any of the rail-

ways in this State, is guilty of a misdemeanor. (*Penal Code*, § 419.)

§ **325.** *Persons of intemperate habits to be refused employment.*—All incorporated companies and persons in this State, engaged in conveying passengers, including especially all railroad, steamboat and ferry companies, and all kinds of corporations conveying for hire, persons or property, shall be and hereby are required to refuse employment to all persons who, on good and sufficient proof, shall be shown to indulge in the intemperate use of intoxicating drinks, and any such company which shall retain in its employ any person or persons who shall, on competent proof, be shown to be intoxicated at any period whilst in the active service of said company or person, either as engineer, conductor, fireman, switchtender, commander, pilot, mate or foreman, or be in any way connected with the moving power or management, or whose duty, if neglected, would diminish the safety and security of life, limb or property, entrusted thereto, said company or corporation shall be liable to pay a sum of not less than fifty dollars nor more than one hundred dollars to the county treasurer in the county where the offense may be committed and proved, before any court of competent jurisdiction. (*Laws* 1857, *chap.* 628, § 31.)

For the enforcement of the above penalty, see the excise laws, sections 22, 30, chapter 628, Laws 1877, as amended by sections 1, 2, chapter 820, Laws 1873; also, see 16 How. Pr., 46; 35 N. Y., 154.

§ **326.** *Employees liable to penalty for being intoxicated.*—If any person employed or who shall be employed upon the railroad of any such corporation as engineer, conductor, baggage-master, brakeman, switchman, fireman, bridge-tender, flagman, signalman, or having charge of the regulating or running of trains upon said railroad in any manner whatsoever, be intoxicated while in the discharge of such duties, he shall, upon conviction thereof, be deemed guilty of a misdemeanor, and shall be punished for each offense by a fine not exceeding one hundred dollars, or by imprisonment in a county jail for a term not exceeding six months, in the discretion of the court having cognizance of the offense. And if any person so employed as aforesaid by any such corporation shall, by reason of such intoxication, do any act or neglect any duty, which act or neglect shall cause the death or injury to any person or persons, he shall, upon conviction thereof, be punishable by imprisonment in the county jail for a term of not less than six months, or in the State prison for a term not exceeding five years, in the discretion of the court having cognizance of

the offense. (*Laws* 1850, *chap.* 140, § 41, *as amended by the Laws of* 1871, *chap.* 560, § 4.)

"Section forty-one of the general railroad act, previous to its amendment reads as follows: If any person shall, while in charge of a locomotive engine running upon the railroad of any such corporation, or while acting as the conductor of a car or train of cars on any such railroad, be intoxicated, he shall be deemed guilty of a misdemeanor." (*Laws* 1850, *chap.* 140, § 41.)

§ **327.** *Intoxication of persons running trains or boats a misdemeanor.*—A person who being employed upon any railway as engineer, conductor, baggage master, brakeman, switch tender, fireman, bridge tender, flagman, signalman, or having charge of stations, starting, regulating or running trains upon a railway, or being employed as captain, engineer or other officer of a vessel propelled by steam, is intoxicated while engaged in the discharge of any such duties, is guilty of a misdemeanor. (*Penal Code*, § 420.)

See Code Criminal Procedure, § 56, subd. 10, as to jurisdiction of courts of special sessions over this offense.

§ **328.** *Agents, engineers, conductors, etc., liable for wrongful act, causing death.*—Every agent, engineer, conductor, or other person in the employ of such company or person, through whose wrongful act, neglect, or default the death of a person shall have been caused as aforesaid, shall be liable to be indicted therefor, and upon conviction thereof may be sentenced to a State prison for a term not exceeding five years, or in a county jail not exceeding one year, or to pay a fine not exceeding two hundred and fifty dollars, or both such fine and imprisonment. (*Laws* 1849, *chap.* 256, § 2.)

See section 326, *ante.*

§ **329.** *Violation of duty by officers, agents, or servants of railroad companies a misdemeanor.*—An engineer, conductor, brakeman, switch tender, or other officer, agent or servant of any railway company, who is guilty of any willful violation or omission of his duty, as such officer, agent or servant, by which human life or safety is endangered, the punishment of which is not otherwise prescribed, is guilty of a misdemeanor. (*Penal Code*, § 424.)

