THE

LAW OF BAILMENTS

INCLUDING PLEDGE, INNKEEPERS

AND CARRIERS

BY

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PREFACE

THE main purpose of this volume is to supply students and the professional lawyer alike with an elementary treatise which may serve for study and practical use. It is based upon the author's larger work upon this subject, and makes use of the lecture notes used by him for twenty years or more as a Law School Professor.

While the whole field of Bailments is here developed, special prominence has been given to the important topics of Pledge and Carriers. The latest cases have been consulted and the whole work brought fairly down to date, with the citations as full as a volume of the present compass may permit, whose chief object is the elucidation of principles. Reference figures in heavy type are to sections of the original work.

J. S.

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THE LAW OF BAILMENTS

PART I.

BAILMENTS IN GENERAL.

1. **Bailment as to its nature** relates exclusively to personal property, and the law is considered from the standpoint of title. Three elements constitute at our law a perfect title: (1) possession; (2) the right of possession; (3) the right of property or ownership. Of these elements bailments comprise (1) and (2), but not (3); and hence bailment may be said in a broad sense to consist in rightful possession of a chattel severed from its ownership.[1]

2. **Rightful possession necessarily** is here contemplated. For wherever one becomes the wrongful possessor of a chattel or thing personal, he is not only criminally liable, but, in the civil sense which here concerns us, he is at the law absolutely responsible in damages for the thing or its value, no

[1] §§ 1, 2. It is often found convenient to study the law by regarding specific property and considering title thereto and other incidents. Real property is usually treated in this manner by text-writers, and the same may be said of personal property, notwithstanding the many various kinds which involve various incidents. In such an investigation the law of Bailments corresponds to that of Gifts and Sales. For under Bailments we discuss an acquired title in the holder, which stops short of ownership, whether with or without a mutual consideration; while that title whose essence includes full ownership is discussed correspondingly under Gifts, where the transfer was without consideration, or under Sales, where the transfer was upon mutual consideration.

matter how irresistible on his part may have been the occasion of its loss or injury.[1]

3. For a broad legal definition it may be said that bailment consists in the rightful holding of a chattel (or thing personal) by some party, under an obligation to return or deliver it over (or in certain instances hold as full owner), after some special purpose is accomplished.[2] Such a definition may suffice for the present treatise; and yet the fundamental principle of bailment responsibility applies in many legal relations whose discussion comes more amply under other heads. Wherever the law of bailments is applied, it is the *bailee*, or holder of the chattel, whose rights and obligations are chiefly viewed: the rights and obligations of the *bailor* being correspondingly adjusted.[3]

[1] §§ 17, 18. We shall see this principle applied to bailees who by departing from the terms of the permitted trust commit a breach; as bailees who misappropriate or inexcusably deviate from the bailment undertaking. Such a rule applies likewise to a tortious capture in war which the law of belligerents fails to justify. And, more generally, where one is a tortious possessor, — as, *e. g.*, if he steals my boat, and, while pulling it, is overtaken by irresistible flood or tempest, — the circumstance which caused the loss is of no avail to him, for the law pronounces him an insurer. Fisher *v.* Kyle, 27 Mich. 545; Wentworth *v.* McDuffie, 48 N. H. 402.

[2] §§ 2, 3. A good definition (and the more so since it is based upon the word "bailment," importing literally "delivery") is this: A delivery of some chattel by one party to another, to be held according to the special purpose of the delivery, and to be returned or delivered over when that special purpose is accomplished. Bouv. Dict. Bailment, citing Prof. Joel Parker, late of Harvard University. But the subject takes a wider scope for treatment; for it is obvious that one may be a bailee in many instances without delivery; as where an owner sells and then continues in possession for some temporary purpose, not to add cases of finding, seizure, or attachment. So, once more, where one takes as bailee with an option to buy (*e. g.* a horse taken on trial), the exercise of the option takes the place of "return or delivery over." While no one is to be pronounced a responsible bailee without his knowledge and acceptance, the simple fact of knowingly taking and holding possession (as in case of a finder or salvor) will subject one to that responsibility. See § 3; Kohler *v.* Hayes, 41 Cal. 455; Sturm *v.* Boker, 150 U. S. 312.

[3] §§ 2, 3. The liability an executor or administrator, or a trustee, or a commission merchant or other agent incurs in respect of per-

4. Delivery back or over (or, at all events, a due termination of this bailment relation) is contemplated, as distinguished from one's full ownership of a chattel; and hence, however changed in product or species the thing bailed may become, that specific thing retains its identity while the bailment relation lasts.[1] On such a principle we distinguish from bailment the gift or sale of a thing personal.[2]

5. Coggs v. Bernard is historically the leading case of bailment law in our English jurisprudence. It was decided at Westminster Hall in 1703; and for the first time the court expounded here, with an attempt at method, the English law of bailments. The point decided was that a certain bailment responsibility exists on the part of a gratuitous bailee, and

sonal property in his representative custody, may be studied in works on those subjects; and it will be seen to apply our bailment principle. But such fiduciaries are often intrusted with business of a different or more comprehensive nature, and hence we may exclude them from our general treatment.

[1] §§ 6–8. Milk may be bailed to be returned in cheese or butter. Stewart *v.* Stone, 127 N. Y. 500. Or apples to be ground into cider, rough logs to be cut into boards, corn to be returned as meal, etc. See Stewart *v.* Stone, 127 N. Y. 500; Chase *v.* Washburn, 1 Ohio St. 244; Brown *v.* Hitchcock, 28 Vt. 452. But as to the Roman *mutuum*, or a sale of equivalents, — as where one's sheep are bought under a contract to return the same in kind, — this is no bailment. An ordinary bank deposit of a hundred dollars creates in the bank an obligation to return a hundred equivalent dollars; but where a trunk of dollars is left with a special depositary, the latter becomes a bailee, with an undertaking to return the trunk and contents intact. As to the business of grain elevators, which depends upon custom or a particular contract, see § 8.

[2] *Ib.* In a *mutuum* there is virtually a sale of the thing given over. The rights and liabilities of owner vest in the party receiving possession, unlike the case of a mere bailee. There are many interesting cases which consider whether, from the wording and apparent intent of an instrument, there was a bailment or a conditional sale first intended; as in case of a printing press, sold outright on the instalment plan, or, instead, leased for so much periodical hire, with a stipulation that the hirer (or bailee) shall have finally a bill of sale upon the due fulfilment of his obligation to pay the hire money for the term prescribed. Cf. Stiles *v.* Seaton, 200 Penn. St. 114; Nye *v.* Daniels, 75 Vt. 81. See also the distinction made in Sturm *v.* Boker, 150 U. S. 312.

even though one merely undertakes to do a favor in consenting to occupy that relation.[1]

6. **Bailment classification according to recompense** appears the true modern method and preferable to that which was laid down in this case by Lord Holt and followed by later writers, including Judge Story.[2] Under such a method, this writer submits the following scheme:[3]

I. Bailments for the Bailor's sole Benefit; or without Benefit to the Bailee.	Including among the special purposes of such bailments more particularly: —	Or, under the old method of classification: —
	(*a*) The gratuitous taking of a thing on deposit; (*b*) the gratuitous performance of work upon a thing; (*c*) the gratuitous carriage of a thing from place to place.	(*a*) *Depositum.* (*b*, *c*) *Mandatum.*
II. Bailments for the Bailee's sole Benefit.	(*d*) The lending of a thing; *i.e.*, practically for its temporary enjoyment by the borrower.	(*d*) *Commodatum.*

All of the foregoing are sometimes styled gratuitous bailments.

III. Ordinary Bailments for Mutual Benefit.	(*a*) The taking of a thing on deposit for reward; (*b*) the performance of work upon a thing for reward; (*c*) the carriage of a thing from place to place on reward; (*d*) the hiring of a thing, *i. e.*, for temporary enjoyment; also, (*e*) the pledge or pawn of a thing.	(*a*) *Locatio custodiæ* (*b*) *Locatio operis faciendi.* (*c*) *Locatio operis mercium vehendarum.* (*d*) *Locatio rei.* (*e*) *Pignus.*
IV. Exceptional Bailments.	(*a*) Postmasters. (*b*) Innkeepers. (*c*) Common Carriers.	(*a*, *c*) A branch of *Locatio operis mercium vehendarum.* (*b*) A branch of *Locatio custodiæ.*

[1] §§ 10–12. Coggs *v.* Bernard, 2 Ld. Raym. 909; 1 Smith Ld. Cas. 283. And see elaborate opinion pronounced by Lord Holt, in this case. The crude mode of classification with Roman titles which the distinguished Chief Justice here doubtfully suggested, was later adopted by Sir William Jones and Judge Story in their respective treatises on "Bailments."

[2] § 14. *Ib.* Judge Story himself, in a footnote to his famous text-book on the subject, admits that a better grouping might be made as above. Story, Bailments, § 14.

[3] § 14.

7. The standard of care and diligence to be thus applied varies in the foregoing classes of bailments, as in other instances of common-law doctrine, by the question of recompense. In other words (save for the exceptional bailments to be hereafter discussed, where public policy makes an exceptional rule), the *quid pro quo* on either side, or on both sides, makes the presumable test of a bailee's responsibility in the course of his fiduciary relation to the chattel or chattels.[1] Here, then, is the standard:

	The measure of care and diligence exacted of the bailee is: —	And the measure of negligence for which he becomes answerable is: —
I. In bailments for the bailor's sole benefit.	= Slight.	= Gross (or more than ordinary).
II. In bailments for mutual benefit.	= Ordinary.	= Ordinary.
III. In bailments for the bailee's sole benefit.	= Great (or more than ordinary).	= Slight.
IV. In exceptional bailments (Postmasters, Innkeepers, Common Carriers).	= An Exceptional Responsibility. (Approximating insurance in the two latter instances.)	

[1] §§ 15, 16. It has not escaped comment that an adjustment of rights and duties like this is inexact. Our unit here is "ordinary" or "average"; and yet ordinary diligence must differ with the nature and value of a particular thing, the peculiar risks to which it may be exposed, and the like. True, and yet the unit is such as men can apply to a particular state of facts. Rainbow colors blend imperceptibly, and yet the generality of people distinguish them. It is usual for a jury to test all the facts and circumstances by this relative standard and determine accordingly.

Other tests of comparison have been attempted, but not successfully, nor so as to induce the courts to substitute them for that (as in our text) of "slight," "ordinary," "great." But it is found preferable to fit such adjectives to "diligence," an affirmative word, rather than to its correlative "negligence." And while in general cases of tort, culpable negligence may perhaps be tested sufficiently by the criterion of ordinary care and prudence, negligence in bailment considers conduct exercised towards some specific personal property, and, moreover, conduct in a transaction, which involves always the element of recompense, of advantage, mutual or on one side only. We distinguish the law of gift and sale (as

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91 " 383

8. **Honesty and good faith** are also required of a bailee, and this, whether his particular service contemplates a reward or is merely gratuitous in its intent. For a bailment is a trust, under any circumstances, and exacts of the bailee an honest performance, together with such degree of care and diligence as may properly relate to the particular undertaking.[1]

9. **Agents or servants** may be employed in a bailment; and wherever the bailee is a corporation, the law of agency is constantly invoked to determine the extent to which the master or principal may be held legally responsible for the carelessness or wilful misconduct of the agent, servant, or other substitute who becomes concerned in the undertaking. Were the bailment relation strictly personal, permitting, under the contract of the parties concerned, no substitution or employment of a third person whatever, considerations of this kind would not arise.[2]

10. **The effect of special contract**, express or implied, may be considered in the relation of bailor and bailee; and this to the extent of modifying or explaining the presumed and primary relation we are considering. For the parties themselves are

to an unexecuted contract) upon this element of recompense; and in the obligations of bailment law a like distinction is found. See Giblin *v.* McMullen, L. R. 2 P. C. 336 (1869); First Nat. Bank *v.* Ocean Nat. Bank, 60 N. Y. 278; Preston *v.* Prather, 137 U. S. 604.

[1] § 17. A bailee should not sell, pledge, or otherwise deal with the thing as though he were full owner. The continental jurisprudence, like our own and that of every civilized country, permits not even the bailee for the bailor's exclusive benefit to pursue his trust dishonestly, and gross negligence itself, or the failure to bestow slight diligence, though designated sometimes *dolo proxima*, is but the next thing to fraud, and less censurable.

[2] The general distinction between agents carelessly performing and agents wilfully, wantonly, and tortiously performing outside the real or apparent scope given by the principal, will be found applied in the various classes of bailment considered hereafter. See, *e. g.*, special deposits with a bank, Part II. But it is further observable that with Innkeepers and Common Carriers, *post*, the inclination of the courts is to discard all distinctions between the careless and the wanton misbehavior of a servant, so far as the principal's own responsibility to his bailor is concerned. See Parts V. and VI. And see § 19.

at liberty to fix the time and mode of accomplishing the particular bailment purpose, and may even regulate the responsibilities of the relation; but with this general restriction, that the terms which public policy and contemporaneous legislation impose are not thus to be transgressed.[1]

11. Other cardinal maxims may here be stated by way of a general introduction to our exposition of the various bailments, and each of these maxims we shall have frequent occasion to apply specially. (1) Bailment arises only upon the corporeal possession of the thing by the temporary holder or his agent; though there may, or may not be, a contract for some bailment. Thus, if I agree to take goods to-morrow on storage, there is a contract for a bailment, but no bailment arises until I take the goods.[2] (2) Compound bailments may exist, involving the mingled undertakings of custody, carriage, or work upon a thing; or again, so that one part of the service is upon recompense and another gratuitous; and a bailee's liability may shift accordingly.[3] (3) A bailment need not be by the full owner of a thing; for privity between bailor and bailee suffices, and if the bailor has a special property in the thing, he may bail it for various purposes. A bailee has only to undertake and pursue his undertaking in good faith towards the person from whom he received the thing, and of course

[1] § 20. Special contract will be seen to modify considerably the presumable engagement of parties to a bailment in various instances. Thus, a bailee may specially agree to return the thing, so as to become practically an insurer of its safety; while, on the other hand, he may stipulate for a less degree of care or diligence. The usual standard of care and diligence (*ante*, 7), applies in the absence of some special agreement, but what the parties may have mutually understood in respect of the bailment is to be considered in the same connection. But this limitation should always be borne in mind, as we shall observe hereafter: that the contract must conform to public policy, whatever such policy may be. No bailee is permitted to stipulate for absolute exemption from the consequences of his own negligence; while in the case of Common Carriers, public policy asserts its rule against immunity still more strongly.

