1895

Contracts Limiting Liability of Passenger Carriers for Injuries

John C. Taylor
Cornell Law School

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by

John C. Taylor.

Cornell University School of Law.

1895.
# Table of Contents

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>INTRODUCTION</td>
<td></td>
<td></td>
</tr>
<tr>
<td>CHAPTER I</td>
<td>Vicissitudes in the Law Affecting Special Contracts.</td>
<td>7</td>
</tr>
<tr>
<td>CHAPTER II</td>
<td>Policy of the Law</td>
<td>17</td>
</tr>
<tr>
<td>CHAPTER III</td>
<td>Modifications of Liability by Contract.</td>
<td>23</td>
</tr>
<tr>
<td></td>
<td>Free Passes</td>
<td>25</td>
</tr>
<tr>
<td></td>
<td>Drover's Passes</td>
<td>30</td>
</tr>
<tr>
<td></td>
<td>Passenger Tickets</td>
<td>33</td>
</tr>
<tr>
<td>CHAPTER IV</td>
<td>Liability of Street Car Companies for Personal Injuries.</td>
<td>37</td>
</tr>
<tr>
<td>CHAPTER V</td>
<td>Rules as to Carriers Contracts in Different States.</td>
<td>44</td>
</tr>
</tbody>
</table>
INTRODUCTION.

The right of common carriers of passengers, for hire, to limit their liability by special contract is of comparatively modern origin. The reason is obvious, for it was not till the nineteenth century that carriers of passengers played an important part in the affairs of nations. Since then, many cases both in this country and in England, have arisen which have called for the intervention of the courts and the unfolding of legal principles. Originally the only mode of public travel on land was by mail-coach, and as the risk attending such travel was very inconsiderable, it was not necessary for the carrier to attempt to limit his liability for personal injury; and if attempted it would not have been tolerated by the common law. The age of steam which wrought so many changes and revolutionized the carrying business, established a new era in that department of law. At the present time, the carrier of passengers has become an important vocation, and one which calls for many rules and regulations which heretofore were unknown; and therefore the rights and liabilities of such carriers are often difficult to determine and raise many nice and intricate questions for considerations of the courts. The carrier of passengers is a common carrier and his rights and liabili-
ies in some respects are the same as a common carrier of
goods. Thus, the courts make no distinction as to the valid-
ity of a notice which seeks to limit the carrier's liability
for personal injury, and for injury to goods. (1) But there
is a distinction between the liability of a carrier of goods
and a carrier of passengers; the former is responsible for
all damage which does not fall within the excepted cases of
the act of God and the public enemy. The policy of the law
which imposes this extraordinary responsibility is not appli-
cable to carriers of passengers, because the carrier has an
absolute control over the goods, and only a qualified control
over the passenger. The key to the subject under consider-
ation is found not in the contract between the carrier and
his passenger, but in the more solemn obligation, the contract
between the carrier and the State. From these relations we
may be able to understand and trace the developments in the
law regarding this branch of the subject.

The tendency has been and now is to allow the carrier
to gradually enlarge his rights and exercise, to a greater
degree, more freedom in his relations to the persons with
whom he deals. At the time of Lord Kenyon, in 1797, the right
of a common carrier to limit his liability by a special con-

(1) Railroad Company v. Lockwood, (17 Wallace 357)
tract was unknown; since that time his rights have been gradually augmented until now the right of a common carrier to limit his liability by such special contracts is recognized in nearly all the states.

The first case, it seems, to recover damages, by a person for personal injury done him as a passenger, was in 1791. The case referred to was White v. Houlton, (Fenkes Cases 81) Lord Kenyon, in delivering his opinion, said: "When these (mail) coaches carried passengers, the proprietors of them were bound to carry safely and properly." Thus, it seems to "carry safely and properly" was the obligation the law imposed upon special carriers of goods for hire; which made the carrier of passengers practically an insurer of the safety of the passenger. There are two or three old cases which give countenance to the same idea. Thus, in Bremner v. Williams, (1 Carington & Payne 414), Best, C. J., said, "I consider that every coach proprietor warrants that his stage-coach is equal to the journey he undertakes." In Sharp v. Grey, (9 Bing. 457), an axletree of defendants' coach broke on the journey, injuring the plaintiff, who was a passenger. It appeared that the axletree was of iron inclosed in wood, and the defect could not have been discovered on investigation. Tindal, C. J., directed the jury to consider whether there had been on the part of the defendant that degree of
vigilance which was required by his engagement to carry the
plaintiff safely. The jury found for the plaintiff. Alderson.
J., in the same case said:—"I am of the same opinion. A
couch proprietor is liable for all defects in his vehicle,
which can be seen at the time of construction, as well as
for such as may exist afterwards and be discovered on inves-
tigation. The injury in the present case appears to have
occasioned by an original defect of construction; and if the
defendant were not responsible, a coach proprietor might
buy ill-constructed or unsafe vehicles and his passengers be
without a remedy. Strenuous efforts were made to continue
the liability of carriers of passengers to the same degree
of responsibility as carriers of goods; but the courts
soon overruled the decisions of the earlier cases and made
a distinction between the two classes of carriers. Thus, in
the case of Christie v. Griggs, (2 Camp. 76.), tried in 1809,
before Lord Mansfield, when he said, "There was a difference
between a contract to carry goods and a contract to carry
passengers; for the carrier is answerable at all events for
the goods, but he did not warrant the safety of his passen-
gers; his contract with was to provide for their safe con-
veyance, as far as human care and foresight would go." Chief
Justice Marshall said, "The law applicable to common carriers
is one of great rigor. Though to the extent it has been
carried, and the cases to which it has been applied, we admit its necessity and policy. We do not think it ought to be carried any further or applied to new cases. We think it has not been applied to living men and that it ought not to be applied to them." (1) In 1862, the Court of Appeals of the State of New York followed the earlier cases and laid down the rule, that a carrier of passengers is bound absolutely, and irrespective of negligence, to furnish a road worthy vehicle; and the court held, that the railroad company was liable for injuries to a passenger caused by a crack in the iron axle of the car, although the defect could not have been discovered by any practical mode of examination. (2)

This doctrine was overruled by Judge Andrews, in the case of Carroll v. Staten Island Railway Company, (58 N. Y. 126) where he lays down the present rule in New York, that, "Carriers of passengers are not insurers of the safety of persons whom they carry; nor do they undertake that the vessels or vehicles which they use, or the machinery which they employ, are absolutely free from defects. They are held to the exercise of the utmost skill and care in the construction and management of both. The general liability of car-

riers of passengers may be thus stated: The carrier is under a duty to carry the passenger safely, so far as human care, foresight, and skill will enable him to do it. This duty, it is said, exists independently of contract, and although there is no contract in a legal sense between the parties, whether there is a contract to carry, or the service undertaken is gratuitous, an action lies against the carrier for a negligent injury to the passenger. (1)

With these considerations of the general liabilities of common carriers of passengers, we may now proceed to a discussion of their rights as affected by special contracts which seek to limit their liability for personal injuries.