See Penal Code, § 199.

§ **330.** *Certain qualifications of employees.*—It shall be lawful for the owner or owners of any railroad in this State to employ any inhabitant of this State of the age of twenty-one years as a car driver or conductor, or any other capacity,

notwithstanding any law, regulation or ordinance of any officer or municipality, or of the common council or government of any city or county to the contrary. (*Laws* 1865, *chap.* 246.)

Liability of company toward employees.

The general rule may be laid down that the company is not liable to an employee for the negligence of a co-employee, unless the company has been negligent in the selection of the employee in fault. (Sherman and Redfield on Negligence, § 86; *Sherman* v. *Rochester, etc., R. R. Co.*, 17 N. Y., 153; *Russell* v. *Hudson R. R. R. Co.*, id., 134; *Coon* v. *Syracuse and Utica R. R. Co.*, 5 id., 452; *Wright* v. *N. Y. C. R. R. Co.*, 25 id., 562; reversing, 28 Barb., 80.) A railroad corporation, having employed skillful and competent persons to supervise and inspect its roadbed and bridges, and having made it their duty to do so, is not liable for an injury to an employee, occasioned by the falling of one of the bridges, where the defect was such as was not apparent, and of which it had no notice. It cannot be maintained that if the company employ skillful employees, they are guilty of negligence for all consequences resulting to employees for an omission of duty which the directors have failed to discover. (*Ct. of Appeals*, 1868, *Warner* v. *Erie R'way Co.*, 39 N. Y., 468; reversing S. C., 49 Barb., 558.)

It is the duty of an engineer upon a railroad to make known to the company any defects of fences, etc., which may lead to the straying of animals on the track, and any defects in the locomotive. The company are not liable for injuries to him arising from such defects which he did not make known. (8 N. Y., 175; *Supreme Ct.*, 1855, *McMillan* v. *Saratoga and Washington R. R. Co.*, 20 Barb., 449.) The company is not *prima facie* liable to its own servants for injuries from defects of which it had no notice, in its rolling stock, rails, bridges, etc. (*Warner* v. *Erie R'way Co*,, 39 N. Y., 468; reversing S. C., 49 Barb., 558; *McMillan* v. *Saratoga and Washington R. R. Co.*, 20 Barb., 449; *Faulkner* v. *Erie R'way Co.*, 49 id., 324; *Owen* v. *N. Y. C. R. R. Co.*, 1 Lans., 108); and this, though the servant is not employed upon the particular thing which is defective, but upon work wholly unconnected therewith. (*Id.*) The rule is otherwise where the company is aware of such defects. (*Keegan* v. *Western R. R. Co.*, 8 N. Y., 175.) A brakeman upon a railroad, whose duty it is not to apply the brakes except when directed by the engineer or conductor, cannot maintain an action against their common employer for an injury resulting from the culpable speed at which the engineer and conductor ran the train. A principal is not liable to one of his agents or servants for injuries sustained through the negligence of another agent or servant, when both are engaged in the same general business. [Citing many cases.] (*Ct. of Appeals*, 1858, *Sherman* v. *Rochester and Syracuse R. R. Co.*, 17 N. Y. [3 Smith], 153.)

A corporation succeeded certain trustees in the ownership of a railroad, but there was no evidence that, in doing so, it assumed the existing contracts of such trustees, but, so far as appeared, it merely continued the plaintiff as an employee of the road, in the same line of business he was in, under an implied contract to pay, but without any agreement as to time. *Held*, that the plaintiff could be discharged at any time by the company, without liability for further employment. (*Supreme Ct.*, 1868, *Morrison* v. *Ogdensburg, etc., R. R. Co.*, 52 Barb., 173.) There is no rule of law requiring intelligent men of good habits, who are brakemen or switchmen on railroads, to be discharged for the first

error or act of negligence which they may commit, or making railroad companies liable for their second error or negligent act, to all other servants of such companies who may sustain damage by reason of such second error or negligent act. (*Baulie* v. *N. Y. and Harlem R. R. Co.*, 12 Abb. Pr. [N. S.], 310.)