[2] § 21.

[3] § 21. See, *e. g.*, Mariner *v.* Smith, 5 Heisk. (Tenn.) 203; Preston *v.* Prather, 137 U. S. 604.

honestly in the first instance. But while he should not voluntarily dispute his bailor's title, he is bound at his peril to regard paramount claims of ownership brought to his attention while he has possession.[1] (4) Furthermore, the bailee's possession constitutes a sufficient title to enable him to maintain remedies against all others who invade his rights, yielding only to a superior title, and to such interest of his bailor as may consist with their mutual undertaking. Even a mere finder or other naked bailee without reward may maintain his possession against all strangers who would deprive him thereof.[2]

12. **Form of action and burden of proof** have frequently to be considered where a bailee is sued for culpable loss or injury to the chattel or chattels in his care or custody. As to the form of action, it would appear that the bailor has usually the right to bring a suit sounding either in contract or tort, at his option; since culpable loss or injury, involving negligence or misconduct, is consistent in such cases with either theory where redress is sought.[3] As to burden of proof, there is more apparent than real discrepancy in the decisions, or rather dicta of the courts, for common sense applies to the particular stage of proof presented by the facts in such an issue. We may say, generally, that the burden of imputing negligence or culpable misconduct to another rests, in general, upon the party who asserts it; and yet that where the facts show a bailment and due acceptance of certain chattels in a good condition, and they are not returned or delivered over at all, or are delivered badly damaged, the burden of exculpation or exoneration rests upon the bailee, if

[1] § 22. Every bailee should honor his bailor's title and pursue his undertaking in good faith towards the party from whom he received the thing, volunteering no dispute of such party's title; for bailment is a trust and should be honestly undertaken, if undertaken at all. But a bailee is bound at his peril to regard paramount claims of ownership brought to his attention while he has possession and to conduct himself accordingly.

[2] § 22. Part II, *post*.

[3] 1 Chitt. Pl. 151; 100 U. S. 762; Coal Co. *v.* Richter, 31 W. Va. 858; and as to suits against Carriers, see Part VI, c. 7.

at all events such loss or injury could not ordinarily have occurred without negligence on his part.[1]

[1] § 23, and numerous cases cited. The application of this rule to the various classes of bailments will be considered in Parts II, III, IV, VI, *post*.

The law is always consistent with itself; and whether we make our study from one point of view or another, the legal result will be found the same.

haracteristics of all Bailments
ubject matter must be personal
. there must be delivery actual a Cons
. must be acceptance
. competent parties
. Possession by bailor is sufficie
ith to support bailment
. Right of prop. remains in bailor
he may maintain action to protect
. Bailee is estopped to deny that
bailor had title at the time
goods were delivered.
8. Bailor must not expose bailee t
to damage without notice.
9. Bailee must exercise due care
10. Parties may be changed by
special agreement. (For further
data note Hale p. 10)

PART II.

BAILMENTS FOR THE BAILOR'S SOLE BENEFIT; OR WITHOUT BENEFIT TO THE BAILEE.

GRATUITOUS SERVICE ABOUT A CHATTEL.

13. **By way of classification** we are to consider: I. Matters preliminary, including delivery in bailment. II. Accomplishment of the bailment purpose. III. Termination of the bailment.

14. I. **Matters Preliminary. As to the nature of the undertaking,** no arbitrary rule of division among the common pursuits of life could do justice to the present topic. A gratuitous bailment is outside of one's business, so to speak; or, in other words, it applies wherever the party who carries on a bailment vocation for reward deals exceptionally with a party on the footing of a favor, and no recompense is mutually intended. It is enough, whether with or without a mutual understanding, that the bailee in the present instance serves without recompense or benefit, since the party to be benefited may not always be apparent. And as in all other topics of bailment law, benefit, recompense, or advantage is viewed with reference not to the actual result, but to the purpose of the undertaking.[1]

15. **The kinds of gratuitous bailment** are, as in bailments for hired service: (1) to keep the chattel in custody, or (2) to perform some work upon it; or (3) to carry it from place to place. Under one or another of these three sub-classes, however compounded may be the transaction, do such bailments commonly range; custody of a thing being a passive sort of relation, as compared with the other two.[2]

[1] §§ 24, 25.

[2] § 25. Under one or another of these sub-classes does the bailment without benefit to the bailee usually fall. But Sir William Jones and

16. Foundation in contract or not in contract may here be distinguished. Where the bailment is founded in contract and on express undertaking, oral or written, the familiar rules of contract, — *e. g.* as to competent parties and a voluntary assent — will here apply.[1] But a bailment of the present class might be constituted where the undertaking was not strictly upon contract, or where circumstances, at least, rendered a mutual assent impossible, needless, or impracticable. Such, for instance, is the case of a finder of things upon land, who, unlike salvors by water, can claim no legal recompense, but only the reimbursement of reasonable expenses, unless a reward had been promised, or some local statute changed the common-law rule.[2] So, too, is it with judicial attachment and the custody of a keeper, unless, indeed, as usually occurs, the element of recompense enters, making such custodian a

Judge Story have preferred, following Lord Holt in Coggs *v.* Bernard (2 Ld. Raym. 909), to discuss bailments of this class under two distinct titles taken from the Roman Law. They give us *Depositum*, a Deposit, and *Mandatum*, a Mandate; the former applying to all bailments for gratuitous custody, the latter to gratuitous work and carriage, or the residue. The bailee in the former case they style the *depositary*: in the latter, the *mandatary*. The use of such technical words appears, however, disadvantageous and needless. And besides, Roman distinctions at the civil law are here of no precise significance. A *depositary*, in the English sense, would usually import one whose vocation of custody is for hire, while a *mandatary*, as the civil law regarded him, meant simply a gratuitous agency, which might equally apply to our unpaid bailee, or to an unpaid oral messenger. Cf. at length, § **26**; Story, Bailm. §§ 47, 137; Jones, Bailm. 64; Colquhoun Rom. Civ. Law, §§ 1736–1739, 2068, 2069.

[1] § **27**. But infants have sometimes been held liable as bailees, by considering the tort instead of the contract side of the present relation. Towne *v.* Wiley, 23 Vt. 355. A bailment undertaking should not contravene the rule of sound policy or good morals. An assent is always needful, whether evinced by words or acts. No one becomes responsible, even as a gratuitous bailee, where goods are surreptitiously placed in his carriage or thrust upon him without his knowledge and assent; though if, after ascertainment of the fact, he went on with the trust, this might bind him. Lethbridge *v.* Phillips, 2 Stark. 544; Michigan Central R. *v.* Carrow, 73 Ill. 348; Green *v.* Birchard, 27 Ind. 483.

[2] § **28**. 2 Kent, Com. 356, 357; Wentworth *v.* Day, 3 Met. (Mass.) 352.

bailee of the third class.[1] A gratuitous stakeholder may or may not serve by virtue of contract with bailors of the thing deposited, according to circumstances.[2]

17. The test of recompense or no recompense may often be a delicate one to apply, but the question is one of fact, depending upon the proof of mutual intent. It is not necessarily money recompense to be considered, since a contemplated benefit to the bailee, though contingent and indirect, may render the bailment one of our third class.[3] And cases may arise where a bailment originally gratuitous changes to a bailment for hire.[4]

18. Servants or agents in such bailments are considered, at the outset, with reference to the authority or want of authority to bind the master or principal. One may have accepted the chattel in a personal capacity, or, instead, in some particular representative capacity; and if, in the latter case, such acceptance was unauthorized in the real or apparent scope of one's powers as agent or servant, he binds only himself in the bailment.[5]

[1] § 28. The New York rule regards the bailment as, in effect, one for hire. Phelps *v.* People, 72 N. Y. 334; 41 N. Y. Super. 284. See Part IV, *post*.

[2] § 28. A stakeholder of property becomes a bailee, his undertaking involving an exercise of discretion as to delivery over. So, too, where money is paid into court, and the clerk holds property as a specific and not a general deposit.

[3] § 29. See Newhall *v.* Paige, 10 Gray (Mass.), 368. Where one undertakes in the line of his usual business, it may be presumed a bailment upon recompense, and one consequently of the third class; but such a presumption may be overcome by the proof. See Kinchelo *v.* Priest, 89 Mo. 240; 4 Thomp. & C. (N.Y.) 96; Preston *v.* Prather, 137 U. S. 604. A bailee's silent determination to charge nothing is not enough, where the bailor's reasonable expectation was otherwise; and so *vice versa*, with the bailor's expectation not to be charged. 11 Blatchf. (U.S.) 362. Mere expectation of holding business, etc., introduces a difficult element; yet the question of recompense is usually for a jury to determine on the facts. See further Part IV.

[4] As where bonds originally left for gratuitous custody are afterwards by mutual consent made a standing security (or pledge) for advances of money to the bailee. Preston *v.* Prather, 137 U. S. 604.

[5] § 30. Here, once more, we have an issue mainly of fact upon all the

19. Personal property is the sole subject-matter of all bailments; but specific personal property here bailed may consist of corporeal or incorporeal chattels, things in possession or things in action (so called), or both kinds together; and the bailment may be either of a bare thing or of personal property contained in some receptacle.[1]

20. Delivery or taking possession is here of the physical or corporeal sort, since such a possession, rightfully procured, is essential to charge one as a bailee; and this, of course, excludes for the time being the holder's ownership in the thing. Delivery in bailment imports a corresponding acceptance, and the undertaking itself is reciprocal; but, conformably to our general rule, there may be a rightful holding of possession, without actual delivery, consistently with the law of bailments.[2]

evidence submitted. The main principle has been discussed in various modern cases with peculiar reference to the dangerous practice pursued by banks engaged for a general deposit business, of taking into their safes the valuables of favored individuals for their mere accommodation; these valuables being commonly contained in a box or sealed package. The voluntary act of a bank's executive officer in receiving such special deposit would not, as sound authorities hold, make the bank *per se* liable; and still less would that of some subordinate; but if such deposit, exceptionally or customarily, were made known to the directors or management, their acquiescence so as to bind the bank as bailee may be established expressly or as by an implied sanction. Foster *v.* Essex Bank, 17 Mass. 479 (a leading case); First Nat. Bank *v.* Graham, 79 Penn. St. 106; Wiley *v.* First Nat. Bank, 47 Vt. 546. National banks are forbidden by act of Congress to take special deposits gratuitously, and hence the issue of *ultra vires* sometimes raised. The Supreme Court of the United States holds a national bank liable in such cases. National Bank *v.* Graham, 100 U. S. 691; Wylie *v.* Northampton Bank, 119 U. S. 361. Cf. Third Nat. Bank *v.* Boyd, 44 Md. 47, 61; First Nat. Bank *v.* Ocean Nat. Bank, 60 N. Y. 278; Wiley *v.* First Nat. Bank, 47 Vt. 546. Latterly the business of safeguarding money, securities and valuables has been specially developed in our leading cities; so that the former dangerous custom among general deposit banks has been greatly diminished. See Part IV, *post*.

[1] § **31**.

[2] § **32**. *Ante*, 3. The bailor's surrender of possession upon the faith of the bailee's undertaking furnishes a contract consideration sufficient to

21. **Privity between bailor and bailee** is here sufficient, for the bailment to take due effect; the bailor need not himself be owner; and even if the bailor's delivery were wholly without right, the bailment would take full effect, subject to the adverse claims of third parties made subsequently upon the bailee, so long as the latter accepted the thing in good faith and without intending to participate in a wrong.[1]

22. **Whether the mere contract for such a bailment is actionable** has sometimes been considered. We are always to distinguish between the contract for a future bailment and the bailment itself, which latter cannot arise without receiving or taking possession of the thing. In a bailment of the first class, any mere contract is without mutual consideration and the intended bailee may break his word with impunity, even where the intended bailor's over-confidence in the intended bailee's word has put him to special damage.[2] But once becoming voluntarily a bailee of this class, a mutual trust is created, and the bailee is bound to perform his undertaking with at least slight care and fidelity.[3]

23. II. **Accomplishment of Bailment Purpose. The requisite measure of care and diligence** on the bailee's part in the performance of his undertaking is the most important principle discussed in the courts under the present head. Only the lowest degree is requisite, as shown in the table already presented; in other words, the bailee must use slight care and diligence, according to the circumstances, and he cannot

support even a gratuitous bailment. First Nat. Bank *v.* Ocean Nat. Bank, 60 N. Y. 278; Mariner *v.* Smith, 5 Heisk. (Tenn.) 203.

[1] § 33. Taylor *v.* Plummer, 3 M. & S. 562; Tancil *v.* Seaton, 28 Gratt. (Va.) 601.

[2] § 34. The line is thus drawn between non-feasance and mis-feasance by the bailee in such cases. Thorne *v.* Deas, 4 Johns. (N.Y.) 84; Elsee *v.* Gatward, 5 T. R. 143. If I, for instance, agree to convey A.'s valise to town the next day without recompense, and so receive it, I am not justified in dropping it, or handling it with gross negligence; but I may refuse to receive it when the time comes, and the other party cannot compel nor sue me in damages for breaking my promise.