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(1) Philadelphia & Reading R. Co. v. Derby, (14 Howard 468). New World v. King, (14 Howard 463)
CHAPTER I.

VICISSITUDES IN THE LAW AFFECTING SPECIAL CONTRACTS.

The law respecting the validity of special contracts of carriers of passengers is to all intents and purposes, the same as carriers of goods. We have seen from the introductory remarks that the law, so far as it relates to special contracts of carriers of passengers, is of comparatively modern origin; but we find in the books references to special contracts affecting the rights of carriers of goods and bailments in general. These contracts antedate back to the civil law; therefore it is our purpose to give a somewhat historical sketch of the right of carriers to limit their liability by special contract.

The civil law did not recognize the right of a carrier to protect himself against responsibility for losses occasioned by his own fraud; nor by a contract that he should be responsible for such losses. For the law would not tolerate such an indecency and immorality, as that a man shall contract to be safely dishonest. It therefore declares such contracts to be utterly void; and holds the carrier liable.
in the same manner, and to the same extent, as if no contract had ever existed. Thus reads the digest:—(1) "Non valet, si convenerit, ne dolus praestetur." "Menececius says:—"Dolus semper et in omni contractu praestandus, nec conveniri potest in antecessum ut ne dolus praestandus." (2)

The policy of the common law in its earlier stages did not recognize the right of common carriers to modify their liability by contract. In the Doctor and Student, it is said, "If he (the carrier) would percase refuse to carry it, unless a promise were made unto him that he shall not be charged for no misdemeanor that should be in him, the promise were void, for it were against reason and against good manners, and so it is in all other cases like." (3) And so in Noys Maxims it is said:—"If a carrier would refuse to carry, unless a promise were made to him, that he shall not be charged with any such miscarriage, that promise were void." (4) In the case of Hide v. Proprietors, (1 Esse 38) tried in 1703, Lord Kenyon said:—"There is a difference where a man is chargeable by law generally, and where on his

(1) Roman Digest, Lib. 50, tit. 17, 1. 23.
(3) Doctor and Student, Dialogue II. Chapter 38.
(4) Noys Maxims, Maxim 92, p. 149.
contract, where a man is bound to any duty and can only discharge to a certain extent by the operation of law, in such a case he cannot by any act of his own discharge himself," putting the case of common carriers who, he says, cannot discharge themselves "by any act of their own, as by giving notice, for example, to that effect."

The earliest authority that gives countenance to the idea of a relaxation of the ancient rule is found in a note of Sir Edward Coke to Southcote's Case, (1) decided in 1501. This note is somewhat ambiguous and cannot be considered as authority as it was a case against an ordinary bailee without reward, and Coke apparently was not speaking of common carriers. The doctrine that a carrier can limit his liability was not definitely acknowledged by Sir Matthew Hale in Morse v. Slue. (2) But by the beginning of the nineteenth century it was settled in England that common carriers could limit their liability by special contract. (3) Thus, in 1804, Lord Ellenborough remarked; in a case regarding the validity of a notice limiting the carriers' liability, that: "There is no case to be met with in the books in which the right of a

(1) Southcote's Case (4 Rep. 34.)
(2) Morse v. Slue, (1 Vent. 110.) 1804.
(3) Nicholson v. Willan, (5 East 507.)
carrier thus to limit by special contract his own responsibility, has ever been by express decision denied." The right once given, it was carried to the other extreme and to such an extent, that in 1815 carriers were allowed to exempt themselves from the consequences of their own neglect. (1) This is practically the rule in England to-day except as it has been modified by statute. (2) The courts carried the power of carriers to limit their liability so far that a reaction was sure to follow, and when it came, the courts regretted that the step had ever been taken. Thus, in 1819, Le Blanck, J., complained that the exemption of carriers from their general liability had been carried to the utmost extent, and in 1810, Mansfield, C. J., said:—"I wish that those notices had never been held sufficient to limit the carriers responsibility." (3) In the case of Brooke v. Pickwick, Rest, C. J., made a like complaint. (4) In Nicholson v. Willan, Supra., Lord Ellenborough said:—"We cannot do otherwise than sustain such right in the present instance, however liable to abuse and productive of inconvenience it may be.

(1) Savin v. Todd, (1 Stark. 75, 1815.)
(2) York, Newcastle &c. R. Co. v. Crisp, (14 C. B. 527)
(3) Innes v. Peckwood, (3 Taunt. 264.)
(4) Brooke v. Pickwick, (4 Bing. 218, 1827.)
leaving to the legislature, if it shall think fit, to apply such remedy thereafter as the evil may require." In Havini v. Todd, Supra., the same judge said:—"I am very sorry the law is so; it leads to very great negligence." In Smith v. Horne, (1) Parker, J., said:—"The doctrine of carriers exempting themselves from liability by notice has been carried much to far." And Burroughs, J., added:—"I lament that the doctrine of notice was ever introduced into Westminster Hall."

