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RAILWAY PASSENGER TRAFFIC.[1]

I. THE DEGREE OF CARE REQUIRED OF RAILWAY COMPANIES.

1. No insurance of passengers, but only the utmost care, diligence, and skill.

2. The degree of care, &c., is always proportioned to the hazards of the business.

3. The fact that injury occurs on a railway, presumptive evidence of negligence.

4. And it will make no difference that the passenger had a free ticket.

5. Unless it was conditioned to be at his own risk, or the passenger went in some unusual mode, for his own convenience.

II. THE POWER OF RAILWAY COMPANIES TO MAKE RULES AND REGULATIONS AFFECTING PASSENGERS.

1. They may exclude from their cars, stations, and grounds, persons having no business there, and control the conduct of those who have.

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[1] A PRACTICAL TREATISE UPON THE LAW OF RAILWAYS. BY ISAAC F. REDFIELD, LL. D., Chief Justice of Vermont. *Second Edition.* Boston: Little, Brown & Co. We shall be excused for the frequent references which we make to this work, since the substance of our article is based upon its arrangement and analysis of the subject; and it would be scarcely less than an affectation to attempt to make it appear otherwise. The decided cases, too, as is well known, are so numerous, upon many of the points embraced in our article, that a particular reference to all would, far too much, encumber our pages. We have, therefore, contented ourselves with naming a leading case or two, either English or American, under each head; and referring the reader to the above work, where he may find all the cases which had been published at the date of the edition, carefully analyzed, with the precise point decided in each, abstracted.

2. May discriminate between fares paid at stations and in the cars.
3. So also between way-fare and through-fare.
4. And may require passengers to go through in same train.
5. Or in a prescribed time.
6. May exclude merchandise from passenger trains.
7. And passengers may be required to pay five cents additional fare at each payment in the cars.
8. Servants of company may enforce the regulations in reasonable manner. Their acts bind the company.
9. Company cannot enforce penalties, except by legislative provision.
10. May not make unreasonable restrictions as to baggage.
11. Should exclude mere intermeddlers from their grounds.
12. The law implies mutual contracts for safe transportation and good behavior.
13. And to deliver passengers in advertised time.
14. And to make advertised connections.
15. Must give proper notice of time and place of changing cars.
16. The rule of damages in the several cases above enumerated.

III. THE RESPONSIBILITY OF DIFFERENT COMPANIES FORMING CONTINUOUS ROUTE, WHERE THEY SELL THROUGH TICKETS.

1. Not commonly regarded as a partnership.
2. But will be, if entire line is consolidated, and net fare divided rateably.
3. The responsibility for baggage is the same as for freight, and binds each company for the entire route.
4. But as to passengers it is the same as separate tickets for each road.

THE TRANSPORTATION OF PASSENGERS upon railways is one of the most extensive and important of the material interests of the country. There is no other, perhaps, which affects so large a number of persons, and at the same time is liable to become so essential to life, and health, and comfort, and every thing else, which makes up the sum of social happiness and enjoyment. We have thought. therefore, that we could not do a more essential service to the profession throughout the country, than by giving them a succinct and comprehensive analysis of the law applicable to that subject in its numerous departments. Nothing more than a brief resumé of the doctrines and decisions affecting its complicated and manifold relations, could be brought within our narrow limits. Its full discussion would require a volume, and one which we hope some time to welcome. But we trust we shall be able, within reasonable compass, so give the outline of the most essential topics which will go to

make up such a volume, devoted exclusively to the transportation of passengers upon railways.

I. We begin with the degree of care required of railways in the transportation of passengers.

1. There is no actual insurance of the safe arrival of passengers at their destination without injury: Redfield on Railways, § 149, pl. 1, p. 323. The degree of care required of passenger carriers is well defined by EYRE, Ch. J., in *Aston* vs. *Heaven*, 2 Esp. R. 533. Carriers of passengers are not "liable for injuries happening to passengers, from unforeseen accident or misfortune, where there has been *no* negligence or default." "A driver is answerable for the *smallest negligence*." If any degree of negligence have intervened in any of the particulars which go to make up the entire force and apparatus connected with passenger transportation, a liability for any evil consequences resulting therefrom will attach: Redfield on Railways, § 149, and cases cited.