[3] § 34. And see *ante*, 20.

be held answerable for loss or injury to the chattel, unless grossly negligent.[1]

24. Slight care and diligence is a relative term, and all the circumstances should be considered by the trier of a case, to determine as a question of fact whether on the whole such a degree of care and diligence has been bestowed in the particular instance.[2]

25. It rests peculiarly upon the bailor in such bailments to scrutinize the bailee of his own selection; for if no bailee without reward can be lawfully required to bestow the average pains upon his undertaking, unless expressly agreeing so to do, still less ought the bailor, under such circumstances, to expect an unskilful man to perform skilfully.[3]

26. Other so-called standards are false for the present application; for the courts, English and American, fairly harmonize at the present day in applying, for their own or for a jury's guidance, the test above stated. But other standards have sometimes been incorrectly put forward: such as; (1) That the bailee shall exercise towards the chattel bailed to him the same diligence that he exercises towards his own;[4] or,

[1] § 35; *ante*, 6, 7. A glance at the latest cases to be cited presently for illustration will show adherence to this rule. "Gross negligence in such cases is nothing more than a failure to bestow the care which the property in its situation demands," and whether there is such negligence "is a question of fact," for the jury to determine, or for the court, where a jury is waived. Preston *v.* Prather, 137 U. S. 604, per Mr. Justice Field.

[2] § 37. Thus a plough might be kept in an open shed; but money and valuables received on deposit ought to be fastened up. A load of brick might be left exposed to the weather, but not a load of furniture. And see cases cited *post*, which illustrate.

[3] § 35. Smith *v.* Meegan, 22 Mo. 150. The opportunities afforded the bailor of observing the general fitness of the person whom he intrusts with the thing are to be considered; and so, too, as to the place of deposit intended. Searle *v.* Laverick, L. R. 9 Q. B. 122.

[4] § 36. See Doorman *v.* Jenkins, 2 Ad. & E. 256, against such a criterion. As Judge Story has suggested, the fact that one keeps the goods as his own affords rather a presumption than a test. Story, Bailm. § 64. In this sense such an excuse may be of some service, and particularly in vindicating one's honesty in the bailment. In Tracy *v.* Wood,

(2) That the bailee is only liable for fraud or such gross negligence as amounts to fraud.[1]

27. **All the circumstances should be considered,** for abstract care or diligence is not to be contemplated apart from the circumstances present in the case, such as the intrinsic nature and quality of the thing bailed, and the reputed habits and character of the bailee.[2] And, as we shall presently see, matters of custom, mutual knowledge and assent or, indeed, of positive agreement avail, within the usual limits, to affect the standard we have stated, which is always presumable, at least, in such cases.[3]

28. **In short, the conclusion** to which all tests of duty refer, is what the parties mutually understood, or had a right to infer upon all the facts, subject, of course, to public policy.[4]

29. **Honesty and good faith** are requisite here, as elsewhere,

3 Mas. (U. S. Cir.) 132, a man lost both his own and his bailor's valuables by an act of gross carelessness, and this did not excuse him.

[1] See dicta in 154 Penn. St. 296; Job *v.* Job, 6 Ch. D. 562 ("wilful default"). The true Roman expression is *dolo proxima* — that negligence which comes very close to fraud.

[2] § 37. [3] *Ib.*

[4] Nevertheless slight diligence remains the presumable and fundamental test. For the evidence of mutual understanding in bailments like these is rarely positive ; we may well ascertain whether recompense was or was not to be claimed, and yet rarely would the gratuitous bailee indicate to what extent he meant to render himself liable, or his bailor do more than express a personal confidence in his fidelity and discretion. Human experience justifies, in this state of things, the assumption that the bailee meant to act in good faith, but not with as strict advertence necessarily as though he had been hired to perform the transaction, and that the bailor assents to run a greater personal risk because the accommodation is to cost him nothing. Once more, then, does mutual silence and the want of an express understanding necessitate a reference to general tests, and, in fact, to a relative application of "slight diligence" to all the circumstances and incidents. § 35.

Such a bailment can hardly demand a skilful performance in any abstract sense ; and yet the exercise of a profession importing skill has its bearing. § 38 ; 2 Hawks (N. C.), 115. It is gross carelessness in a bank not to make due presentment of a note so as to charge indorsers. § 40.

on a bailee's part, in addition to the requisite degree of care and diligence.[1]

30. Liability or non-liability of the bailee is illustrated by a number of simple cases decided under the present head.[2]

[1] § **39.** The civil and common law concur on this point. Gaius III. § 207; 2 Kent, Com. 563; Dunn *v.* Branner, 13 La. An. 452. And see *ante*, 8.

[2] § **40.** (1) *Bailee pronounced liable.* The decisions, English and American, on this point, start off with our leading case of Coggs *v.* Bernard, 2 Ld. Raym. 909. Here one who was to have nothing for his service undertook to carry several hogsheads (or casks) of brandy from one cellar to another; he did the work so badly as to break one of the casks and spill its contents, and for this loss (upon a full exposition for the first time of the law applicable to such cases) he was adjudged liable. Following this precedent, Lord Ellenborough, in 1817, pronounced the gratuitous bailee of another person's horse grossly negligent and liable, for turning the animal, after dark, into an unused and dangerous pasture to which it was unaccustomed, whereby the animal received hurt. Rooth *v.* Wilson, 1 B. & Ald. 59. But cf. 6 Jones (N. C.) 532. See also Doorman *v.* Jenkins, 2 Ad. & E. 256 (1834). Where one who permits a prior tenant's stove to remain in an office during his own tenancy, moves it arbitrarily into an open lot, thereby exposing it to injury, he comes within such a rule; for he should, at all events, have terminated the license to remain by reasonable notice to his predecessor. Burk *v.* Dempster, 34 Neb. 426. And see 70 Minn. 95. Culpable exposure to theft, or a heedless surrender to some third person may render one liable. 1 Cold. (Tenn.) 372. For an interesting case of doubloons carelessly exposed in a steamboat, see Tracy *v.* Wood, 3 Mas. (U. S. Cir.) 132.

Sending loose money through the mail without registering the letter may render one liable, where such transmission is grossly careless and unauthorized. Jenkins *v.* Bacon, 111 Mass. 373. And see Beardslee *v.* Richardson, 11 Wend. (N. Y.) 25; Stewart *v.* Frazier, 5 Ala. 114.

(2) *Bailee pronounced not liable.* While a bank might be held liable for non-observance of the familiar presentment of a note, and a broker for disregard of the skill usual in his profession, such skill will not be exacted from one not a banker nor a broker. Eddy *v.* Livingston, 35 Mo. 487. See Shiells *v.* Blackburne, 1 H. Bl. 158. And where an officer in custody of trust funds serves without reward, or any friend carries or takes care of another's chattels gratuitously, slight diligence on his part is sufficient to shield him from loss. See Bronnenburg *v.* Charman, 80 Ind. 475; Schermer *v.* Neurath, 54 Md. 491; Caldwell *v.* Hall, 60 Miss. 330 (keeping in a safe as one keeps his own is no positive test); Hibernian Ass'n *v.* McGrath, 154 Penn. St. 296; Spooner *v.* Mattoon, 40 Vt. 300 (comrades in camp).

31. **Gratuitous special deposit at a bank** illustrates the present class of bailments, besides bringing into view an application of the law of agency to bailments generally.[1]

[1] §§ 42-44. The most numerous and important cases of bailment under the present head relate to the liability of banks of general deposit for special deposits (*e. g.*, boxes of money or valuables) received by way of bailment without the expectation of reward. And here, we are to distinguish, as in all other instances of service or agency, three important principles of the law: (a) That every service or agency has its due scope and limits, beyond which the relation fails to apply. (b) That for merely negligent performance on the servant's or agent's part, and his misfeasance not wilful, generally, in the course and usual scope of his employment, the master or principal must respond to third persons in his stead. (c) But that while, for the positively wrongful and wanton acts of a servant or agent, disconnected with his business and the usual scope of his employment (since there can be no agency to commit a wilful wrong), such party may be charged by others as a wrongdoer, his master or principal shall not be held answerable to them, unless himself contributing to the wrong, as, for instance, in the manner of employing him. And the gist of liability on the employer's part is here, that he was himself wilful or wanton, or at all events failed materially in due care and diligence. And see *ante*, 9, 18.

Foster *v.* Essex Bank, 17 Mass. 479 (1821), is the leading authority in point, and the later American and English cases have followed its main distinctions with approval. In this instance the bank was pronounced chargeable as a bailee, had the valuables in its custody disappeared through the gross negligence of its own cashier; but here it was in fact exonerated, inasmuch as the thing bailed had been fraudulently appropriated by its cashier, who acted without the scope of his employment in stealing it, like any stranger. For it did not here appear that the bank directors or supervising authority showed any culpable negligence in employing and trusting that individual.

In a later Massachusetts case the same distinctions were applied where a special deposit had disappeared from bank vaults. The court announced that, in order to charge the bank, a gratuitous bailee, with such loss, gross carelessness on the part of the corporation, in some respect affecting the custody or occasioning the loss, must be shown; and further that such gross carelessness should be evinced by such circumstances as the want of a suitable place or of proper precautions taken in guarding the deposit, or, as to those employed by the bank and concerned in the affair, negligence in selecting men or in failing to discharge them after receiving notice of their unfitness. Smith *v.* First Nat. Bank, 99 Mass. 605, 611, per Wells J.

For other similar cases which pursue such distinctions, see Giblin *v.*

32. Miscellaneous illustrations are supplied in various bailments which arise not strictly upon a contract, or, at least, upon a relation of taking into custody under peculiar circumstances which infer rather than express a bailment undertaking.[1] But here, as in other cases, it should be noted that the bailment created may be upon mutual inducement, rather than gratuitous, and hence, for its standard of liability, should be referred to our third class.[2]

McMullen, L. R. 2 P. C. 317 (the cashier stole); Scott *v.* Nat. Bank of Chester Valley, 72 Penn. St. 471, 479 (absconding teller who had operated in stocks and kept false accounts, and yet gross negligence in not removing him had not been shown); First Nat. Bank *v.* Ocean Nat. Bank, 60 N. Y. 278. Yet actual knowledge that the cashier or teller engages in fraudulent or dishonorable practices, that he gambles, speculates, lives beyond his evident means, frequents disreputable houses, or carries on outside money operations which his situation and fortune do not warrant, ought to put the directors upon the alert lest they make themselves or the bank strictly answerable to others for the fruits of his misconduct. Gray *v.* Merriam, 148 Ill. 179; Preston *v.* Prather, 137 U. S. 604. Slight diligence or even more towards a valuable gratuitous deposit may be exercised by keeping it in a safe, without giving the further safeguard of an inner compartment used for the bank's similar valuables. Gritfith *v.* Zipperwick, 28 Ohio St. 388. The distinction between such bailments and those for hire in respect of the standard of diligence will further appear under Part IV. Culpable carelessness may appear in failing to take steps to recover the stolen property. Wylie *v.* Northampton Bank, 119 U. S. 361. As to giving up the special deposit to one fraudulently assuming to be entitled, cf. 62 Penn. St 47; 81 Penn. St. 47.

[1] § 45. In the case of a finder on land, the bailee is chargeable simply for gross negligence and fraud, where no reward was offered. And we should bear in mind that one who sees a pocket-book or other thing lying about and apparently lost, may pass it by and become no bailee at all; but if he picks it up and takes it in custody, the rights and liabilities of a bailee attach to him. See *ante*, 3, 16; Bobo *v.* Patton, 6 Heisk. (Tenn.) 172; 4 Esp. 165. And as to an attaching officer and those he employs, see Blake *v.* Kimball, 106 Mass. 115; *ante*, 16.

[2] See *ante*, 17; Part IV, *post*.

Several recent cases, English and American, discuss the constructive custody which may arise where a patron on certain premises uses facilities specially provided for his convenience, and in some such cases a bailment relation, with or without recompense, fairly exists. See 141 Mass. 561 (trying on a new suit of clothes and leaving garments in a dressing

33. Inevitable accident excuses and so, too, does any occasion of loss which imputes no gross negligence or bad faith to the bailee of the present class.[1]

34. As to liability for the contents of a closed receptacle, such as a box or trunk, the liability, here as elsewhere, should be according to what the bailee had fair reason to suppose the receptacle contained; and while in one instance the bailee may have been left in ignorance, or else misled by appearances or his bailor's representations, in another, he is found fully apprised as to the contents or left free to infer for himself.[2]

35. On the whole, then, the bailee's liability in bailments under the present head, must be, apart from special contract modifications, such a degree of diligence, less than what the average of mankind under the same conditions and circumstances are wont to exert with reference to similar property, as may be relatively termed slight diligence; that, correspondingly, he is liable only for what the law terms great or gross negligence; and that, of course, for dishonesty and bad faith in performing the transaction, he becomes, as a matter of course, liable. But it is here essential that the bailment be undertaken gratuitously and without the expectation of reward.[3]

closet); Ultzen *v.* Nicols (1891), 1 Q. B. 92 (hanging up one's overcoat in a restaurant). And see Hillis *v.* Chicago R., 72 Iowa, 228. A mutual consideration or inducement is usually said to exist here. See further, Part IV, *post*.