It was obvious from this condition of affairs that a change was necessary. There must be some uniform rule by which the validity of these special contracts could be regulated. The courts had gone so far as to hold that public notice brought to a person's knowledge was a special acceptance by the carrier and was, therefore, the contract of the parties. In many instances it was impossible for the carrier to prove knowledge of the notice to his employer; and many questions arose as to what would constitute notice; whether it would be presumed that a person had seen it in a newspaper which he had been accustomed to read, or whether he had seen a public notice posted in the carrier's place of business. Frauds were also practiced on the carrier by con-

(1) Smith v. Horne, (10t, 643. 3 Taunt. 144, (1818)
cealments of value, and frequent hardships fell upon the
owner of the goods caused by the carelessness of the carri-
ers servants; these and other considerations induced Parlia-
ment to pass what is known as the English Land Carriers Act.
It is not my purpose to give a detailed account of this act
or its provisions; suffice it to say, that the effect of
notices was much controlled. Twenty-four years later, Par-
liament passed a supplementary act entitled, The Railway and
Canal Traffic Act. This statute prevails in England to this
day and governs the conduct of the greater part of the trans-
portation of Great Britain. The seventy section of this act
makes the carrier liable for injury done to goods and ani-
mals notwithstanding a notice contrary to that effect. The
act prohibits such carriers from limiting their liability
by "notice, condition or decloration;" provided that nothing
in the act shall be construed to prevent these companies
from making such conditions as are "reasonable and just."

In this country the first cases which passed upon this
question of limitation of liability by special contract,
commenced in 1833, before the Supreme Court of the State of
New York. The cases were Tollister v. Newlen, and Cole v.
Goodwin; (1) both were stage-coach cases and the question

(1) Tollister v. Newlen and C. v. C. (12 Wendel 234 and 251)
involved was the validity of a notice which sought to exempt the proprietors of the stage-coaches for loss of baggage, by stating that all baggage should be at the risk of the owners. The great question for our judges was, whether they should follow the decisions which had heretofore been rendered in England or follow the spirit of Parliamentary enactments or adopt a policy of our own. After much consideration and deliberation they decided that a common carrier could not restrict his common law liability by a general notice though brought home to the owner of the property. They infer that carriers never had the right to limit their liability by such notices, and that, on the ground of public policy, they ought not to not to be so allowed; thus arriving at an opposite conclusion from the English judges. Since the decisions of these cases there has been a considerable confusion in the several States and in order to know what the law in each State is a separate rule would be necessary in nearly every case.

In New York the courts at first rigorously resisted the attempts of the common carrier to limit his common law liability. But after the decision of the case of the New Jersey Steam Navigation Company v. Merchants Bank, (1) the courts of this State uniformly held, that a common carrier

(1) N. J. Steam Nav. Co. v. Mer. Bank. (8 Howard 344.)
right, by special contract, limit his common law liability(1) but there was some confusion as to the amount of limitation. In 1850, in the case of Wells v. The New York Central Railway Company, the Supreme Court, for the first time, assented to the proposition that a common carrier might stipulate against the responsibility of his own or his servants negligence. The Court of Appeals affirmed this judgement in 1862. (2) In the same year the Court of Appeals held valid a special contract which expressly stipulated, that the railroad company should not be liable under any circumstances, "whether of negligence of their agents or otherwise", for the injury to the person or stock of the passenger. This is substantially the law in this State to-day; but in all cases it is held that the language of the contract, to protect the carrier from the consequences of his negligence, must have clear and unmistakable reference to the subject of negligence. (3)

The courts of New York do not follow the rule as laid down by the courts of the United States, and are not followed by many courts of other States. The great land mark

(1) Wescott v. Fargo. (87 N. Y. 540.)

(2) Wells v. N. Y. C. R. R. Co., (94 N. Y. 131.)

(3) Canfield v. R.R. Co., (95 N. Y. 832.)
for the guidance of the United States Courts, and the rules
laid down which permanently settle the law, of special
contracts of carriers, is found in the case of Railway Com-
pany v. Lockwood, (17 Wallace 357.) decided in 1873. Judge
Bradley lays down these rules which have ever since been
followed: First, "That a common carrier cannot lawfully
stipulate for exemption from responsibility, when such ex-
emption is not just and reasonable in the eye of the law."
Second, "That it is not just and reasonable in the eye of the
law for a common carrier to stipulate for exemption from
responsibility for the negligence of himself or his servants."
Thirdly, "That these rules apply to both carriers of goods
and carriers of passengers for hire, and with special force
to the latter." Fourthly, "That a drover traveling on a pass,
such as was given in this case, for the purpose of taking
care of his stock on the train, is a passenger for hire."

These rules, while they settle the law so far as the
United States Courts are concerned, state generally the law
in most of the States. The American rule may be thus broadly
stated: - that a common carrier may limit his responsibility
as an insurer, by special contract, but that he cannot by any
contract exempt himself from responsibility for the conse-
quences of his own negligence, or for the negligence of his
servants or agents; because such contracts are contrary to
the policy of the law and are therefore void. Having now discussed to some extent the changes in the rules relative to common carriers liability, and having considered the rules of law as they exist to-day, I trust we may be able to apply them to actual conditions which will subsequently come before us.
CHAPTER II.

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POLICY OF THE LAW.

Public policy, in the eye of the law, is a topic of broad and indefinite signification. It enters into the affairs of men and controls, to a considerable extent, their affairs with each other. It seeks to promote the general welfare of the community and to provide for the public good against acts of immorality, dishonesty and injustice. It is defined by Bonnie, in his work on Railway Carriers, to be: -A universal rule of law, for the promotion of right, and suppression of the wrong. It embraces in one complex rule, the conclusions of the common sense of mankind. It enters into every law, and every contract, and exercises a controlling influence in their interpretation and application." It is obvious, from the definition, that it would be impossible to so frame a definition that would define its exact power or lay down any body of rules that would permanently regulate its operation. For, what the courts would regard as being against public to-day, they would sanction tomorrow. It relies for its enforcement upon the sentiment of the people, and as that constantly changes the policy changes with it. Thus, in the
case of Iadden v. The Collector. (5 Wallace 107), the court says:—"It is a ground to unstable upon which to rest the judgment of the court in the interpretation of the statutes."

The policy of different states or nations differ as do their laws. Thus, England has one policy; the Federal Courts of the United States declare another; and the different States disagree between themselves; and all change as progress and civilization demands.