2. The degree of care and watchfulness required in any particular business is to be proportioned to the importance and the hazards of such business. If the business be of the highest moment, then the care, diligence, and skill should also be of a similar character: *Briggs* vs. *Taylor*, 28 Vt. R. 180, 184; CURTIS, J., in *Steamboat New World* vs. *King*, 16 Howard U. S. R. 474; Redfield on Railways, § 149, note 5; *Fletcher* vs. *Boston and Maine Railway*, 1 Allen R. 9.

It is scarcely necessary to add, that when we consider the vast importance of railway transportation and its extreme peril and hazard to life and limb in case of accident, it is proper that the courts should require every precaution, to insure the safety of passengers, which study and skill can devise, or art accomplish. And there has generally been no backwardness in that particular hitherto manifested in the courts. And the complaints which have come from interested parties, as if the courts made it a rule to hold every railway company liable, when any loss or injury occurred, is certainly not so well founded in fact as one might affect to believe. And if most cases of accident are found to be the result of carelessness, it is not so wonderful if courts and juries hold a

firm hand upon the companies. Jurors, who have the chief responsibility in deciding these questions, are generally shrewd and sensible men. And if they have seemed to proceed upon any such rule, as that alleged, it has been because the manner of an accident occurring, in railway passenger trains, has generally demonstrated that some precaution, having a tendency to prevent the disaster, was omitted, and which, if it had been taken, would probably have secured the safety of all.

The familiar gossip of the companies and their employees, too, that railway transportation of passengers is the safest in the world, in proportion to the number exposed, has precious little foundation in truth, as applied to existing circumstances. And if it had, would be a mere evasion of the question. The inquiry is not how safe, comparatively, railway travelling now is, but how safe it may be made with proper care and skill. If railway travelling, then, with the existing want of care and skill, is still safer than any other, it only shows how entirely safe it is susceptible of being made. And if that be true, it exhibits the wrong of allowing such fearful accidents as now occur almost daily, in a most inexcusable point of light. The effort to escape such perils should be in proportion to their disastrous consequences. And the degree of safety which the Courts ought to require should be the utmost which is attainable within reasonable limits of expense.

The truth undoubtedly is that railway travelling, in this country, with single tracks and imperfect construction and equipment, is rendered astonishingly exempt from calamitous disasters. But, when we attempt to convince ourselves that, in its present state, it is less perilous than any other mode of conveyance; the wish is generally father to the thought. The number of accidents and disasters is, doubtless, diminished by it; but the fatal consequences of them, when they do occur, are immensely multiplied; and it is either a delusion, or an affectation, which would induce any one to argue the contrary. There are hundreds now killed, or rendered useless for life, by railway accidents, where one such case occurred in the former modes of travelling. It is the very frequency of such disasters that induces the public mind to look upon them in any

other light than that of wholesale murder. And when they are attempted to be salved over by the trite falsehood of the general, or comparative, security of railway travelling, it is time to remonstrate, both against the supineness of railway directors and employees, in leaving open so much room for these calamitous occurrences, and the facility with which the public mind is hoodwinked and deluded into the belief that they are inevitable, and that they are but the necessary instruments of human demolition, in order to secure us against the too great multiplication of the race and the possible immortality of our poor humanity. The truth undoubtedly is, that the public have a right to require that this majestic mode of passenger transportation be made not only as safe as any other, but that it be made as safe as it is possible.

3. The fact that injury was suffered by any one while upon a railway train, as a passenger, is regarded as prima facie evidence of the liability of the company. *Hegeman* vs. *The Western Railway*, 16 Barb. Sup. Ct. R. 353; S. C. 3 Kernan, 9; Redfield on Railways, § 149, note 6.