[1] § 47. Inevitable accident — *e. g.*, lightning, shipwreck, or sudden death — may excuse all three classes of bailees where such was the direct and proximate cause of loss. And so is it with irresistible human force, such as the invasion of an army, highway robbery, or piracy. Stress of the law excuses. Biddle *v.* Bond, 34 L. J. Q. B. 137; 7 Cow. 278. Or loss by accidental fire. Hobson *v.* Woolfolk, 23 La. An. 384. Or loss by burglary or stealing, without the bailee's fault. Danville Bank *v.* Waddill, 31 Gratt (Va.) 469. But in all such cases we assume that the bailee did not bring on the loss or injury or fail to forfend consequences by his own culpable carelessness or bad faith.

[2] § 48. 2 Ld. Raym. 914; 2 Kent. Com. 561.

[3] § 49. As to the exercise of skill, a gratuitous bailment can rarely demand what, in the abstract, is termed skilful performance, and yet the bailee's responsibility in class pursuits should be tested by class

36. But special contract may modify, not only in respect of the standard of care and diligence to be here bestowed, but in other particulars of bailment performance.[1] Public policy, however, intervenes, as it does in all other bailments, to put bounds to the right of private arrangement; and this principle, which has sometimes been overlooked by the courts, permeates the fiduciary relation which a bailment creates.[2]

37. Other mutual rights and duties are sometimes considered in the present connection; the right to use or appropriate, for instance. There can, strictly speaking, be no substantially beneficial use by the bailee in transactions of the present kind; since, in such a case, the bailment would come under the third class. And if by special agreement there is an option to sell and share the profits or an option to buy or make beneficial use, the bailment continues gratuitous only until

rather than individual comparison; and where the exercise of one's profession implies skill, the want of that skill may be imputed as gross negligence. §§ **38**, **46**. Thus, bankers have the better facilities for keeping money and valuables; agistors, for keeping cattle. A banker, *e. g.*, becomes familiar with the routine of presenting a note on maturity, so as to charge an indorser in case of the maker's default.

[1] § **51**. It is this undertow of a mutual understanding, founded on custom or an implied contract, which so often baffles the operation of general principles in the case; for it is always material to know what the parties expressly intended or were presumed to intend. Thus, the bailor may become affected by the understanding that the thing was to be kept in a certain place of whose security and fitness he had full opportunity to judge for himself.

[2] § **51**. The universal limitation applies to a bailment, that the bailee shall not stipulate against responsibility for his own fraud and wilful misconduct; and it is further held that public policy will not permit even a gratuitous bailee to procure absolute immunity from the consequences of his gross negligence. Pattison *v.* Syracuse Nat. Bank, 4 Thomp. & C. (N. Y.) 96. But if the gratuitous bailee is foolish enough to insure safety, or enhance the risks on his own part, public policy will not relieve him from the consequences. Clark *v.* Gaylord, 24 Conn. 484.

Within such limits of policy, whatever special directions accompanied the bailment delivery should be followed; and the bailee's special terms of acceptance bind him and his bailor alike. Smith *v.* Library Board, 58 Minn. 108; 3 Fla. 27; 5 Ala. 114; 8 B. Mon. (Ky.) 416. But a fair construction should be put upon doubtful words and phrases, such as the

the option is exercised.[1] Appropriation, in any unpermitted sense, constitutes misappropriation; and for any misappropriation the bailee is answerable as for conversion.[2]

38. A right to incur reasonable expense about the thing bailed may be presumed to exist, for its due care and preservation, and the owner or bailor may fairly be held bound to a corresponding indemnity by the bailee.[3]

39. As concerns third persons and the bailment rights and duties, every bailee, and even one without reward, precarious and incomplete as may be his own title, has an interest sufficiently great to enable him to sue others, whether tortwise or as for breach of some contract privity with him.[4] But if the bailee has a right to sue in full damages any third party who molests or interferes with his possession, so, too, has the bailor himself; and whichever of the two first sues and recovers the damages bars a similar action by the other.[5]

promise to keep "safely" or "securely," and the modern inclination is to regard such expressions as meaning no more than to fulfil the legal measure of one's duty. Cf. 2 Ld. Raym. 909, 913; Whitney *v.* Lee, 8 Met. (Mass.) 91; Ross *v.* Hill, 2 C. B. 877.

[1] § 52. 60 Miss. 332.

[2] Selling, pledging, or giving away the thing as one's own is, of course, a misappropriation and wrongful. See King *v.* Bates, 57 N. H. 416; 7 Daly (N. Y.), 45.

[3] § 53. But while the common law never presumes that a gratuitous undertaking was designed for burdening the bailee with expense, it does not clearly define the extent to which the bailor may incur expense upon the thing, or expose it to liens created by him; and hence the bailee ought, if possible, to secure his bailor's sanction to expenses. See Devalcourt *v.* Dillon, 12 La. Ann. 672; Harter *v.* Blanchard, 64 Barb. (N. Y.) 617.

[4] § 54 Shaw *v.* Kaler, 103 Mass. 448. Even a mere finder has such a right. 2 Taunt. 302. Whether trover (arising out of "a special property" in the thing) is maintainable by a bailee without reward, rather than trespass, has sometimes been controverted: but the weight of authority seems to sanction such a suit, and our modern practice acts dispense largely with such nice distinctions. Cf. Story, Bailm. § 133; 121 Mass. 269; 13 N. H. 491; 13 Vt. 504; 2 Kent, Com. 568 n.

[5] § 54. See Gillette *v.* Goodspeed, 69 Conn. 363. In various instances the bailor or owner might fairly intervene in the suit for his own protection, and have the fund secured to himself. And see Part III, *post*. Harrington *v.* King, 121 Mass. 269.

40. III. **Termination of the Bailment. A bailment of this class may be terminated** in a variety of ways, according to circumstances and the fair intent of the relation.[1] In general (and this holds particularly true of gratuitous custody for a time uncertain) this bailment is sufficiently accomplished whenever either party, upon giving due notice and opportunity, sees fit to put an end to it.[2] And mutual consent may, of course, put an end to the gratuitous relation, whether by terminating it or by substituting some other undertaking towards the thing.[3]

41. The bailor's demand, by putting a decisive end to the bailment, whose limits were not definitely prearranged, obliges the bailee to give up the thing or else account for it.[4]

42. Redelivery or delivery over should be of the thing in its then existing condition; but if destroyed, injured, or spoiled, the bailee is responsible in damages so far only as his bad faith,

[1] §§ 55, 56.

[2] *Ib.* Unless the formality of a demand would be nugatory on his part, the bailor should make it. See 5 Ala. 114; 8 Ga. 178; 2 E. D. Smith (N. Y.), 60; 21 Vt. 558. But where something precise was to be accomplished, such as carrying the thing to a particular place, or performing a certain work upon it, the bailee cannot divest himself of his trust at pleasure, but must go on and perform his self-imposed task with at least good faith and slight diligence; and so is it in bailments for custody for a fixed period. See *ante*, 22.

[3] See Howard *v.* Roeben, 33 Cal. 399; Chiles *v.* Garrison, 32 Mo. 475.

Notice, given by the bailee to take away, may, if disregarded by his bailor, justify the bailee in putting the thing off his premises, where the undertaking was precarious and not for a time certain. See 2 E. D. Smith (N. Y.), 60. But the bailment fiduciary should still act with honor; and even in such a case he is hardly justified in selling the property, as for his own charges upon further storage, but should rather turn it over to some third party to store or sell for his own reimbursement against the bailor. 7 Daly (N. Y.), 45.

[4] § 56. If the bailee misappropriates the thing, as by selling or pledging it as his own, the bailor may treat the bailment as virtually ended, and bring trover for repossession; yet he may elect, instead, to treat the bailment as continuing and sue for damages. See Crump *v.* Mitchell, 34 Miss. 449; King *v.* Bates, 57 N. H. 446; Wilkinson *v.* Verity, L. R. 6 C. P. 206.

or what the law terms the failure to exercise slight diligence, caused the mischief.[1]

43. **A stakeholder,** or one who holds as under a sort of sequestration, must needs assume a certain responsibility for ascertaining to whom he should make delivery; and in various instances discretion must be exercised by the bailee as to the party entitled to receive the thing from him ultimately, under the terms of his undertaking.[2]

44. **Wherever adverse claims of title** are made, the bailee may either take his own risk as to what delivery on his part is rightful, either with or without the security of a bond of indemnity; or, in matters of sufficient importance, he may interplead the claimants in equity and leave the court to adjust the issue.[3]

45. **The effect of death or revocation upon a bailment without reward,** whether that of bailee or bailor, is sometimes considered.[4]

[1] § 57. All profit and increase derived from the thing ought also to be delivered up or accounted for. *Ib.*; 2 Ld. Raym. 909.

[2] § 58. See Carle *v.* Bearce, 33 Me. 337; State *v.* Fitzpatrick, 64 Mo. 185; Trefftz *v.* Canelli, L. R. 4 P. C. 277. A finder, or an attaching officer or clerk of court, might come under this head where the bailment was without reward. But see Part IV, *post.* The courts are indisposed to extend, by mere inference, the perils of an unprofitable trust.

As to a misdelivery cunningly induced and not grossly careless or wanton, see Metzger *v.* Franklin Bank, 119 Ind. 359; Hubbell *v.* Blandy, 87 Mich. 209. Or where the bailor or his agent misled. Brant *v.* McMahon, 56 Mich. 498.

For a misdelivery amounting to conversion, see Hubbell *v.* Blandy, 87 Mich. 209.

[3] § 60. And see *ante*, 11. See also Cook *v.* Holt, 48 N. Y. 275; Magdeburg *v.* Uihlein, 53 Wis. 165. Actual delivery back or over, in accordance with one's undertaking, and without adverse notice, will doubtless clear the bailee. 17 Ala. 216; 34 La. An. 1133. And he should never volunteer a dispute of his bailor's title. 53 Wis. 165, *supra.*

[4] §§ 59, 61. Revocation of an agency follows the usual rule. See *ante*, 9. But bailment undertakings stand not on the strict footing of an agency, as to revocation by death of one's bailor. See Story, Agency, §§ 488–490. Upon death of a bailee, nothing but the bailee's possible lien for reimbursement or *jus tertii* can obstruct the bailor in

46. As to the place of delivering back or over the apparent understanding of the parties, their situation and circumstances, and the character of the thing, must mainly determine. Such is the general rule of bailments; and in a bailment of this class, the bailee ought to be given the least possible trouble consistent with his actual undertaking.[1]

46 *a*. The duty of rendering an account is considered by the civilians in connection with bailments; but account, under the present head, could scarcely be more than the bailee's report of what he had done, with a statement of expenses, if any were incurred.[2] But assuredly, if the thing be not forthcoming when the bailment is terminated, or if it be produced in a damaged state, such as presumably must have been caused by his own fault, the duty arises of giving a satisfactory account, or, in other words, of exonerating himself at the law, or else indemnifying his bailor in damages.[3]

recovering his property from the bailee's personal representative or other third person. Smiley *v.* Allen, 13 Allen (Mass.), 465.

As to a bailment, joint or common, see § **62**.

[1] § **63**. For a mere gratuitous custody, the place of deposit is presumably the place of final surrender. But wherever the place of redelivery or delivery over was prearranged by mutual contract, that contract shall be decisive of the matter. See 2 E. D. Smith (N. Y.), 60.

[2] § **64**. Whether such account is requisite at all should depend upon the particular circumstances of the undertaking; and the final redelivery or delivery over of the thing in suitable condition and after a suitable manner ought usually to suffice wherever a bailee has performed a simple undertaking without reward. *Ib.*

[3] § **64**. And see, *ante*, 12, generally, as to burden of proof and exculpation or exoneration. See also Graves *v.* Ticknor, 6 N. H. 537.

It follows from our general course of investigation that the bailee who has fully and in good faith accounted to his bailor, cannot be held responsible by third persons of whose adverse claims he was not previously notified. Dickson *v.* Chaffe, 34 La. An. 1133; *ante*, 44.

The reader will bear in mind that redelivery or delivery over is not always the intended termination of a bailment (as, *e. g.*, where the bailee may become full owner). *Ante*, 3, 4.

PART III.

BAILMENTS FOR THE BAILEE'S SOLE BENEFIT.

GRATUITOUS LOAN FOR USE.

47. This next class of bailments resembles the preceding in its one-sidedness of recompense; whence some have reckoned both under the single denomination of gratuitous bailments. Familiar as this transaction must be in daily life, very few English or American decisions are found, and our guide must be common sense and the analogies available. To all practical intent, every bailment for the bailee's sole benefit is a loan for use; and accordingly we may define the bailment as one for the temporary beneficial use, *gratis*, of a chattel which the borrower must afterwards return.[1]

48. Under three heads, elsewhere employed, the bailment by way of gratuitous loan for use may be discussed. I. Matters preliminary, including delivery in bailment. II. Accomplishment of the bailment purpose. III. Termination of the bailment.

49. I. **Matters Preliminary. As to mutuality,** such a bailment could scarcely arise apart from some contract relation; and a

[1] §§ 65. 66. The Roman jurisprudence, with more exactness than our own, has styled this loan *Commodatum*, to distinguish it from that other loan, *Mutuum*, where the borrower or hirer was bound to redeliver, not the specific thing furnished him, but, at his option, some other of the same kind. *Mutuum*, at the common law, is, as we have seen, a sale of equivalents and no bailment at all. Yet, in popular English speech, we blend the two Roman meanings when we speak of "a loan" and "lending;" and could some such word as "commodate" be contrived in the present connection, our legal vocabulary would be more exact.