In the infancy of the carrying business in England it was thought necessary to prescribe rigid rules for the government of common carriers, lest they might be tempted to collude with robbers who then infested the country. A little later the rule was relaxed and the carrier was allowed more freedom in the making of its contracts. The same has been true in this country, but the progress made by the different courts has been varied, hence, there now exists considerable diversity and friction as to the policy of the law of the different States and of the United States. In England, today public policy sanctions contracts of carriers which expressly exempt them from liability for negligence. The same doctrine is held in France. Thus the court in that country says, in the case of Le Normant v. Compagnie Generale Transatlantique, (Court of Appeal at Rouen, Journal de Palais 1154.), That by declaring valid in this case the clause
of the bill of lading by which the Company, defendant, declined any responsibility for the fault or negligence whatever, imputable to the captain, the crew or the engineers the contested decision was not transgressed any law." In Italy, in a case decided by the Court of Cassation in June, 1886, the judge said:—A stipulation that exempts or limits the responsibility for the default or negligence is valid and obligatory." In this country there seems to be a different doctrine in different jurisdictions. Contracts which are declared contrary to public policy and void in the courts of some States are sanctioned and held good in others.

The courts of the United States maintain that the public is concerned in every contract which seeks to usurp the carriers common law liability, for, if such contracts are held valid, it places the carrier in a position to change the law of common carriers, in effect, by introducing new rules of obligation. Then too the carrier and his customer do not stand on a footing of equality. The former acts in more of a fiduciary capacity which gives him undue advantage over the person with whom he deals. He exacts from his customer such contracts as he desires for the carrying business is now confined to powerful and concentrated corporations whose position in the body politic enables them to control it. The customer on the other hand cannot afford to haggle or stand
out and seek redress in the courts; he prefers to accede to
any conditions or sign any paper the carrier presents, rather
than abandon his purpose. So the Courts of the United States
conclude that, in such contracts, the public are directly
interested and public sentiment is opposed to dealings of any
person, who, by reason of his peculiar position, is able to
take undue advantage of the person with whom he contracts.

The doctrine which prevails in England and France is the
one followed by New York. It allows the carrier more freedom
in the making of his contracts as at the present time, he may
excuse himself for his own negligence. But in such cases the
contract must be clear and unequivocal in its terms. The
courts of this state have not had clear sailing in estab-
lishing this doctrine; there always has been and is now a
strong public sentiment against it. Thus, remarks Judge Davis:
"The fruits of this rule are already being gathered in in-
creasing accidents, through the decreasing care and vigi-
lance on the part of these corporations; and they will be con-
tinued to be reaped until the just sense of public policy
shall lead to the legislative enactment restricting the power
to make this kind of contracts." (1) Judge Wright observed,
in a dissenting opinion: "Whether a contract shall be avoided

on the ground of public policy, does not depend upon the question whether it is beneficial or otherwise to the contracting parties. Their personal interests have nothing to do with it; but the interests of the public are alone to be considered. The State is interested not only in the welfare but in the safety of its citizens. To promote these ends is a leading object of government. Parties are left to make whatever contracts they please, provided no legal or moral obligation is thereby violated or any public interest impaired; but when the effect, or tendency of the contract is to impair such interest, it is contrary to public policy and void." (1)

The judges who favor the rule in New York maintain that the public can have no interest in contracts made with the carrier and his customer; they maintain that parties may make such contracts as they please, and if a person enters into a contract with a carrier to assume all the risk, provided, he shall be carried for a smaller consideration, then the only parties concerned are the carrier and the passenger. Thus, Judge Allen says:—"No principle is better settled than that a party to whom any benefit is secured by contract, by statute, or even by the Constitution may waive such benefit, and the public are not interested in protecting him or benefitting him

(1) Smith v. N.Y. C. & L.R.R. Co., (24 N.Y. 222)
against his wishes." These judges would infer that the person who enters into this sort of contract with the carrier does so of his own free will and never by force of circumstances. As a matter of fact, he usually has no alternative but to do this, or abandon his business. It seems to me that public policy should not sanction any contract whereby one person has undue advantage of another unless such contract is made in good faith and with the free consent of both parties. If it be true that the business of carriers has assumed such vast proportions that it is impossible for them to carry on their business without some degree of negligence, on the part of their servants, then such limitations in a contract might be just; but as the carrying business is controlled by powerful corporations who impose strict rules and regulations upon travel, which the public is bound to accept, then I do not think public policy should sanction their contracts which exempt them from their own or their servants negligence. It seems to me that the doctrine laid down in the case of Railroad Company v. Lockwood, approaches nearest the justness of the situation and should be followed by the courts of the several States, unless regulated by statute.
CHAPTER III.

MODIFICATIONS OF LIABILITY

BY CONTRACT.

Thus far, we have considered contracts of carriers with reference not only of passengers but of goods also. Hence forth the subjects we shall deal with will have to do only with carriers of passengers. The courts, to be sure, have made no distinction between the two, so far as their contracts are concerned, but we purpose to consider the carriers liability for personal injuries.

All passengers do not have their right of action against the carrier by reason of a contract with him, either express or implied. In other words, the obligations to the passenger may arise without privity of contract. Thus, where an express company enters into a contract with a railroad corporation for carrying their goods, express messengers &c; or where the government contracts with the railroad company to carry its mail clerks. If either the express messenger or the mail clerk be injured, by the negligence of the carrier, they can recover, not by virtue of any contract which exists between
the railroad company and the government, but, for the breach of duty, which the law always imposes upon every person who undertakes to perform duties for another, whether gratuitous or not. And such persons are entitled to the same degree of care for their safety as those who are strictly passengers. (1)

This principle may be better seen in a case where a passenger purchased his ticket and was being carried on Sunday, when the accident happened by which he was injured; although the contract was illegal on his part, being in violation of the law which prohibited traveling on that day, except in cases of necessity, yet, the court held that the carrier was bound to carry safely, so far as human skill and foresight would go, and his liability was the same whether the action was brought upon the contract or upon the duty imposed upon the carrier. (2)

It is the rule rather than the exception, that the passengers right to recover for injuries is due, not to the duty imposed upon the carrier, but to special contracts, either expressed or implied, between them. It is to a consideration of these special contracts we will now turn our attention.

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(2) Carroll v. R. R. Co. (53 N. Y. 128.)
FREE PASSES.