4. It will make no difference in regard to the liability of the company, that the passenger was travelling on a free ticket. *Derby* vs. *Philadelphia and Reading Railway Company*, 14 How. U. S. R. 468, 483. It is the nature of the undertaking, and not the consideration, which creates the duty; and it makes no difference whether the consideration is of a pecuniary character, or results merely from the confidence reposed in the company. Their duty in regard to care, and diligence, and skill, is the same, in every respect, in either case.

5. But if the party chooses to ride on the engine, or in any other exposed situation, for his own convenience, after being made aware of his peril, the company are not responsible for the consequences. So too, if one accept a free ticket of the company, one of the expressed conditions of which is, that the company assume no responsibility in regard to the transportation either of the passenger or his baggage, the condition is binding. *Welles* vs. *New York Central Railway*, 26 Barb. R. 341. But if, in such case, the passenger is injured by gross negligence of the company, they are still liable.

Bissell vs. *New York Central Railway*, 29 Barb. 602; Redfield on Railways, § 149, § 28, pp. 24–36, 328–330. And if one ride upon a freight train, for his own accommodation, he is not at liberty to demand the same accommodation or security which would be expected in passenger trains, but only such as is reasonable under the circumstances. See cases collected in Redfield on Railways, § 183, note 3.

II. The next subject which seems to demand our attention in this connection, is the power of railway companies to make rules and regulations affecting the conduct of passengers. This subject has been considerably discussed, first and last, but it is now firmly settled, that all such regulations as are necessary and reasonable are binding upon passengers. Hodges on Railways, 553; Redfield on Railways, § 28, pp. 24–36, and cases cited.

1. Railway companies may exclude or remove persons from their cars, stations, or grounds, for violation of the proper regulations and by-laws of the corporation. This may extend to the exclusion of persons having no business there, and the regulation of the conduct of such as have. *Commonwealth* vs. *Power*, 7 Met. R. 596; *Hall* vs. *Power*, 12 Met. R. 482; *Barker* vs. *Midland Railway*, 36 Eng. L. & Eq. R. 253; Redfield on Railways, §§ 26, 27, 28, pp. 24–36, and cases cited.

2. Railway companies may discriminate between fares paid at the stations and those paid in the cars. This is reasonable and just, since it costs the company more to collect fares in the cars than at their stations, inasmuch as they have it not in their power to impose the same checks in regard to accountability. In the English and foreign railways, no passenger is allowed to enter a carriage of the company without a ticket, and it should be so here; and would be, doubtless, were it not for the difficulty of inducing Americans always to submit to reasonable constraint at the hands of others, where they do not fully comprehend its urgent necessity. In some parts of the United States the same regulations are enforced as on the foreign railways, but in other sections, such restrictions would be liable to produce embarrassment, and in some cases, uproar and collision with the servants of the company we fear. But as there is not the least question the companies have

the right to the rigid and strict enforcement of all such regulations, and have also a deep interest in their enforcement, it is hoped they will soon be enabled to do so. *Hilliard* vs. *Goold*, 34 N. H. R. 230; *Chicago, Burlington and Quincy Railway* vs. *Parks*, 18 Ill. R. 460; *Crocker* vs. *New London W. & P. Railway*, 24 Conn. R. 249; Redfield on Railways, §§ 26, 28, and notes. But where railway companies make a discrimination between the rate of fare paid in the cars and at stations, they must afford every reasonable facility for procuring tickets at the stations. *St. Louis and Chicago Railway* vs. *Dalby*, 19 Ill. 353.

3. So, too, the company may discriminate between way fare and through fare. *Reg.* vs. *Frere*, 29 Eng. L. & Eq. R. 143; Redfield on Railways, § 28, pl. 3, n. 3, 4.