Yet there may be a present lending with an option in the borrower to purchase hereafter. Whitehead *v.* Vanderbilt, 10 Daly (N. Y.), 214.

contract relation presumes competent parties and a free mutual assent. No loan so called can prevail against an unwilling owner from whom the thing was forcefully or fraudulently taken, nor, of course, where it was taken without his knowledge.[1]

50. The subject-matter of a bailment loan for use consists in articles to be returned or delivered over, in specie, and not, in a loan or commodate, where only an equivalent is to be rendered in return.[2]

51. As to the period of loan, it would appear that the distinction between a loan for a fixed and for an uncertain time is of legal importance.[3] But the binding force of a contract to loan dates only from delivery, as in other gratuitous bailments.[4]

[1] § **68.** In such a case the pretended borrower is not only without the rights of a bailee, but may, if he meant to appropriate, be indicted for larceny besides. State *v.* Bryant, 74 N. C. 124. See further, Hagebush *v.* Ragland, 78 Ill. 41.

[2] § **69.** See *ante*, 47, and *n.* A loan of things consumable in use, like wine, corn, or money, cannot in strictness be made, if that use consists in the consumption; and indeed such a transaction may be presumed an outright gift, or, if a consideration intervened, a sale of the thing. Yet the loan of a consumable thing, not for consumption, but by way of commodate is possible; as in the loan of such articles to make a show, to ornament, or to enhance a friend's credit. See Archer *v.* Walker, 38 Ind. 472. Whatever the character of the use, our bailment confers the right to use only as the borrower and lender mutually intended, expressly or by implication.

[3] § **70.** The Roman civilians carefully distinguished between the two sorts: a loan with some definite period fixed in advance, and the *precarium*, which was for a time indefinite, or no longer than the lender chose to permit. In Story, Bailm. §§ 253, 258, 277, it is laid down that every loan for use is understood, at common law, to be so strictly precarious that the lender may terminate it whenever he pleases; but this may be doubted, in advance of actual decision by the courts. See next note.

[4] § **71.** It has been seen (*ante*, 22) that a gratuitous bailment, resting in mere contract, is not enforceable or actionable, inasmuch as the contract is without consideration; but that, after delivery has taken place, the bailment itself affords sufficient mutuality for requiring the fiduciary undertaking, when definite, to be carried out as agreed upon. To this extent the disadvantage which one party would sustain by the

52. II. **Accomplishment of Bailment Purpose. Great diligence is required** in bailments of the present class, conversely to bailments of the first class, already considered. The bailee is bound to exercise what is called great, or more than ordinary diligence, and to respond for every loss which is caused by even slight negligence on his part.[1]

53. **Good faith is also requisite,** as in all bailments. Hence the mutual understanding, or the extent of the bailor's license to use, should here be considered; for where the loan was strictly personal the bailee may not admit others inconsistently to the use; and where the loan was for a particular time or purpose, the bailee who deviates essentially in such respects, becomes absolutely liable for the thing, and may be treated otherwise as a wrong-doer.[2]

54. **What is excusable or inexcusable loss or injury** will depend upon the circumstances of each case, using our stan-

other's non-performance receives indulgence. Why, then, should not a corresponding indulgence be allowed a borrower, where the lender agreed that he should have the thing for a fixed definite period, and delivery was made accordingly?

Says Coleridge, J., in Blakemore *v.* Bristol R., 8 El. & Bl. 1035, 1050: "It is surprising how little in the way of decision in our courts is to be found in our books, upon the obligations which the mere lender of a chattel for use contracts towards the borrower. . . . It may, however, we think, be safely laid down, that the duties of the borrower and lender are in some degree correlative." See also Clapp *v.* Nelson, 12 Tex. 370.

[1] § 72. And see *ante*, 6, 7. The Roman law emphasized this duty as *exactissima diligentia*, or the highest degree known. And see Lord Holt in Coggs *v.* Bernard, 2 Ld. Raym. 909, 915. Such diligence as one more than ordinarily careful would bestow upon such property, or manifest under like circumstances, appears the criterion here. See 3 Bing. N. C. 475; Beller *v.* Schultz, 44 Mich. 529.

[2] § 73. And see *ante*, 8, 29. See 31 Ark. 518; Cullen *v.* Lord, 39 Iowa, 302; 17 N. Y. Supr. 474; Lane *v.* Cameron, 38 Wis. 603.

In general, for attempting to sell, pledge, give away, or otherwise misappropriate the thing, a borrower, like all other bailees, is answerable as a wrong-doer. Crump *v.* Mitchell, 34 Miss. 449; McMahon *v.* Sloan, 12 Penn. St. 229. As to deviating from the permitted purpose, see 41 Fed. (U. S.) 152 (borrower of a barge).

dard and the general rules as to evidence and burden of proof which apply to bailments.[1]

55. False standards of liability or non-liability in such bailments should be avoided. Thus, the exercise of more diligence than to one's own goods, is not a test; but the question is simply one of good faith and the exercise of great diligence under all the circumstances.[2]

56. Where loss or injury is occasioned by third persons, the borrower's responsibility depends usually upon the issue of his wilful or slightly careless participation therein.[3] But for damage occasioned by the borrower's own agent, or by one whom the borrower, with the lender's permission, let into the use of the thing, the usual principles of agency should apply.[4]

57. Bailment may be affected by special contract as in other

[1] § 74. Here, as in all other bailments, we consider the direct and proximate cause of loss or injury; whether due to the irresistible disaster or stress set up in excuse by the borrower, or to the want of great diligence on his own part. Thus would it be, where act of God intervened; or a fire; or death and spoliation; or robbery or burglary, etc. It may be incumbent upon the bailee, in case of theft or other loss, to make the loss known and take prompt measures for regaining possession. The actual decisions under the present head are few, but the leading principle appears clear. In general, if the loss occurred under some generally excusable calamity, it is incumbent upon the plaintiff to establish that the lender was, in fact, to blame. Beller *v.* Schultz, 44 Mich. 529 (borrowed flag left exposed during a hail-storm). And see *ante*, 12.

[2] § 75. It has been seen (*ante*, 26) that care by the bailee of our first class the same as towards his own affords nothing more than a presumption vindicating, most of all, the bailee's good faith in the situation. The illogical nature of such a test (more care than towards one's own) appears in the fine-drawn discussion by Pothier and the civilians of the hypothetical case, where one's house is on fire, and whether in such a case the borrowed chattels must be rescued in preference to one's own. This whole controversy appears trivial.

[3] § 76. If dispossessed without fault, he is, of course, not answerable for the acts of a robber, thief, or other mere stranger.

[4] § 76. And see *ante*, 9, 31. The application of the law of agency to such cases may raise, sometimes, "nice and puzzling questions." See analogous case, 3 H. & C. 256, 602 (where English judges disagreed), in the misuse of a building. And cf. the doctrine of sub-users, as applied to hired use, *post*, Part IV. c. 3.

cases for regulating performance; and seldom can a borrower of valuable chattels be found who has not been laid under some injunction as to the time and manner of enjoying their use, or the bestowal of care upon the undertaking. The usual qualification of public policy applies; and while such a bailee might positively insure his bailor against loss, he cannot by special contract procure his own immunity for gross negligence or wilful misconduct.[1]

58. **The right to beneficially use** is of the essence of bailments of the present class; but mutual understanding may determine how far this right shall extend, and how incidental expenses regarding the thing shall be borne.[2]

59. **The lender's duties correspond** to those of the borrower, so far as decisions may serve to establish a legal principle.[3]

[1] § 77. Thus, one who borrows may make a written contract to "return or account for," *i. e.*, to make full restitution, even though the property be destroyed without his fault. Archer *v.* Walker, 38 Ind. 472. But no special contract of this sort ought to be admitted upon doubtful or conflicting evidence. Watkins *v.* Roberts, 28 Ind. 167. On the other hand, even for public exhibition purposes by a municipal or charitable corporation, a borrower cannot lawfully stipulate that the lender shall bear all the risk of loss. Smith *v.* Library Board, 58 Minn. 108. And see *ante*, 10, 36.

[2] § 78. Unless circumstances warrant a different inference, every gratuitous loan for use should be regarded as personal to the borrower by intendment. 4 Sandf. (N. Y.) 5; 5 Ind. 546; 1 Mod. 210. But cf. 9 C. & P. 383. Any borrowed domestic animal must be fed and sheltered, and the circumstance that the borrower bears this expense does not necessarily change the gratuitous nature of the bailment. See 66, *post*.

[3] § 79. The civilians have taken pains to enumerate these correlative duties as follows: (1) He must allow the borrower to use and enjoy unmolested the thing loaned, as long as the bailment properly lasts; (2) He must reimburse, not the borrower's ordinary bailment expenses, but such as are out of course in preserving the thing lent; (3) He must not, knowingly, lend an injuriously defective article without giving the bailee notice of the defects; for even a gratuitous lending should be to confer a benefit, not to do mischief. As to this last point, the lender is, with reference to his borrower, liable for all damage which directly results from the thing's unsafe condition for the loan, if the lender alone was aware of it; but not where the defect which occasions the damage was utterly unknown to him, and could not readily have been ascertained. Cf.

60. Rights of action against third parties avail here, according to the better opinion, as in other bailments; and the fact that the bailee's own interest is without recompense does not debar him, since he is answerable over for the thing borrowed.[1] But so slight is the borrower's interest that, if the lender may terminate the loan at pleasure, so may he sue third parties in his own name, as by virtue of such termination.[2]

61. III. **Termination of the Bailment. There are various ways** in which a bailment of the present class may be terminated. It is commonly terminable at the bailor's pleasure, where, at all events, the fixed time or a reasonable time has elapsed; nor, perhaps, ought the bailee's own right to be deemed inferior in this respect.[3] A formal demand, on the one hand, or a formal tender on the other, may fix one's rights in this respect.[4]

Blakemore *v.* Bristol R., 8 El. & Bl. 1035; 6 H. & N. 329. Slight care in communicating such defects appears to be the standard in bailments of this class. Coughlin *v.* Gillison (1899), 1 Q. B. 145. And see Gagnon *v.* Dana, 69 N. H. 264; 58 N. H. 134.

[1] § **80.** Gillette *v.* Goodspeed, 69 Conn. 363; Chamberlain *v.* West, 37 Minn. 54. And see The Winkfield, C. A. (1902) 42, overruling Claridge *v.* Tramway Co. (1892), 1 Q. B. 422.

[2] § **80.** It is fair that the owner should be allowed to intervene for his own protection in such a case. 58 N. H. 134; 69 Conn. 363; 9 Cow. (N. Y.) 687. And see *ante*, 39.

[3] § **81.** Our courts have not decided whether the Roman distinction of definite and precarious loans shall apply. It would seem fair, however, that the right of a lender to keep for a time fixed should be respected, where he so desires, and has not been at fault. See *ante*, 51. But in any case the lapse of a definite period of loan will terminate the bailment; and where the loan is for "a week or two," lapse of the longer period fixes the ultimate limit. Stipulation apart, a reasonable period of use is all that any borrower has a right to expect. 5 Dana (Ky.), 173; 12 Tex. 370.

[4] § **81.** Where no uncertainty exists, or the demand would be an empty form, such preliminaries may be dispensed with. Ross *v.* Clark, 27 Mo. 549. And the attempt of a borrower to exercise full ownership over the thing without the lender's permission — as in selling, pledging, or letting the thing out to hire — is so gross a breach of faith as to enable the lender to put an end to the bailment and claim repossession or damages. 9 Barb. (N. Y.) 176; McMahon *v.* Sloan, 12 Penn. St. 229; Crump *v.* Mitchell, 34 Miss. 449; 1 C. B. 672; Wilkinson *v.* Verity, L. R. 6 C. P. 206.

62. **The borrower's duty to deliver back or over,** as to time, place, and person, will depend upon the circumstances and situation. A borrower is not free to exercise his own option in such respects, aside from the mutual understanding; nor can he set up adverse title to his lender; though if some third person as rightful owner should put him at legal jeopardy, this is another matter.[1]

63. **Whether the borrower may detain for expenses incurred** will depend upon the circumstances.[2] The lender's intervention to remedy mischief does not release the borrower from liability for causing that mischief through his own culpable negligence or misconduct.[3]

[1] § 82. In doubtful cases, delivery back to the lender at his own residence or place of lending may be presumed. 9 Barb. (N. Y.) 176. As to third parties who claim, see *ante*, 44; The Idaho, 93 U. S. 575; 34 L. J. Q. B. 137.

As to the lender's representative, see 72 N. C. 234 (assignee in bankruptcy). And see Simpson *v.* Wrenn, 50 Ill. 222; Nudd *v.* Montayne, 38 Wis. 511. On the borrower's death, this bailment may usually be cut short by the lender, in which case no third person can as custodian resist a demand. Smiley *v.* Allen, 13 Allen (Mass.), 465.

[2] § 83. Perhaps for extraordinary expenses incurred under special and justifying circumstances.

[3] § 84. And see 7 Watts (Penn.), 512.

Discussion in this chapter should impress the fact that, wherever one is intrusted gratuitously with his friend's chattels, — as, *e. g.*, with a borrowed horse, or, when enjoying free hospitality, with the use of household plate and furniture, — it is a matter not only of honor, but of legal obligation on his part, to offer to make good any damage thereto occasioned by carelessness on his own part, however slight. A rule less strict would properly apply where the horse was hired by him, or he lodged as a boarder or paying guest of the person owning plate or furniture.

PART IV.

ORDINARY BAILMENTS FOR MUTUAL BENEFIT.

CHAPTER I.

BAILMENTS FOR HIRE IN GENERAL.