Company not liable to one of two servants engaged in common employment for personal injury resulting from reckless or wanton act of the other, if the latter was competent and skillful, and the regulations under which they served were not such that the injury could be attributed to them. (Reviewing authorities, *Wright* v. *N. Y. C. R. R. Co.*, 25 N. Y., 502; see *Laning* v. *N. Y. C. R. R. Co.*, 49 N. Y., 521, explaining this case.) A railroad company is not, as to its employees, bound to furnish a safe roadbed, and in default thereof liable for an injury to one of them, occasioned by such default. (*Tinney* v. *Boston and Albany R. R. Co.*, 62 Barb. 218.) The extent and limits of the doctrine of liability of company to its servants determined. (*Laning* v. *N. Y. C. R. R. Co.*, 49 N. Y., 521; *Hofnogh* v. *The Same*, 55 id., 608; reversing 1 Supr. Ct. [T. & C.], 346.) In the *Laning Case* the case of *Wright* v. *N. Y C. R. R. Co.* (25 N. Y., 562, *supra*), is limited and explained. For evidence of specific acts of neglect by servant when they are admissible to charge company with negligence in retaining him. (See *Bowler* v. *N. Y. and Harlem R. R. Co.*, 59 N. Y., 310.) The obligation to employ mechanical appliances is not for the protection of servants. (*Salters* v. *D. and H. C. Co.*, 3 Hun, 338.) Liability to casual laborer employed by track master. (*Brooly* v. *N. Y. C. R. R. Co.*, 3 Supr. Ct. [T. & C.], 288.) Liability to servants of contractor injured at work on track. (*Omenger* v. *N. Y. C. R. R. Co.*, 4 Hun, 159.) Company not liable to servant of connecting company in joint service. (*Cruty* v. *Erie R'way Co.*, 3 Supr. Ct. [T. & C.], 244.) Surveyor a fellow servant of conductor. (*Ross* v. *N. Y. C. R. R. Co.*, 5 Hun, 488.) Company liable for trench in track unsafe to servant. (*Plank* v. *N. Y. C. R. R. Co.*, 60 N. Y., 607.) Liable to servant for want of sufficient force in train dispatching officers. (*Flike* v. *B. and A. R. R. Co.*, 53 N. Y , 549; but see *Rose* v. *Same*, 58 id., 217.)

It is the duty of a railroad corporation to see that there are a sufficient number of brakemen upon a train when it starts upon its trip. If this duty is neglected, and injury to a servant results therefrom, without contributory negligence on his part, the company is liable, although the immediate negligence in starting the train without sufficient brakemen was that of a co-servant. (*Booth* v. *B. and A. R. R. Co.*, 73 N. Y., 38.) When the negligence of the engineer of a train in running it is contributory with that of the company in not sending a sufficient number of brakemen, and both together cause an injury to an employee, the negligence of the engineer does not relieve the company from liability. (*Id.*) If an engineer knew the track was so badly out of repair that it was dangerous to run over it, by continuing in the employment after such knowledge he assumed the risk, and the corporation was not liable for the injury. (*Mehan* v. *S. B. and N. Y. R. R. Co.*, 73 N. Y., 585.) It cannot be affirmed as a matter of law that the engineer has the same opportunity as the corporation, or its subordinates, whose duty it is to keep the track in repair, to ascertain and know of defects, and he cannot be deemed guilty of contributory negligence simply because he knew that the track was somewhat out of repair. (*Id.*) Conductor of freight train killed by being struck by projecting roof of a depot building. *Held*, that conductor assumed the risk, and company not held liable. (*Gibson* v. *Erie R. R. Co.*, 63 N. Y., 449.)