4. And a regulation requiring passengers to go through in the same train, and if they do not, requiring them to pay fare for the remainder of the route, is entirely valid. *Cheney* vs. *Boston and Maine Railway*, 11 Met. R. 121; 1 Am. Railway Cases, 601; Redfield on Railways, § 28, pl. 4, and notes. And if the regulations of the company allow a passenger to stay over and then complete his trip on the same ticket, where he obtains the permission of the conductor and a memorandum on his ticket, he cannot claim that privilege without such memorandum. *Beebe* vs. *Ayres*, 28 Barb. R. 275. And if he refuse to pay additional fare he may be expelled from the cars. *Ib.*

5. So also if one have a ticket marked "good only two days after date," he is not entitled to demand permission to ride upon it after the expiration of the time. Such a condition is regarded as evidence of a contract between the company and the passenger, that they shall not be required to carry upon the ticket after the expiration of the term limited. *Boston and Lowell Railway* vs. *Proctor*, 1 Allen R. 267.

6. A regulation excluding merchandise from passenger trains, even where it does not exceed the weight of the ordinary baggage of a passenger, is valid, since merchandise is not baggage. *Merrihew* vs. *Milwaukee and Mississippi Railway*, 5 Am. Law Reg. 364.

7. And where the company, by standing regulation, required passengers paying in the cars to pay five cents more fare than if they paid at the stations, and a passenger paid only from station to station, it was held that he was liable to pay the additional five cents at each time of payment. *Chicago, Burlington and Quincy Railway* vs. *Parks*, 18 Ill. R. 460.

8. The servants of the company may enforce the just regulations of the company in a reasonable manner; and in so doing, the company are bound by their acts, and responsible for any peril or expense they incur on that account. But where a conductor or other employee of the company exceeds the reasonable limits of the law, in applying gentle force in the expulsion of a passenger from the cars, or in any other mode of enforcing such regulations, and thereby himself becomes the aggressor, he is liable for his own acts, and has no claim upon the company for indemnity. But the authorities are not agreed, whether in such case the company are liable also for the unauthorized act of their agent while employed in their business. The better opinion seems to be, that they are liable for the acts of their servants, so long as they keep within the limits of their employment, although they exceed their authority. *The Eastern Counties Railway* vs. *Broom*, 2 Eng. L. & Eq. R. 406; S. C. 6 Railway C. 743; *State* vs. *Vermont Central Railway*, 27 Vt. R. 103; Redfield on Railways, §§ 28, 160, 169, 225, and notes. This is certainly the general rule in regard to the liability of the master for the acts of his servants, and we see no reason to question its application to the case of corporations generally, or railways in particular. It is now entirely settled by the great preponderance of authority, both English and American, that railway companies and other corporations are liable to indictment for the acts of their officers and servants in transcending the powers secured by their charters. *Reg.* vs. *Rigby*, 6 Railway Cases, 479; *Queen* vs. *Scott and others*, 3 Q. B. R. 543; *Commonwealth* vs. *Nashua and Lowell Railway*, 2 Gray, 54; *Same* vs. *New Bedford Bridge Co.*, Id. 339; opinion of PATTERSON, J., in *Regina* vs. *Birmingham and Gloucester Railway Co.*, 3 Q. B. R. 231, and in Redfield on Railways, 515, note 2, § 225.

9. But it seems to be conceded that railway companies cannot impose and enforce penalties, either upon passengers or strangers coming upon their grounds, except in conformity to express statutory powers granted for that specific purpose. *Matter of Long Island Railway*, 19 Wendell R. 37; S. C. 2 Am. Railway, C. 453.

10. And a by-law, declaring that the company would not be responsible for a passenger's baggage unless booked, and the carriage paid, is bad, as being inconsistent with the general provisions of the English statute, allowing railway passengers to carry a certain amount and kind of baggage. *Williams* vs. *Great Western Railway*, 28 Eng. L. & Eq. R. 439. But this decision is questioned. Redfield on Railways, § 26, note 10.