64. In passing from gratuitous bailments to those intending a mutual benefit, from the one-sided undertaking to that which puts the rights of the parties in balance, we are at once impressed by the similitude borne by these two classes, with regard to the varied purposes which the bailment may seek to accomplish. This similitude jurists have somewhat obscured by a promiscuous use of Latin epithets, but it is traceable notwithstanding. Our chattel for mutual benefit is delivered as before. And this delivery may be, to speak generally, (1) for its deposit, or (2) for the performance of some work upon it, or (3) for its carriage — in all of which three instances the bailee has the main undertaking to perform. Or it may be (4) for beneficial use, where the bailee is to derive some temporary enjoyment. In only one marked instance, (5) that of pledge, or delivery in security for some debt or engagement, does the bailment for mutual benefit present an essentially new class of transactions; and this is accumulative. For, after all, the difference of legal principle arises only from the introduction of a make-weight, namely, recompense, or the *quid pro quo* for doing as before.[1]

[1] § 85. There may, of course, as in gratuitous bailments, be a compound bailment; or a bailment with option to purchase. See *ante*, 11, 17.

65. Ordinary bailments for hire, will, in the next two chapters, receive treatment so as to show separately (following the order pursued in gratuitous bailments), *first*, the hire of services about a chattel; *second*, the hired use of a chattel. And under the first head we shall incidentally distinguish these kinds: the service of custody of the thing, the service of bestowing work upon it, and the service of carrying it from one place to another; not for the sake, however, of making blunt dissection of a bailment purpose which often runs into combination. But extraordinary or exceptional bailments, notably Innkeepers and Common Carriers, we reserve for later and distinct treatment. That unique mercantile transaction, known as Pledge or Pawn (which is also an ordinary bailment for mutual benefit), will occupy our fourth chapter.[1]

66. Three essentials are found to all bailment contracts for hire: (1) a chattel or chattels as the subject-matter; (2) a recompense; (3) mutual assent to accomplishing a specific bailment purpose towards such chattel or chattels for such recompense.[2]

67. That there should be a chattel or chattels as the subject-matter is implied in every bailment from its definition. Real estate is therefore excluded: but any kind of personal property, corporeal or incorporeal, may furnish a subject-matter, whether in the tangible thing itself, or, as to things incorporeal, in

[1] §§ 86, 87. We speak, here, of hiring and letting with reference to bailments of chattels only, and aside from the hiring of mere personal services, since bailment operates strictly *in rem*. The bailment for hire, then, may be defined as one in which recompense is to be given either for services about a chattel, or for its temporary use.

As to the corresponding Roman *locatio conductio* (which we may liken to the sending back and forth of a tennis ball), see § 86.

[2] All this is analogous to the law of sales. The distinction runs sometimes, closely, and yet logically, as between a gratuitous loan and a hired use (*i. e.*, with mutual recompense). One may borrow a horse (bailment of second class) and at the same time bear the expense of his care. Bennett *v.* O'Brien, 37 Ill. 250. Or he may take a horse to use for a season in distinct consideration of the animal's keep (bailment of the present class). Chamberlin *v.* Cobb, 32 Iowa, 161.

some muniment of title which is capable of delivery.[1] But that which has not yet come into existence as property, or which exists as such no longer, cannot be the subject-matter of a present undertaking for hire.[2]

68. As to a recompense, *pretium*, or price, is the Roman term, which we employ with quite an extensive meaning in our law of sales. This recompense need not be definitely fixed, provided it be ascertainable from the contract; and it may have been tacitly implied as well as expressly agreed to. In the absence of more positive proof, we may regard compensation in a particular bailment to be such as, consistently with local and business usage and the general situation and circumstances of the parties, would be just and reasonable. If left to some third party to fix, the essential is supplied on his *bona fide* performance of the trust.[3] Bailment recompense is commonly in money; but not indispensably so, as some other kind of property would suffice, some service, some contemplated advantage; any reciprocal benefit, and even a benefit contingent and indirect, such as the opportunity of getting more business, may, it is held, take a bailment out of the gratuitous class.[4]

69. Mutual assent to accomplishing a specific bailment purpose towards the specific chattel or chattels for the specific recompense is our third essential; the accomplishment requiring, of course, that delivery precede, and delivery back or over follow. This mutual assent must relate to the particular subject-matter whose continuous identity our law of bailments so carefully preserves; likewise to the particular compensation. For if I promise to hire a certain horse, the bailor's assent must not attach to a different horse, else there would be no mutual

[1] § **89.** And see c. IV, *post*.

[2] § **89.** A thing which will prospectively come into existence may be the subject of an executory contract for hire; but there can be no bailment except upon delivery or taking possession of the thing when it exists. Cf. c. IV, *post*.

[3] § **90.**

[4] Newhall *v.* Paige, 10 Gray (Mass.), 368; Bunnell *v.* Stern, 122 N. Y. 539; Woodward *v.* Painter, 150 Penn. St. 91. Cf. 31 Vt. 161.

understanding, but rather a misunderstanding. So, too, if the bailee offered one recompense while the bailor assented to another, the essential mutuality would be wanting. Error going to the essentials invalidates the contract; and fraud or force on either side renders it voidable by the aggrieved party.[1]

70. Competent parties and a lawful purpose are requisite in a contract for hire upon bailment as in other contracts.[2] And to compare such bailment contract with a contract for sale, we in the latter instance watch to discover the passage over of a full title or property in the thing; but here the passage of a mere corporeal delivery.[3]

71. This contract for hire is distinguishable from a bailment, but here, unlike the two classes of gratuitous bailment already discussed, a mutual consideration supports the contract and entitles the party injured by a breach thereof to redress in damages.[4] Yet our bailment in general arises only upon delivery and acceptance with intent of delivery back or over.[5]

72. Non-contract bailments may exist upon mutual recompense, in certain instances, as in the gratuitous bailments of the first class, already considered. And here, in accord with our general definition, there arises rather a rightful holding or possession of another's chattels under an obligation to return or deliver over, than actual delivery and acceptance.[6]

[1] § 91. Parker *v.* Marquis, 64 Mo. 38. As to withdrawal of one's proposal, where the other made a counter-proposal, see Lincoln *v.* Gay, 164 Mass. 537. And see 171 Penn. St. 243 (bailment to a corporation); 102 Cal. 666.

[2] § 92. As to liability of an infant for his tort, but not his contract, see Homer *v.* Thwing, 3 Pick. (Mass.) 492. As to illegality, see Frost *v.* Plumb, 40 Conn. 111. And see, *post*, c. IV.

[3] § 93.

[4] § 94. Cf. *ante*, 22, 51.

[5] § 94. And see next chapter.

[6] § 94. See *ante*, 3, 16. Under the present head may be included the lawful captors or salvors of a vessel at sea, and (under exceptional circumstances, where a reward was offered) finders on land; and further, where their employment *in rem* goes not unrecompensed, sheriffs, clerks, and other officers of the law, where a sort of judicial sequestration or

seizure has taken place. Cross *v.* Brown, 41 N. H. 283 ; Phelps *v.* People, 72 N. Y. 334.

A bailment custody and responsibility may take place, moreover, under various circumstances, where the contract relation is simply inferable from the situation. As where a customer hangs up his hat and coat in a restaurant or exchanges his clothes in a closet furnished by his tailor for trying on garments. See *ante*, 32. Here, if there be an inducement, so that the constructive bailment is not gratuitous, the general rule of bailment for recompense should apply, as to liability.

CHAPTER II.

HIRED SERVICES ABOUT A CHATTEL.

73. The leading divisions of the present chapter are these: I. Matters preliminary, including delivery in bailment. II. Accomplishment of the bailment purpose. III. Termination of the bailment. These correspond to the divisions hitherto employed in treating of bailments without recompense.[1]

74. I. **Matters Preliminary. There are numerous business vocations** whose pursuit involves the bailment exercise of one or more of these three chief kinds of hired service: namely, (1) hired custody of a thing, (2) hired work upon a thing, and (3) hired carriage of a thing. Among hired custodians are, safe-depositaries, or those who, for reward, take money and valuables into secure places on special deposit; warehousemen, a designation more generic, but familiarly applied to such as, for reward, keep goods and merchandise on storage; wharfingers, who, for reward, undertake the charge of goods and merchandise on wharves; and agistors, so called, who, for reward, take care of domestic animals. Those regularly employed in doing hired work upon chattels are styled workmen, mechanics, artificers, artisans; terms which may here be not inappropriately used as designating a wide range of secondary manual pursuits, upon a thing of unchanged identity, from cobbling a shoe to rigging out a vessel.[2] The hired carriage of chattels is a pursuit of such vast importance that public policy has made the bailment exceptional, as we shall show hereafter;

[1] See *ante*, 13, 48.

[2] § 96. See, *e. g.*, Safe Deposit Co. *v.* Pollock, 85 Penn. St. 391; 3 Blatchf. (U. S.) 413; Schwerin *v.* McKie, 51 N. Y. 180; Rogers *v.* Stophel 32 Penn. St. 111; Smith *v.* Cook, 1 Q. B. D. 79 (*e. g.*, stabling horses for customers); cases *post*. Or in making a product.

but a distinction lies between Private Carriers and Public or Common Carriers.[1]

75. The vocation is here of only secondary legal consequence; and for hired as well as gratuitous service, notwithstanding the important bearings of business usage, each bailment stands on its independent merits, and one's promise or acceptance is to be discussed with primary reference to the particular undertaking and particular circumstances.[2]

76. As to recompense, one of the three essentials to a contract of hire already considered, the circumstances must determine whether a reward was mutually intended or not; whether, in other words, the bailment is for hired or compensated service with its greater responsibilities, or for gratuitous service with its less.[3]

77. Where materials are to be employed in repairing a thing, the law of accession comes into view.[4]

[1] § **96.** Cf. 5 Harr. 238; 28 Vt. 268; Part VI, c. 1, *post*. Private Carriers, or such as fall without the restraints of a public vocation, can seldom be found as a class in modern times, but we usually designate as such a party one who, not making hired transportation his calling, undertakes to transport for reward on some special occasion.

[2] § **97.** Some whose pursuits are above enumerated — *e.g.*, warehousemen and wharfingers — may appear in one aspect as custodians, and in another as workmen, or even carriers of the thing delivered.

[3] § **98.** We have seen that bailment recompense need not be in money; and that even an indirect advantage may often suffice. *Ante*, 67. The question of recompense or non-recompense in a given case is one of fact. One's usual course of dealing, his line of business, is an important and often a decisive circumstance. 5 Ind. 131; 4 Thomp. & C. (N.Y.) 96. Recompense or no recompense refers, too, we must remember, not to the result of the undertaking, but to the mutual expectation at the outset. And cf. Chamberlin *v.* Cobb, 32 Iowa, 161, Francis *v.* Shrader, 67 Ill. 272.

So, too, that which began as a gratuitous bailment may change, by mutual assent, into one for mutual benefit, or *vice versa*. Preston *v.* Prather, 137 U. S. 604. And see *ante*, 17.

[4] § **99.** Presumably, where a workman adds materials to the principal thing of the owner, a bailment was intended, and the accession becomes owned by his bailor, as well as the principal thing; and so, where the owner leaves raw materials to be worked up into a new product, he is bailor and owner of the finished product. But where a chattel is to be manufactured by the workman himself out of his own principal materials, the workman is no bailee, but becomes bound to an executory contract of

78. **Until delivery of the chattel** there is no bailment, but at the most the right to a bailment under some bailment contract; either party to which contract, if for hired service about a chattel, may, for a breach, compel specific performance, or sue in damages; but, upon the concurrence of delivery and acceptance, the parties assume the full relation whose rights and obligations we shall proceed to discuss.[1]

79. II. **Accomplishment of the Bailment Purpose. The standard of care and diligence** for a hired bailee is now to be considered. He ought, in good faith, to perform the intended service about the chattel, in the exercise throughout of the requisite degree of care and diligence, whether it relate to mere custody, or work of a more active sort. The requisite degree which our law prescribes is styled "ordinary"; and ordinary or the average care and diligence is such as prudent persons of the same class are wont to exercise towards such property or in the management of their own property under like circumstances. It follows that, for loss or injury of the thing, caused by the hired bailee's ordinary negligence, or failure to bestow this ordinary or average care and diligence, he must respond. Such is the criterion in the absence of special modifying stipulations.[2]

sale. See Gregory *v.* Stryker, 2 Denio (N. Y.), 628; 19 Kan. 95; 32 Me. 404; 164 Mass. 537; Powder Co. *v.* Burkhardt, 97 U. S. 110.

[1] § 100. As in all bailments, there may be delivery and acceptance, either personally or through the medium of agents. There may be constructive instead of actual delivery or acceptance; as where one continues the hired custodian of that which he has just sold. There may be a rightful taking into possession rather than actual delivery of possession. On all of these points we have touched before.

[2] § 101. See *ante*, 6, 7. The cases under this head are quite numerous. Ordinary diligence is exacted from warehousemen. Batut *v.* Hartley, L. R. 7 Q. B. 594; 10 R. I. 218; White *v.* Colorado Central R., 3 McCr. 559; Schwerin *v.* McKie, 51 N. Y. 180; Jones *v.* Morgan, 90 N. Y. 4. Government may incur such a bailment liability. Brabant *v.* King, App. Cas. [1895] 632.

From safe-depositaries. Safe-Deposit Co. *v.* Pollock, 85 Penn. St. 391; National Bank *v.* Graham, 100 U. S. 694, 704.

From wharfingers. Rogers *v.* Stophel, 32 Penn. St. 111; Cox *v.* O'Riley, 4 Ind. 368.

From agistors of cattle and stable keepers. Smith *v.* Cook, 1 Q. B. D.