Conductor killed while climbing over the top of a car when train was under way. It did not appear that his so doing had any necessary connection with his duties as conductor; *held*, that he was guilty of contributing negligence. (*Id.*) Defendant's trackmaster hired a teamster to scrape snow from the track, and agreed to advise him of the coming of trains; he was struck by a train, of whose coming the trackmaster failed to advise him; the defendant held liable. (*Bradley* v. *N. Y. C. R. R. Co*, 62 N. Y., 99.) Engineer running engine over road out of repair, and injured by bad condition of road. (*Hawley* v. *N. Y. C. R. R. Co.*, 82 N. Y., 370.) Engineer killed by defective boiler, notice of defect to the company. (*Fuller* v. *Jewett*, 80 N. Y., 46.) Two or more persons or companies operating a railroad, jointly as well as severally liable to employee for defective machinery. (*Kain* v. *Smith*, 80 N. Y., 458) Duty of company to furnish adequate and proper machinery, and to maintain it in like condition. (*Id.*) Company owes duty to employee on engine, to see that engine is fit and proper for use (*Kirkpatrick* v. *N. Y. C. R. R. Co.*, 79 N. Y., 240.) Evidence of company's negligence in such case. (*Id.*) An employee in the service of a railroad corporation, assumes the risks and dangers incident to the business in which he is engaged, and, while the company is bound to furnish suitable and safe machinery and appliances for his use, having done so, it is not liable for an injury resulting from their breaking or failure, unless it has been shown that the corporation has been guilty of negligence in regard thereto. (*De Graff* v. *N. Y. C. R. R. Co.*, 76 N. Y., 125.) Employee a minor makes no difference. (*Id.*) The measure of a master's duty to his servant is reasonable care, having relation to the parties, the business in which they are engaged, and the exigencies which require vigilance and attention. He is not a guarantor of the safety of the servant. One employee hired by one superior agent, and another employee hired by another. Injury occasioned by change of time in running the trains from regular time-table—due care and diligence in giving notice are all that is required. (*Slater* v. *Jewett, Receiver, etc.*, 85 N. Y., 61; *Filke* v. *B. and A. R. R. Co.*, 53 id., 549; *Fuller* v. *Jewett*, 80 id., 46; and *Cuspin* v. *Babbitt*, 81 id., 516, distinguished.)

Liability of the company for wrongful acts of its employees.

The company is not liable, in exemplary damages, for the act of its employee, where the plaintiff would not have been entitled to recover such damages had the suit been against the servant. (*Tounsend* v. *N. Y. C. R. R. Co.*, 56 N. Y., 205; distinguishing, *Caldwell* v. *N. J. Steamboat Co.*, 47 id., 282; see, also, *Hamilton* v. *Third Ave. R. R. Co.*, 53 id., 25.) The essence of a man's justifying exemplary damages is, that it shall be an intentional violation of another's rights, or that a proper act shall be done with an excess of force and violence, or with malicious intent to injure another in his person or property. (*Cox* v. *N. Y. C. R. R. Co.*, 4 Hun, 176.) The above case was where a conductor forcibly removed a passenger from the cars for not paying extra fare in a drawing-room car.

The brakeman said to the passenger, "You had better step off, as we are not going to halt any longer." She was about to step off upon the ground, the cars gave a sudden jerk and threw her down. She was dragged upon the ground and injured. The case was submitted to the jury upon the question of negligence and contributory negligence, and the verdict for plaintiff sustained. (*Filer* v. *N. Y. C. R. R. Co.*, 68 N. Y., 124.)

Plaintiff jumped on platform of a baggage car to ride to a place where cars

were backed to make up a train. The company's rules forbade all persons except certain employees from riding on baggage car. The baggage master warned plaintiff off while the car was in motion. A pile of wood near the track prevented him from getting off, and the baggage master kicked him off; he fell against the wood then near the cars and was injured. *Held*, the fact that plaintiff was a tresspasser was not a defence. (*Rounds* v. *D. S. and W. R. R. Co.*, 64 N. Y., 129; see the judges charge in this case.) A railroad corporation which has let by contract the entire work of constructing its road, and has no control over those employed in the work, is not liable for injuries to a third person occasioned by negligent acts in doing the work, such as blasting. (*McCafferty* v. *S. D. and P. M. R. R. Co.*, 61 N. Y., 178.)

The removal of trespassers from the cars is within the implied authority of the company's servants on the train, and the fact that they acted illegally in removing a party while the train was in motion does not exonerate the company. (*Hoffman* v. *N. Y. C. and H. R. R. R. Co.; Ct. of Appeals*, 1881; *N. Y. Weekly Digest*, vol. 13, No. 14; see 46 N. Y., 23; 64 id., 129.)