The right of a carrier of passengers to absolve himself from the consequences of his negligence, by express stipulation in gratuitous passes, is of quite modern origin and development. The attention of the courts were first called to this subject not more than a quarter of a century ago. Since that time the entire field has been canvassed by judges and text writers, and nothing like unanimity of decision has been reached, and it would be quite impossible to reconcile the authorities in the several states.

The question, so far as I can discover, has never been squarely presented to the Supreme Court of the United States, but Mr. Justice Bradley, in the case of Railroad Company v. Lockwood, (17 Wallace 357), intimated as to how that tribunal would hold if the case came before it.

Before we enter into a discussion of contracts in free passes, it would be well to distinguish between a free passenger and one who gives some consideration. "Any consideration moving to the carrier would seem to change the relation." Thus a person who receives a free pass as a part of a contract beneficial to the carrier, as for example, a drovers pass on its face purports to be gratuitous, but the courts hold that the holder is a passenger for hire because the pass is given
for him to accompany his stock, on which freight has been paid, the amount so paid and the care which he takes of the stock on the journey constitute a sufficient consideration for his own passage. A free pass to a person given by a railroad corporation, that he might come and explain to them a car coupling arrangement, of which he was the owner, has been held not to be a free ticket. (1)

I apprehend that it would be impossible to so frame a rule that would draw the line between a gratuitous and a non-gratuitous passenger. The case must depend altogether upon the circumstances of the case and the relations which exist between the parties.

With this distinction that the courts make, between a gratuitous and a non-gratuitous passenger, let us consider how the different courts have treated these kind of passes. The only cases that have come before the United States Courts which involved a consideration of the question of free passes are, Railroad Company, v. Lockwood, supra. and the case of The Grand Trunk Railroad Company, v. Stevens. (95 U. S. 655.). This case purported to bring up the question of the validity of a special contract in a free pass, but a consideration was shown as in the former case. But Mr. Justice Bradley, in

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(1) Grand Trunk R. R. Co. v. Stevens. (95 U. S. 655)
deciding both of these cases left no doubt as to what that tribunal would hold if such a case came before it. He says:—"We do not mean to imply, however, that we should come to a different conclusion, and the plaintiff been a free passenger instead of a passenger for hire. We are aware that respectable tribunals have asserted the right to stipulate for exemption in such a case; and it is often asked with apparent confidence: may not men make their own contracts, or in other words, may not a man do what he will with his own? The question at first sight seems a simple one. But there is a question lying behind that: 'Can a man call that absolutely his own, which he holds as a great public trust, by a public grant and for a public use as well as his own profit?' The business of the common carrier, in this country at least, is eminently a branch of the public service; and the conditions on which the public service shall be performed by private enterprise are not yet entirely settled." These two cases practically settle, I think, the law so far as the United States Courts are concerned. Therefore all stipulations in free passes which seek to exempt the carrier from liability for his own or his servants negligence would not be just and reasonable in the eye of the law and would be declared void.

Concerning the doctrines of the State courts, I would say, that the rules in different states vary, and as before sta-
ted that it would be impossible to harmonize the numerous decisions; but the doctrine in the majority of the States seems to be:—that a person traveling on a free pass, though he expressly agree that the carrier shall not be liable for any injury he may sustain, will still be liable for an injury if such be the result of the negligence of his servants or agents. This rule has been followed in Alabama, (1) Illinois, (2) Indiana, (3) Iowa, (4) Minnesota, (5) Pennsylvania, (6) and Ohio, (7).

The doctrine in New Jersey and Louisiana seems to be that contracts in gratutious passes which exempt the carrier from liability are valid, but that a person injured while riding on such a pass cannot recover. (8)

The doctrine in New York, so far as strictly free passes are concerned, was firmly established by the first cases con-

(1) Mobile & C. R. Co. v. Hopkins, (47 Alabama 486)
(2) Illinois Central R. Co. v. Read, (37 Ill. 484)
(3) Ohio & C. R. Co. v. Selby, (47 Ind. 471.)
(4) Rose v. Des Moines Valley R. Co. (30 Iowa 276)
(5) Jacobins v. St. Paul & C. R. Co. (20 Minn. 125.)
(7) Cleveland v. P. Co., (19 Ohio St. 11)
sidered in its tribunals and the same rule has endured to the present day. The rule is, that stipulations in free passes which exempts the carrier's liability for all responsibility is valid and such stipulation is a bar to recovery for injuries received while riding on such a ticket.

The question came up for the first time in 1858, in the case of Wells v. N. Y. C. R. Co., (26 Harber 847). The plaintiff received a free ticket from the defendant permitting him to ride on their cars at his own pleasure. On the back of the ticket was the following endorsement: "The person accepting this ticket assumes all risk of accidents and expressly agrees that the company shall not be liable under any circumstances, whether of negligence of their agents or otherwise, for any injury to the person or for any loss or injury to the property of the passenger using this ticket." No consideration was shown. The Supreme Court held that the stipulations in the pass was a bar to the action for damages. The court of Appeals affirmed this decision in 1862. The case of Perkins v. N. Y. C. R. Co., (24 N. Y. 198), decided also in 1862, was a case of a person riding on a pass similar in terms to the one already stated. The person sustained an injury from which he died; and the Court of Appeals held that such a stipulation exempted the company from all kinds of negligence of its agents, gross as well as ordinary;
that there is in truth, no practical distinction in the degrees of negligence. These two cases practically establish the doctrine in this state and it has been followed ever since. To be sure, there are cases where a person riding, on what purported to be a free pass, was recovered but on close inspection a consideration was discovered, which materially altered the case, as where a person traveling on a drover's pass. This will be considered under that title.

DROVER'S PASSES.

Drovers passes are usually given to a drover or some person whom he designates, which generally entitle the holder to accompany the stock to their destination and also a return passage. There is usually a stipulation in such passes that the holder assumes all risks from whatsoever cause, and exempts the railroad company from its own or its servants negligence. There is a conflict of authorities as to the status of a person using this kind of a pass. Some courts regard the holder as a passenger for hire, by reason of the contemporaneous contract for the carriage of the stock. Other courts hold that such a pass is a mere gratuity and a sacrifice on the part of the company granting it.