80. If, therefore, in the course of his honest exercise of average diligence, while performing the bailment service, the chattel perish from some internal defect, or through the operation of natural causes, or, generally, because of inevitable accident, the bailee will stand acquitted of blame. So, too, if it be destroyed or captured by a public enemy or by mobs and rioters. But the intervention of irresistible force, whether of human or divine agency, excuses no hired bailee, whose wrongful connivance or culpable exposure, or breach of contract, or remissness of duty in any respect, whether for preventing the calamity, or lessening its injurious effects, proves to have proximately occasioned the mischief. Loss by fire, burglary, robbery, and theft give rise to similar considerations, though less likely to afford a positive excuse; and the bailee's good faith and due diligence have especial reference to precautionary measures, repelling force, and seeking to make the loss from any such cause as light as possible. In short, the

79; 76 Mich. 265; 100 Mass. 40; Eastman *v.* Patterson, 38 Vt. 146; McCarthy *v.* Wolfe, 40 Mo. 520; McMahon *v.* Field, 7 Q. B. D. 591; Union Co. *v.* Mallory, 157 Ill. 554; 49 N. J. L. 682.

From forwarders and private carriers for hire. White *v.* Bascom, 28 Vt. 268; Pennewill *v.* Cullen, 5 Harr. 238.

And from workmen upon chattels, generally. 1 Gow. 30; Baird *v.* Daley, 57 N. Y. 236; Russell *v.* Koehler, 66 Ill. 459; Hillyard *v.* Crabtree, 11 Tex. 264; Halyard *v.* Dechelman, 29 Mo. 459; 11 Lea (Tenn.), 264. As where a saw-mill owner takes logs to be made into boards. Gleason *v.* Beers, 59 Vt. 581. Or where apples are made into cider.

The same standard of ordinary care is applied to *quasi* bailees not acting wrongfully. As for instance, to captors and prize-agents. The Anne, 3 Wheat. (U. S.) 435. To one who holds the property in a replevin suit under a bond. Bobo *v.* Patton, 6 Heisk. (Tenn.) 172. To sheriffs, receivers, and judicial officers in general, whose duty towards the thing is for recompense. Blake *v.* Kimball, 106 Mass. 115; Cross *v.* Brown, 41 N. H. 283; 41 N. Y. Super. 284; Aurentz *v.* Porter, 56 Penn. St. 115.

So to finders, when stimulated by the offer of a reward, and to salvors. Cargo *ex* Schiller, 2 P. D. 145; Wentworth *v.* Day, 3 Met. 352; Cummings *v.* Gann, 52 Penn. St. 484. So to bailees who occupy that relation of custody in cases of incomplete sale transactions. Cloyd *v.* Steiger, 139 Ill. 41.

doctrine of proximate and remote cause here applies; with, however, much favor to any bailee who can establish, on his behalf, that the loss or injury occurred under circumstances which naturally impute no blame to the man of average care and diligence; and subject, of course, to the general maxim, that the party who charges culpable negligence has upon the whole the burden of proof.[1]

81. Local custom, moreover, and the nature and qualities of the thing itself, together with the peculiar methods sanctioned at the time by prudent men of his class (where a vocation is pursued) bears upon the mutual intent and bailment obligation in a particular case.[2]

82. The element of skill in case of a hired vocation has also a bearing here, especially if some active work, beyond mere custody, is hired; and by skill we mean a certain combined knowledge and dexterity in the particular pursuit.[3]

[1] § **101**. Francis *v.* Dubuque R., 25 Iowa, 60; Pacific Co. *v.* Wallace, 143 Mass. 453; Claflin *v.* Meyer, 75 N. Y. 260; 60 Ark. 100; McMahon *v.* Field, 7 Q. B. D. 591. And see *post*, Part VI, c. 4.

[2] § **102.** Thus, safe-depositaries must use secure locks and set a watch, where, in the case of cattle-keepers, it would not be customary; and for inflammable or perishable substances, a warehouseman should have extra precautions and facilities. In the place as well as the method of storage, ordinary care should be taken according to the circumstances. Zell *v.* Dunkle, 156 Penn. St. 353 (employment of a night watchman); Moulton *v.* Phillips, 10 R. I. 218.

A theoretical standard is not applied where the bailor had the means of judging for himself the fitness of the place chosen for storage. Searle *v.* Laverick, L. R. 7 Q. B. 122. And see Kelton *v.* Taylor, 11 Lea (Tenn.), 264. For this is to apply the rule of mutual interest with its qualifying effect. See 84. So where the bailor insisted upon his own methods. 3 Stark. 6, per Bayley J.

[3] §§ **104, 105.** Even from hired custodians — as of explosives — a certain special skill or expertness may be expected. But it is more clearly in the hire of work upon a chattel that the consideration of skill avails; and here, though our standard of ordinary diligence still applies, it is more likely to vary, according to the particular pursuit and the compensation chargeable for such pursuits. A collier may be employed to reduce a piece of wood to charcoal, or an artist to carve it into a vessel's figure-head. See Pusey *v.* Webb (Del.), 47 A. 701; Lincoln *v.* Gay, 164 Mass. 537 (a dressmaker making cloth into a dress wrong side outwards).

83. Some special illustrations, under our present head, may here be furnished.[1]

84. Special contract terms are, of course, to be considered, by way of explaining or modifying the presumed undertaking here as elsewhere, but always subject to the limits which public policy sees fit to impose.[2] Usage and custom are ad-

(1) Ordinary and reasonable skill in the vocation assumed is expected of every one assuming to be a responsible bailee in that vocation. (2) The failure to exercise such ordinary and reasonable skill in the bailment will be imputed as want of ordinary care. But a bailor's previous knowledge of his bailee's unfitness or want of skill for the employment may operate against him in a controversy.

[1] § **103.** To cite a few general examples in point, most of which relate to hired custody. A hired bailee has been held responsible for loss: For storing cotton, so as to expose torn bales upon the muddy ground. Morehead *v.* Brown, 6 Jones L. (N. C.) 367. For turning a young colt into a field accessible to a bull. Smith *v.* Cook, 1 Q. B. D. 79. For failing to keep adequate guard over safe deposit vaults. Safe Deposit Co. *v.* Pollock, 85 Penn. St. 39. For storing goods in a wooden warehouse, with a lot of gunpowder closer to the door of entrance. White *v.* Colorado Central R., 3 McCr. (U. S.) 559 (an accidental fire). And see Chenowith *v.* Dickinson, 8 B. Mon. (Ky.) 156; Wilson *v.* Southern Pac. R., 62 Cal. 164; 61 Mich. 275 (skating rink); 59 Vt. 581 (sawmill); 112 Ga. 242 (cotton ginning).

Act of public authority, or judicial seizure, ought to excuse; but not the seizure under a void attachment or where the bailee is remiss in defending or giving the bailor opportunity to defend. Wood Harvester Co. *v.* Dobry, 81 N. W. 611 (Neb.); Powell *v.* Robinson, 76 Ala. 423. And see *post*, 95.

Where the rule of implied invitation applies to use a restaurant, barber's shop, or tailor's closet for hanging up or bestowing one's outer wearing apparel, a bailment relation may presumably arise; which is considered one of the present class, when an incident and customary inducement of the particular business. 150 Penn. St. 91; 122 N. Y. 531; 92 N. W. 354 (Neb. 1902). Cf. *ante*, 32. But the bailor's contributory carelessness defeats. 12 Pa. Super. 112. And see further, 86, *post*.

[2] § **106.** And see *ante*, 10, 36, 57. Warehouseman's receipt may embrace express stipulations, valid or invalid, under such a rule. And cf. carrier's special contract, bill of lading, etc., *post*, Part VI, c. 5; Reinstein *v.* Watts, 84 Me. 139. See Taussig *v.* Bode, 134 Cal. 260 ("owner's risk"); 78 Miss. 875; Wells *v.* Porter, 169 Mo. 252.

The bailee's essential breach of contract as to the place or manner of performance, so as to increase the exposure of the property to danger,

missible in proof with this very idea in view of embracing what sort of performance each party might reasonably have expected in accomplishing the bailment purpose.[1]

85. Honesty and good faith are mutually and reciprocally required here, as in all other classes of bailments. An honest bailee for hired service will respect the fiduciary relation into which he has entered; he will not attempt to sell, pledge, or appropriate what he holds, in disregard of his bailor's interest; he will not at the outset falsely pretend to skill or opportunity which he does not possess; nor will he take the thing into his possession and then volunteer some objection to the bailor's title by way of hindering its final surrender as promised.[2]

86. The rule of agency in the performance applies frequently under the present head, as in bailment generally; and the cardinal rules of principal and agent are applicable.[3]

enlarges his risk under the doctrine of proximate and remote cause of loss, or rather, perhaps, as a deviation from the bailment agreed upon. As, *e. g.*, where a stable-keeper, undertaking to keep a horse in his stable, turns him out into the yard, and the animal takes cold. McMahon *v.* Field, 7 Q. B. D. 591. Or where one contracts to store goods at a certain place, and then moves them elsewhere, without timely notice to his bailor, whereby the benefit of insurance taken out by the latter is lost. Lilley *v.* Doubleday, 7 Q. B. D. 510. But cf. Bradley *v.* Cunningham, 61 Conn. 485, which distinguishes in a peculiar case.

[1] § 106. The usages and customs of carrying on a business at the time and place in question have, if reasonable, a qualifying effect upon one's duty; but special contract will override a custom. And see *post*, Part VI, c. 5. For the duty of a cold-storage warehouseman, see 107 La. An. 172; 171 N. Y. 269; 73 Conn. 55. And see 81.

[2] § 107. See Calhoun *v.* Thompson, 56 Ala. 166; 62 Penn. St. 242. But as to rightfully assigning one's mere interest as bailee, see Nash *v.* Mosher, 19 Wend. 451; Bailey *v.* Colby, 34 N. H. 29. And see *ante*, 8, 29.

[3] § 108. Thus, the safe-deposit or storage business is frequently carried on in these days by chartered companies; and so is it with a wharf business. Indeed, in any private pursuit, one properly employs often his sub-agents, clerks, or workmen, for whose performance he is answerable. See Blake *v.* Kimball, 106 Mass. 115; 9 Bush (Ky.), 3; Baird *v.* Daly, 57 N. Y. 236.

Where a bank of general deposit receives some special deposit — *i. e.*,

87. The liability of a hired bailee to third persons is sometimes considered.[1]

88. The bailee's right to undisturbed possession is recognized, pending the proper accomplishment of the bailment purpose; and this right applies as against the bailor and all third persons, except where there is rightful intervention and demand by some paramount owner of the thing.[2]

89. The bailee's right of compensation must also be respected, in accordance with reasonable expectation, or the mutual intendment of the relation. Custom, a special understanding, or the spirit of the engagement may establish this compensation, as something to be rendered at the outset, or by periodical instalments, or when the work is fully completed: but, in most bailment undertakings, the third is the presumable arrangement.[3]

a package or box of valuables for storage — and there is mutual inducement and consideration for such custody, the rules of agency, already considered, will apply. Cf. *ante*, 31, and Preston *v.* Prather, 137 U. S. 604.

In general, (1) every agency has its proper scope and limits. Aldrich *v.* Boston & Worcester R., 100 Mass. 31 (where servants of a warehouseman came on the premises at night, while the warehouse was burning, only as individuals or citizens). (2) For the negligence of one's agent, in the course of his employment, the principal bailee is answerable to his bailor, and the agent is not. Cases *ante;* 133 Cal. 534; 180 Ill. 110; 123 N. Y. 57; 85 Penn. St. 391. (3) For the wilful and wanton misconduct of the agent, causing injury or loss of the thing, he is civilly and criminally responsible to the bailor, while the bailee is not; but (4) if under such circumstances, the principal bailee is shown to have participated in the mischief, as by joint wrong-doing, or by want of ordinary care and diligence in employing such agent (as in careless supervision, careless disregard of the agent's unfit habits or character, etc.), such principal may be held answerable.

But any bailee or principal may sue his own sub-bailee or agent for negligent conduct causing him damage. McGill *v.* Monette, 37 Ala. 49.

[1] § 109. A bailee may be sued by third persons for injuries occasioned such persons by the property in his temporary custody. Weymouth *v.* Gile, 72 Me. 446 (trespass committed by cattle in his charge). And, so, as to injury done third persons by the hirer of a runaway horse, see *post*, c. 3.

[2] § 110.

[3] §§ 111–113. Compensation may be awarded differently, according as the service upon the chattel has been: (1) left incomplete; (2) or

90. How expenses shall be borne, such as the hired bailee may have incurred while performing his services, the evident understanding of the parties must ultimately determine; but usually the hired bailee is understood to bear such incidental

bestowed differently from what was mutually intended; (3) or completely bestowed in accordance with the mutual intention. The doctrine for the two former cases is not readily reduced to rule; but the two inquiries of chief pertinence appear to be, whether blame attaches, in fact, to either party, and how far a mutual understanding may have regulated the particular case.

(1) The earlier rule of universal law has been, that should the thing perish without fault, the owner loses his chattel and must recompense his bailee besides. But local usage or special contract creates exceptions at the present day, so that the doctrine of apportionment may apply — the owner losing his chattel while the bailee loses his claim for work upon it. But where there was fault in occasioning the loss, the party at fault, on one side or the other, should bear the whole loss, or at all events indemnify fully the other party. In a simple incompleteness of bailment service, our courts incline to allow the party at fault to set off the substantial benefit received by the other against the damage occasioned by breach of engagement — or in other words to make the injured and innocent party whole, no more and no less. See § 111. Smith *v.* Meegan, 22 Mo. 150; McConihe *v.* New York R., 20 N. Y. 495; Appleby *v.* Myers, L. R. 2 C. P. 651.

(2) The use of better materials than were called for, or the bestowal of better work affords the bailee no ground for claiming extra remuneration, unless the bailor has plainly assented to the deviation by way of mutually changing the original engagement. Dermott *v.* Jones, 2 Wall. (U. S.) 1. But reasonable delay is leniently regarded except where a fixed time or other special circumstances at the outset had entered into the engagement and damage results. And see 61 Hun (N. Y.), 626. Deviation or a disregard of directions, especially if injurious to the bailor, renders the bailee liable; and here again, as under the general law of contracts, the fundamental principle, in case of breach, is to award the injured party such amount, by way of damages, as will make him whole under the engagement; *i. e.* by setting off against the intended recompense such damage as the bailor may have suffered by reason of his bailee's incomplete or faulty performance. § 112; 6 T. R. 320.