11. There is a pretty general impression in many portions of the country, that the passenger stations of railway companies are public places, open to the ingress and egress of all persons, whether they have business there or not; and that any one has the right to pass and repass along the track of a railway. But nothing is farther from the truth. Mere loiterers have no more right to make a railway station the place of their rendezvous, than they have to apply a private dwelling, or a shop or storehouse, to the same purposes. And any persons presuming to come upon the company's land, whether at the stations or along the line of the road, are not only trespassers, in the strict technical sense, but they are intruders and intermeddlers, in the most offensive sense, since they thereby not only needlessly embarrass the operations of the company and expose their own lives to unnecessary peril and destruction; but they do also in more ways than we can here stop to enumerate, sadly and painfully imperil the lives of others. Redfield on Railways, § 27, pp. 28, 29, § 172, note 10. This is a thing which would not be tolerated in any State or country where government, in all its departments, was enabled to exercise the proper control. But we are sorry to say, that the American people, with the best and purest intentions, are slow to submit to restrictions upon their freedom of action, the absolute necessity of which they do not comprehend. We trust they are now in a

school where they will be likely to grow wiser and better in tnat respect. See the question further discussed in Redfield on Railways, § 172, and notes. The company may exclude any particular hackman or passenger carrier from coming within the precincts of the grounds adjoining their stations. *Barker* vs. *Midland Railway*, 36 Eng. L. & Eq. R. 253.

12. In the absence of all express contract the law implies one, on the part of the company, for safe transportation according to the general course of their trains, as indicated by their public advertisements and notices; and on the part of the passenger that he will pay the usual and regular fare, and will, in all respects, conduct in a decent and orderly manner, and conform to all the legal by-laws and regulations of the company. *Frink* vs. *Schroyer*, 18 Illinois R. 416. And fare will be presumed to have been paid in the ordinary way: *McGill* vs. *Rowand*, 9 Barr, 451; Redfield on Railways, § 131; *Harris* vs. *Stevens*, 31 Vt. R. 79.

13. And where railway companies do not deliver a passenger in time, according to their public announcements, whereby he fails to make the proper connections, so as to enable him to pursue his contemplated route; or, if he is otherwise essentially embarrassed in regard to his business, they will be liable for all damages thereby sustained. Hodges on Railways, 619; Redfield on Railways, § 154, note 1.

14. And where a railway company continues to advertise the connection of trains, at a point beyond the terminus of their own road, after the same has been discontinued, whereby one suffers pecuniary loss by not being able to proceed in the manner indicated by the advertisements, the company are responsible for all damages. *Hawcroft* vs. *Great Northern Railway*, 8 Eng. L. & Eq. R. 362; *Denton* vs. *Same*, 34 Eng. L. & Eq. R. 154.

15. The company are responsible, too, that proper notice be given to passengers of the places of changing cars, and that this be done in such a manner, that every person of common understanding and watchfulness would not be in danger of mistaking its import, or in doubt in regard to following it. And if this is done, the company are not responsible for any loss a passenger may sustain by mistaking

the place of changing cars, or by taking the wrong train. But if the passenger discovers his mistake in time to return and take the proper route, and is offered to do so without additional charge, and declines to do it or to leave the cars, or to pay his fare on the route he is travelling off the route, for which he had tickets, he may lawfully be expelled from the cars. *Page* vs. *New York Central Railway*, 6 Duer, 528.

16. But the rule of damages which has been adopted in some of the English cases, of allowing nothing more than the extra expense at hotels and for additional fare, if anything, on account of not going through by the same train; and refusing all allowance of special damages, in consequence of loss of time and embarrassment in one's business arrangements and connections, seems almost like a denial of justice. *Hamlin* vs. *Great Northern Railway*, 38 Eng. L. & Eq. R. 335; Redfield on Railways, § 154. The true rule undoubtedly is to allow such damages as might naturally have been expected to follow from such an interruption as occurred, under all the circumstances, known to the passenger at the time he purchased his ticket; such as he would have been likely to have claimed, if the consequence of such a disappointment had been pointed out to him by the company at the time; and not to allow such special damages, as might actually occur, contrary to the ordinary course of events, and which could not have been within the contemplation of the parties, or either of them, at the time of entering into the contract. This is in accordance with the general rule of damages now established in analogous cases. Redfield on Railways, § 154 and notes, § 131 and notes.

III. The precise liability incurred by the different roads constituting a continuous line, where they sell through tickets, in the form of coupons, for each separate road, is sometimes an embarrassing question.