The construction given to this kind of a contract var-
ries in the different States. The doctrine of the United States Courts and the one prevalent in most of the States, is, that a person traveling on a drovers pass is a passenger for hire, and the stipulation contained therein, which seeks to exempt the carrier from his own or his servants negligence, is void, as being against public policy. (1) This doctrine, in the United States Courts was firmly established by the renowned case of Railroad Company v. Lockwood, supra, and but one case of the same import has since been carried to that court. The question involved was, the validity of a stipulation in a drovers pass which exempted the carrier from liability for negligence. Mr. Justice Bradley delivered the opinion of the court and comes to the following conclusions:

First, "That a common carrier cannot lawfully stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law."

Secondly, "That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants."

Sager v. Portsmouth, (31 Maine 228, 238.)
Thirdly, "That these rules apply to carriers of goods and carriers of passengers for hire, and with special force to the latter."

Fourthly, "That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire." With these rules as landmarks, there can be no doubt as to the position of the United States Courts on this subject.

The doctrine in New York, at the present time, is materially the same as the rule regarding free passes. The courts of this State do not consider a drover's pass founded upon a sufficient consideration to make the holder a passenger for hire. The first case was that of Smith v. N. Y. C. R. Co. (1) The question involved the validity of a drover's pass which exempted the carrier from all responsibility. The Supreme Court held that the plaintiff could recover. The Court of Appeals affirmed this decision by a vote of five to three.(2) Two of the judges held that if the party injured had been a gratuitous passenger the company would have been discharged, but in their opinion he was not a gratuitous passenger.

The next case, Hissell v. The New York Central Railroad Com-

(1) Smith v. N. Y. C. R. Co. (20 Harboor 132)
(2) " " " " " " " , (24 N. Y. 222)
pany, differed from the preceding case in that the ticket expressly stipulated that the railroad company should not be liable under any circumstances, "whether of negligence of their agents or otherwise." The Supreme Court held that the plaintiff could recover. In December, 1862, this judgment was reversed by the Court of Appeals, by a vote of four to three. The majority held that the ticket was a free ticket, therefore the case was governed by Wells v. N. Y. C. R. Co., supra. The doctrine as established by this case, has remained from that time till the present unchanged. (1) But in order that such contracts shall be valid, their terms, which will exempt the carrier from liability for negligence, must be clear and unmistakable. (2)

**PASSENGER TICKETS.**

The law as applied to passenger tickets seems to be somewhat at a variance in regard to whether or not it is a special contract between the carrier and the passenger. The better and more settled opinion seems to be that the ticket is not the contract and the stipulations contained therein does not state the terms of the contract; but that it is a

(1) Poucier v. N. Y. C. R. Co., (42 N. Y. 283)

(2) Blair v. Erie R. R. Co., (60 N. Y. 373)
mere token or voucher or receipt, adopted for convenience, to show that the passenger has paid his fare and is entitled to a passage. (1) In the case of *Rawson v. Pa. R. Co.*, supra, Judge Earl said: "The words thus printed (in the ticket) do not purport to embody the contract between the parties. They are a mere notice as to the terms upon which the passengers baggage will be carried, and are entitled to no more force because they are printed upon the face of the ticket than if they had been printed on the back of the ticket, or on a separate piece of paper posted up in the ticket office; and hence this case is clearly within the rule that a carrier cannot limit his liability by notice, but can do so only by express contract."

If the only questions before the courts for consideration were the effect of the stipulations in the ordinary every day railroad tickets, for places in close proximity, the rule as above stated would be probably universal to-day; but with the growth of the carrying business new and more complicated situations have arisen which have induced the courts to deviate

(1) *Quinby v. Vanderbilt*, (17 N. Y. 306.)

*Rawson v. Pa. R. Co.*, (48 N. Y. 212.)


from the beaten paths which heretofore were universally followed. Thus, when long journeys are undertaken, either by land or water, and when tickets are sold by one carrier over the roads of others, the situation then becomes changed and the courts look at the stipulations in such tickets with more approval, because of the fact that a person intends to go on a long journey is a matter of more deliberation and attention than buying an ordinary railroad ticket. So it may be said that where a railroad company sells excursion tickets, or tickets providing for a return passage, or where the carrier sells tickets for passage on other roads besides his own, or where the journey undertaken is a long one, the courts regard stipulations, which are usually found in this class of tickets, as express contracts between the parties concerned, and the passenger is bound by such stipulations if they are reasonable and just. (1) The validity of such stipulations in railroad tickets, I think, will depend altogether upon the

circumstances of the case; and the position of the parties will many times be a question of fact for the jury.
CHAPTER IV.

LIABILITY OF STREET CAR COMPANIES

FOR PERSONAL INJURIES.

The liability of street car companies for injuries done to its passengers, does not differ materially from the ordinary railway carriers. Rules which are applicable to one apply to the other. They are carriers of passengers within the meaning of a statute which provides that, "a carrier of passengers is bound to extraordinary diligence on behalf of himself and his agents to protect the lives and persons of his passengers." (1) They differ from the steam railways in that the same degree of care is not required, because, the speed of their cars is not so great, and the risk is less hazardous. (2) The degree of care incumbent upon a street car company is the same as is required of persons driving ordinary vehicles for hire drawn by horses. (3)

In discussing the law as applied to street car companies, we purpose to consider their liabilities for injuries received by passengers while in a position not forbidden by

the railroad companies, but which they disclaim, by notice, their liability for injuries so received, as persons injured while riding on the platform of their cars. The question involves to some extent the law of negligence and the manner in which the injured person acted will materially affect the right of recovery. Then, too, statutes have been enacted in many States which regulate the liability of street car companies in their relations with the public. Thus, the statute of New York provides: "In case any passenger on any railroad shall be injured while on the platform of a car, in violation of the printed rules of the company posted up at the time in a conspicuous place inside its passenger cars then in the train, such company shall not be liable for the injury; provided, such company at the time furnished room inside its passenger cars sufficient for the proper accommodation of the passengers. (1) But in the absence of statute there is some conflict of authority. So that being the case we shall consider what the liabilities of the street car companies are and the effect of notices posted in their cars which seek to exempt the carrier from responsibility for injuries received by persons while standing on their platforms. It is a well established rule, that the person injured cannot recover for damages he may sustain, when his own want of ordinary care

(1) Railroad Act: Laws of 1850, Chap. 40, Sec. 48.
contributed directly towards it, however negligent the company may have been. (1)

Our first question to consider is: whether or not is negligent for a person to ride on the platform of a street car? The principle seems to be well established that the mere fact of riding upon a street car platform is not conclusive evidence of negligence. (1) Judge Finch said: - "The rule is settled, that, independent of the mandate of the statute, it is not, even in the case of steam cars, negligence per se for a passenger to stand on the platform of a moving car." The public have always regarded the platform as a safe place to ride. The street car companies themselves view it in the same light. They stop their cars for passengers and invite them to get on as long as there is standing room either in the cars or upon the platform. Therefore, for a court to declare that, because a person was riding on the platform, he contributed to his own injury, and could not recover, would be establishing a rule which would be contrary to reason and good judgment. The fact that a person standing on the platform.

(1) Nolan v. Brooklyn City R. Co., (20 N. Y. 63)
Germantown Pass. R. Co. v. Walling, (20 Pa. St. 55)
Maguire v. Middlesex R. Co., (115 Mass. 283)
Burns v. Bellefontaine R. R. Co., (50 Mo. 13)
when it is not impossible for him to get inside. (1), and in fact when there are seats inside. (2), does not of itself constitute contributory negligence. (3) So also a person who rides upon the platform or foot board. (4) or step. (5) of a street car, with express or implied consent of the conductor, and who receives fare while riding in that position, is not guilty of negligence per se, but it is a question for the jury in view of all the circumstances. (6) From a consideration of nearly all the authorities in point, I think, the weight of authority is, that persons riding on the platforms of street cars by force of necessity or in a proper position even though there are seats inside is not guilty of contributory negligence, and recover damages for injuries sustained while in that position.

We now come to a consideration of the effect of a notice posted in the street car, to the effect that, persons riding on the platforms do so at their own risk. If the same rule

(1) Giuna v. Second Ave. R. Co., (87 N. Y. 526)
(6) Upnun v. R. Co., (48 N. W. Rep. 100.)
that applied to carriers generally, applied to this case there
would be no difficulty; as the rule in most of the States is
that the carrier cannot limit his liability by a mere notice
and especially for negligence. The courts do not seem to
treat this as a notice but as a rule or regulation. Now I can
no distinction between a notice in a stage coach that says:-
"All baggage at the risk of the owner" and a notice in a street
car that a passenger standing on the platform does so at his
own risk. The same degree of care is required of a proprie-
tor of a stage coach as is required of a street car company,
and it seems to me, that the same effect should be given to
both notices.

From a consideration of the cases which have passed upon
this subject of notice in street cars, the courts with con-
siderable unanimity say, that, street car companies can make
reasonable regulations for the safety of their passengers, and
that a rule prohibiting persons from standing on the platforms
of their cars is a reasonable regulation, and one who know-
ingly violates it, without some reasonable excuse, or neces-
sity, cannot be said to be free from negligence if the act
contributed to his injury. (1) It is obvious from this rule
that the right of recovery is so narrowed by the notice.

(1) Baltimore & c. R. Co. v. Co sor. (20 Atlantic 113) Willis
v. Lynn & Boston R. Co. (120 Mass. 351) (30 Pd. 224.)
that in order that the injured party can maintain his action in
the face of the notice, he must show himself free from all
negligence whatsoever; on the other hand the carrier would have
to be grossly negligent. There is a case in Missouri where a
person recovered in spite of the statute which provided that,
"said railroad company shall not be liable for injuries oc-
sioned by the getting off or on the cars at the front or for-
ward end of the car." It was held that the effect of this sta-
tute was such that where an injury to a passenger was ocasioned
by his getting off a car at the front platform, it must be
presumed, as a matter of law, that the negligence of the pas-
enger himself contributed to produce the accident and injury;
yet if the injury was ocasioned to a passenger who got off
the front platform and had fallen in front of the wheel, by
the driver's negligence in either intentionally starting the
horses or in carelessly allowing them to start forward while
the passenger was in that position, it would be an independ-
ent act of negligence, for which the company would be lia-

ble. (1) I have been unable to discover a case in the books
where a person has been allowed to recover while riding on the
platform of a street car, when there was a notice in the car
limiting the company's liability. The courts regard the per-

(1) Mc Keon v. Citizens R. Co., (42 L.O. 73)
son negligent when he rides in such a position in violation of the notice. The only case where he would have reasonable grounds for recovery would be when the car was crowded and the company receive his fare giving him no warning. In such a case it would be probably a question for the jury to consider taking all things into consideration. The most court has held, that a person riding on the front platform when there is a notice inside the car exempting the carrier from liability can recover if the injury was caused by the negligence of the company's servants. Judge Harold in writing the opinion of the court held, that when the conductor accepted fare from the plaintiff while on the platform and said nothing to him it amounted to a waiver of the rule in question and as the person did not contribute to his own injury the company should be liable. It seems to me that is what the law should be, but from a consideration of the cases which bear on this subject, I apprehend that Judge Harold's decision would be overruled.
CHAPTER V.

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RULES AS TO CARRIERS CONTRACTS

IN DIFFERENT STATES.

As we have before observed, there is some diversity in the courts of the several States as to the right of the common carrier to limit his common law liability by special contract or otherwise; so the following rules, deduced largely from the cases of each State, will give us substantially its position and policy on this subject.

Alabama.—Carrier can contract for immunity from the consequences of his own negligence, but not by notice unassented to. (1)

Arkansas.—A stipulation in a bill of lading limiting the carriers liability was held to be binding on the bailor. (2)

California.—Carrier can make a reasonable limitation, but not for negligence. (3)

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(2) Taylor v. Little Rock &c R. Co., (32 Ark. 393.)