1. It is not, in general, regarded as a case of partnership, so as to render each road liable for all losses occurring upon any portion of the road: *Ellsworth* vs. *Tartt*, 26 Alab. R. 733; *Briggs* vs. *Vanderbilt*, 19 Barb. R. 222.

2. But where the entire line is consolidated, and the fare divided

rateably, all losses being first deducted, it has been construed to constitute a partnership so far as responsibility to third persons is concerned: *Champion* vs. *Bostwick*, 11 Wendell, 572; S. C. 18 Id. 175.

3. And the responsibility of common carriers of goods, and that of passenger carriers of baggage is the same. The taking pay and giving tickets or checks through, makes the first company liable for the entire route. And it has been held that, as to baggage, each company is liable for a loss upon any portion of the route: *Hart* vs. *Rensselaer and Saratoga Railway*, 4 Selden, 37; *Straiton* vs. *New York and New Haven Railway*, 2 E. D. Smith, 184. The person selling the ticket is regarded as agent for each company: Redfield on Railways, § 128; § 135, and notes.

4. But, as to the transportation of passengers, the rule has been considered somewhat different. Such coupon-tickets import, ordinarily, no contract to carry beyond the limits of the particular road for which each separate ticket is sold, the undertaking of each road being several and not jointly with the others. Each successive road undertaking for its own line and the proper connections at its terminus: *Sprague* vs. *Smith*, 29 Vt. R. 421; *Hood* vs. *New York and New Haven Railway*, 22 Conn. R. 1, S. C. Id. 502. In this last case the court held that an express contract by a railway company to carry beyond its own line, would be ultra vires, and so not binding. The decision in that respect stands alone, at present: Redfield on Railways, § 158, and notes. The sale of tickets for long routes, in the form of coupons, is regarded much in the same light as when the tickets of one company are sold at the stations of other companies. So far as the transportation of passengers is concerned, such transactions are regarded in the light of agency rather than of partnership. We trust we shall be able to recur to this subject, so replete with interest, and so prolific of litigation, and give a succinct epitome of the law affecting most of the questions which have hitherto arisen in the courts of justice in regard to it. In the meantime, if what we have said, shall induce, in any reader, the desire that we had said more upon the topics already discussed, we can

only say that our space forbade it, and that we have said all that we deemed it prudent or proper to say, at the time, upon this whole subject, in the work named at the beginning of our article.

I. F. R.

RECENT AMERICAN DECISIONS.

In the United States Circuit Court for the Southern District of New York.

PHILIP ALLEN ET AL., *vs.* F. SCHUCHARDT ET AL.

S , acting for parties at Amsterdam, put into the hands of a broker in the city of New York a sample bottle of a quantity of madder, to negotiate a sale. The sale was made in Rhode Island, by the broker, in the name of S., the foreign principal not being disclosed, under an oral contract to A., upon the inspection of the sample bottle, which he refused to open on account of the instructions of S. The madder was, at the time of the sale, in barrels, in a vessel at the port of New York. After the contract was made, a bill of goods was furnished to the purchasers, with a clause, that "no claims for deficiencies shall be allowed unless made within seven days from receipt of goods." The madder in the casks proving inferior to its apparent qualities in the bottle, an action on the case was brought against S., by the purchasers, for damages.

Held—1. The oral contract made in Rhode Island, where the statute of frauds does not prevail, can be enforced here, although the contract, if made in the same manner in New York, would have been void. The fact that the merchandise was in New York does not affect the question.

2. The action on the case is a proper remedy, and it is not necessary to aver a *scienter*.

3. The sale was by sample, and there was an implied warranty that the merchandise should correspond with the apparent qualities of the sample.

4. The clause in the bill of goods respecting deficiencies, is inoperative, as the contract was previously complete.

5. S. not having disclosed his principals, is personally liable.

Before NELSON, C. J., and SHIPMAN, J.

The sample of a quantity of madder was put into the hands of a broker in the city of New York, by the defendants, to make sale of it for them. A sale was made accordingly to the plaintiffs in the State of Rhode Island, upon an inspection of the sample bottle,