(3) Hooper v. Wells, (27 Cal. 11)
Colorado.—Carrier can exempt himself from accidental losses, but not for negligent ones. (1)

Connecticut.—A common carrier can limit his liability except for negligence, but not by notice unassented to. (2)

Georgia.—There is a statute which requires express assent of the owner to any contract limiting the liability of the carrier. (3)

Illinois.—Carriers may limit their liability by express contract, notice, or condition on the back of a ticket or other voucher will not do. (4)

Indiana.—Carrier may limit his liability except for negligence. But not by notice. (5)

Iowa.—Provides by statute that no carrier of goods or passengers shall by contract or notice limit their common law liability. (6)

(1) Merchants Despatch &c. v. Cornforth. (3 Col. 280.)
(2) Peck v. Wells, (34 Conn. 145.)
(3) Statute laws of Georgia.
(4) Ill. Central R. R. Co. v. Frankenberg. (54 Ill. 88)
(5) St. Louis &c. R. Co. v. Smuck, (49 Ind. 302)
(49 Ind. 502.) (38 Ind. 436.)
(6) Laws of 1866, chap. 13, p. 121.
Kansas.-Carrier may relieve himself of strict common law liability, but not for negligence. (1)

Kentucky.-Carrier may limit his common law liability by contract if made in good faith, but not for negligence; and not by a notice. (2)

Louisiana.-Carrier may by express contract (but not by notice), restrict his liability, but not for negligence. (3)

Maine.-Carrier can restrict his liability even by a notice when customer has knowledge and expressly or impliedly, assented thereto, but he cannot exempt himself for negligence. (4)

Maryland.-Carrier may by special contract limit his common law liability where there seems to be reason and justice to sustain the exemption. But the contract must be distinct and clear in its terms. (5)

Massachusetts.-Carrier may limit his responsibility by contract or by a notice containing reasonable and suitable restrictions, if brought home to the owner of the goods, and assented to clearly and unequivocally by him, but cannot

(1) Leavenworth &c. R. Co. v. Mario, (16 Kansas 333)
(2) Louisville &c. R. Co. v. Ledger, (9 Bush. 645 and 688)
(4) Sager v. Portsmouth &c. R. Co., (31 Vt. 248) (66 Me. 233)
(5) McCoy v. Erie Trans. Co., (42 Md. 408) (34 Md. 532)
exempt himself for negligence. (1)

Michigan. - Carrier may limit his liability by express contract, but not by notice. (2) Statute declares that no railroad company shall be permitted to change or limit its common law liability as a common carrier, by any contract, or in any manner, except by a written contract, none of which shall be printed, which shall be signed by the customer. (3)

Minnesota. - Carrier may limit his liability as insurer but cannot exonerate himself from his own or his servants negligence. (4)

Mississippi. - Carrier may contract (but not by notice) exempt himself from liability for losses arising from those accidents and casualties which prudence, skill and care cannot always prevent or guard against. (5)

Missouri. - Carrier can limit his liability by contract but cannot exonerate himself from that responsibility which every bailee assumes for ordinary care and common honesty. (6)

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(2) Great W. R. Co. v. Lawkins, (78 Mich. 427)
(5) Mobile &c. R. Co. v. Weiner, (49 Miss. 725)
Nebraska. - Carrier cannot by contract limit his liability for negligence. (1)

New Hampshire. - Carrier may limit his liability by a contract, but not by a notice unassented to. (2)

New Jersey. - Carrier may by contract limit his liability, but cannot exempt himself from his own negligence, except in case of a person riding on a free ticket. (3)

New York. - At present time a carrier may by special contract exempt himself from liability for losses arising from any degree of carelessness and negligence on the part of his servants or agents. But such contracts must be clear and evidenced by plain and unmistakable language. (4)

North Carolina. - Carrier may limit his liability, but not for negligence, nor by notice unless brought to the knowledge of the customer, and it being a reasonable limitation. (5)

(1) Atkinson &c. R. Co. v. Washburn. (5 Neb. 117)
    Kinney v. Central R. Co., (34 N. J. L. 573.)
Ohio.—Carrier can limit his liability as insurer by contract but not by notice, even if brought home to the knowledge of the customer; but he cannot stipulate for a less degree of care and diligence in the discharge of his duty than that which pertains to his peculiar vocation as a bailee. (1)

Pennsylvania.—Carriers can limit his liability by contract, and by a clear, explicit general notice brought home to the knowledge of the employer; but in no case can he exempt himself or his servants from the consequences of his own negligence. (2)

South Carolina.—Carrier may limit his liability by express contract and also by notice, but not for negligence. (3)

Tennessee.—Carrier may by contract, but not by notice, restrict his common law liability, except for negligence. (4)

Texas.—It is provided by statute "that railroad companies and other common carriers of goods within this State, shall not limit or restrict, their liability, as it exists at

(1) Davidson v. Graham, (2 Ohio St. 131) Jones v. Voorhees, (10 Ohio St. 745)


(3) Southern ex. Co. v. Womack, (1 Leisk. 258)

Walker v. Skipwith, (Meigs 502.)
common law, by any general or special notice, nor by inserting any exceptions in the bill of lading or memorandum given on receipt of goods, and no special agreement made in contravention of the foregoing provisions of this section shall be valid." (1)

Vermont.—Liability of the carrier may be restrained by contract, but not by general notice, unless proved to have been assented to by the employer. (2)

Virginia.—Carrier may restrict his common law liability by contract except for negligence. (3)

West Virginia.—Carrier may, by contract, absolve himself from all liability resulting from any and every degree of negligence short of fraud, provided the contract is clear and unmistakably shows that that was the intent of the parties. (4)

(1) Pascual's Digest, art. 4253.
(2) Mann v. Burchard, (40 Vt. 328.)
Kimball v. Rutland &c. R. Co., (26 Vt. 247.)
Virginia &c. R. Co. v. Sayer's, (28 Gratt 328.)
(4) Baltimore &c. R. Co. v. Rathbone, (129 Va. 87.)
Baltimore &c. R. Co. v. Steel's, (37 Va. 558.)
Wisconsin.—Carrier may limit his liability by contract as insurer, but probably not by notice, and cannot exempt himself from his own or his servants negligence. (1)

In many of the States the question has never been squarely presented to its courts so that the rule in such States may be considered unsettled unless regulated by statute.

(1) Betts v. Farmers Loan &c. Co., (21 Wisconsin 80.)
Gleason v. Goodrich, Transfer Co., (32 Wis. 85.)
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