(3) For full performance, full compensation is due, *i. e.* that mutually stipulated, or such as should be reasonable. § 113; Garrard *v.* Moody, 48 Ga. 96; Learned Co. *v.* Fowler, Ala. (1896). Even a finder by land becomes entitled to the reward, if any, which the loser publicly offered. Wentworth *v.* Day, 3 Met. (Mass.) 352; 52 Penn. St. 484.

expenses, placing the rate of compensation high enough to make him whole.[1] In some extreme and unforeseen emergency, though not otherwise, the hired bailee may, in pursuance of his duty, make expenditure for the preservation of the thing at his bailor's cost.[2]

91. The hired bailee may sue third parties in his own name for injury to the thing, whether tortwise, or for breach of contract obligation with him.[3] But the bailor or owner may thus sue a wrong-doer instead. Full damages are recoverable in either action; but recovery in full by either bailor or bailee bars the action of the other; and it is for the court to protect and adjust the several interests of bailor and bailee in the fund, on the intervention of either party.[4]

92. Hired bailees are not bound to insure the chattels in their keeping, independently of some special undertaking so to do. But the hired bailee's special property is here of such value as entitles him, if so he desire, to cover the risk of fire by a policy to the suitable amount; and thus is it with lien creditors generally.[5]

[1] § 114; 3 Burr. 1592. As to expenses incurred through the bailee's fault, see Jones *v.* Morgan, 90 N. Y. 4.

[2] § 114. But a bailee's more prudent course is to obtain his bailor's consent in advance, where he has opportunity to consult. Small *v.* Robinson, 69 Me. 425 (creation of a lien in favor of third person not favored, without bailor's authority).

[3] § 115; White *v.* Bascom, 28 Vt. 268; Shaw *v.* Kaler, 106 Mass. 242; The Minna, L. R. 2 Ad. & Ecc. 97. For if the gratuitous bailee has such a right, by virtue of his possession and liability over, much more has a bailee with a valuable interest. See *ante*, 11, 39, 60. Larceny from a bailee is larceny from the owner. 101 Mo. 316.

[4] § 115; 20 Atl. 1; Engel *v.* Lumber Co., 60 Minn. 39. As to the bailor's action of replevin against a wrongful purchaser, see 64 N. C. 488.

[5] § 116. While usage might presume an undertaking to insure, special contract might exclude it. See Insurance Co. *v.* Chase, 5 Wall. (U. S.) 513. Warehousemen and wharfingers in the course of business frequently keep up floating policies of insurance for the protection of customers and the security of their own charges. Hough *v.* People's Ins. Co., 36 Md. 398; Johnson *v.* Campbell, 120 Mass. 549; 5 E. & B. 870. And see White *v.* Madison, 26 N. Y. 117 (attaching officer); 98 Mass. 420, 423; Wilson *v.* Jones, L. R. 2 Ex. 150, 151. For special contracts, see 108 Penn. St. 354; 59 Minn. 203; 139 U. S. 79.

93. III. **Termination of the Bailment. The bailment for hired services about a chattel** may either be interrupted from some cause, or carried to its close; but in the natural course it continues until the fixed period, or, it may be, a reasonable time, has elapsed for its full accomplishment. Where the duration of hired custody is not fixed it lasts until either party upon due notice sees fit to terminate it. The main duty of the hired bailee, when his bailment terminates, is to make delivery of the thing back or over in suitable order; and that of the bailor is to render the final compensation: but to know the correlation of these duties, in a given case, is of some consequence; so, too, is it to know the exact point at which delivery back or over is complete.[1]

94. **Business usage or custom may affect** the method of delivering back or over in certain pursuits. With warehousemen and wharfingers, it is not an uncommon business usage to give, at the outset, a delivery-order or receipt, whose transferee will be presumptively entitled to the thing; since goods are constantly sold while thus in store, and advances made upon them, on the faith of such documents. The effect of such orders as documents of title, like bills of lading, is not clearly settled; nor do our States harmonize in policy with regard to the effect of their indorsement and delivery in establishing title.[2]

[1] § 117. See Felton *v.* Hales, 67 N. C. 107.

[2] § 117; Union Stock Yard Co. *v.* Mallory, 157 Ill. 554. See 66 Ala. 10; 44 Ark. 301; 52 Cal. 611; 135 Mass. 1. Apart from local statute, warehouse receipts, though "negotiable" in a certain sense, have not the full character of negotiable paper. Insurance Co. *v.* Kiger, 103 U. S. 352 (no guaranty of the goods as described). And see Commercial Bank *v.* Bemis, 177 Mass. 95. See further c. 4, *post*.

Apart from usage or statute, and in absence of adverse notice, the warehouseman is safe in transferring possession in good faith according to the directions of the person from whom he received the goods. Parker *v.* Lombard, 100 Mass. 405. Delivery to the wrong person amounts in general to conversion of the thing, while delivery to the right party is justified. 60 Ark. 62; Mortimer *v.* Ragsdale, 62 Miss. 86; Oswego Bank *v.* Doyle, 91 N. Y. 32. And see, *post*, Part VI, c. 6. If delivery by warehouse warrant, etc., is stipulated, a de-

95. As to delivery to a paramount owner, or one with adverse claim, the rule is, as in all bailments, that the bailee must honor his own bailor's title, and, upon no pretext, excuse redelivery as he promised, by setting up the claims of another or volunteering a dispute.[1] But, like all other bailees, he must respect the adverse claim of a superior owner or other who makes demand upon him, and in such case, giving his bailor knowledge of the fact and an opportunity to justify his own demand, he may guard his own course with honest prudence.[2] Claimants who do not appear until after the bailee has redelivered to his bailor cannot, of course, hold him liable.[3]

96. If there has been a change of owners in course of the bailment and the bailee is duly notified thereof, he holds under a transfer of title which he and all others are bound to regard; and if the bailee attorns to the new owner in such manner as warrants the title for good consideration to the latter, he is

livery without production of such document is at the bailee's risk. 163 N. Y. 565.

Every bailee for recompense is bound to deliver to the bailor or his agent, or to such third person as may mutually have been agreed upon, and a redelivery in good faith pursuant to the bailment undertaking, before notice of a revocation of agency, or of the claim of a paramount owner, will discharge him. Steele *v.* Marsicano, 102 Cal. 666; Reamer *v.* Davis, 85 Ind. 201.

[1] § **118**; 23 La. An. 63; Foltz *v.* Stevens, 54 Ill. 180; Peebles *v.* Farrar, 73 N. C. 342; Biddle *v.* Bond, 6 B. & S. 225; Rogers *v.* Lambert, [1891] 1 Q. B. 318. And see, *post*, Part VI, c. 6.

[2] § **118.** As in other bailments, he may, instead of taking his own risk, deliver upon a bond of indemnity, or interplead in equity the conflicting parties. Biddle *v.* Bond, 6 B. & S. 225; Ball *v.* Liney, 48 N. Y. 6; Kelly *v.* Patchell, 5 W. Va. 585; Roberts *v.* Yarboro, 41 Tex. 449; 45 N. Y. Super. 428. If, in a strait between claimants, the bailee makes himself an active party to the controversy, or decides for himself, he must stand or fall by the choice he makes. Forcible dispossession by the law is an excuse to him, where he gave his bailor fair opportunity to defend or resisted with due diligence.

[3] 34 La. An. 1133. So strictly is the bailee bound to honor his bailor's title, on his own part, that if he accepts the bailment with full knowledge of an adverse claim he cannot set up that claim afterwards against his bailor, of his own volition. Davies, *Ex parte*, 19 Ch. D. 86.

estopped from setting up *jus tertii* against him afterwards.[1] Yet circumstances may arise, in a doubtful case of new or adverse title, which should fairly afford the bailee time to make prudent inquiry before determining his course.[2]

97. Demand should usually be made upon the bailee, who is remiss in delivering; whereupon, if the default continues without good excuse offered, suit for conversion or replevin will lie; or where the default is in breach of the bailee's own engagement, an action of damages as for breach of contract may be brought.[3] But, as will presently appear, a bailor of the present class has not the right to demand his chattel back regardless of the bailee's right to recompense, but should tender what is due.[4]

98. Successive bailment duties are often considered in our present connection; and in modern business, warehouse and wharfinger duties are closely associated with those of common carrier; so that successive parties, or even the same parties, may pursue successive duties towards the same thing.[5]

99. The bailee's right of lien to secure recompense here intervenes, in such sense that it is the bailor, rather than the bailee, who should here take the initiative. Perhaps, however, delivery and compensation should be called concomitant acts, so far as one party seeks to place the other in the wrong by active litigation.[6] But, for his better security in obtaining

[1] § 119. Henderson *v.* Williams (1895), 1 Q. B. 521; Biddle *v.* Bond, 6 B. & S. 225.

[2] Patten *v.* Baggs, 43 Ga. 167; Rogers *v.* Weir, 34 N. Y. 463. And see 40 N. Y. Super. 222; Batut *v.* Hartley, L. R. 7 Q. B. 594. As to a bailor's subsequent creditors, see Freiberg *v.* Steenbock, 54 Minn. 509; Dempsey *v.* Gardner, 127 Mass. 381.

[3] § 120. Spencer *v.* Morgan, 5 Ind. 146; Leonard *v.* Dunton, 51 Ill. 482; Bates *v.* Stansell, 19 Mich. 91; Halyard *v.* Dechelman, 29 Mo. 459; Roberts *v.* Yarboro, 41 Tex. 449.

[4] Brown *v.* Dempsey, 95 Penn. St. 243.

[5] § 121. And see, *post*, Part VI, cs. 3, 6. It may be a nice point to determine where one bailment service ends and another begins, or where bailment ceases altogether upon a redelivery. Reamer *v.* Davis, 85 Ind. 201; 4 Biss. (U. S.) 13. The bailment control and responsibility may last, although help be called in delivering over. 14 Wend. (N. Y.) 225.

[6] § 122.

his just recompense, the law gives to the bailee a lien upon the chattel or chattels, to the extent of whatever may be due for the particular service.[1] Nor is the lien a privilege for regular occupations of hired bailment only, but it is inferable so commonly from the relation of hired service about a thing, that the right to demand compensation is, as a rule, understood to carry with it the right of compelling compensation by a particular lien.[2] Liens are recognized, on principle, in various other relations of service; and, in general, the law favors, by construction, the right of a particular rather than a general lien.[3]

[1] § 122. This right has been so far extended by usage and the written law, that scarcely a transaction is left, referable to the present head, where the bailee is denied this advantage. A stable-keeper, or agistor, has at the common law no such lien; perhaps, because of the disadvantage, rather than advantage, that may often arise from having to feed and shelter an animal left on one's hands. But local legislation now confers this right, as optional to the agistor. Hired bailees for bestowing work have a lien within the rule of the text; also hired custodians, such as warehousemen and wharfingers. § 122 and citations. And as to carriers, see Part VI, c. 7, *post*. Local statutes extend the right to new classes of pursuits, 32 Minn. 126. Usage and common law may also extend to new pursuits. And a lien may otherwise be created by the express agreement of the parties. Miller *v.* Marston, 35 Me. 153; Goodrich *v.* Willard, 7 Gray (Mass.), 183.

[2] *Ib.* The finder's lien exists, if a reward be offered. 3 Met. (Mass.) 352; 8 Gill (Md.), 213. And as to maritime liens, see works on Shipping. See Leavy *v.* Kinsella, 39 Conn. 50 (bailee "by compulsion").

[3] § 122. By special agreement, or well-sanctioned business usage, a lien might be extended in favor of a general balance due the bailee; but the favor of the law shines only upon particular liens. See 35 Me. 135, 155; 20 Fed. (U. S.) 894. But in a particular bailment, with delivery by loads, the lien for the whole recompense may be kept secure upon the last load. 2 Pick. (Mass.) 213; 3 M. & S. 167. And in the case of successive bailments — *e.g.*, connecting carriers — a bailee may pay his predecessor's rightful charges, and then hold the property until wholly reimbursed. See 3 Thomp. & C. (N. Y.) 761; 53 Fed. (U. S.) 401; Common Carriers, *post*, Part VI, cs. 7, 9; and see 4 Comst. (N. Y.) 551. Cf. Small *v.* Robinson, 69 Me. 425; Gilson *v.* Gwinn, 107 Mass. 126 (no lien for a sub-employee who did his work knowingly on the bailee's credit).

The reimbursement of necessary and proper expenses, *i.e.* (customs

100. But this lien right does not override the will of the party for whose benefit our law asserts it. There can be no lien where the terms of the bailment undertaking or the status of the property expressly forbid the supposition that it was intended: as, for instance, where the bailee plainly agreed to give his bailor credit.[1] Founded, too, in continuous possession, the lien lasts only while the hired bailee chooses to maintain his hold; and voluntary, though not involuntary, relinquishment of possession on his part is tantamount to a waiver or abandonment of the lien. For an independent and exclusive possession of the thing by the bailee's intendment is indispensable to the existence of a lien at common law.[2]

101. The bailee's right to sue for recompense exists, with or without the enforcement of a lien, since any demand for debt is enforceable apart from the security; and such must be his remedy where the bailee delivers up the thing, giving his bailor credit.[3]

102. Continuous possession of the thing by right of his lien, will, in general, be deemed rightful in the bailee until his bailor has, besides demanding the chattel, paid or tendered what was lawfully due for the bailment service, and thereby put him in default. This keeps the requisite standard of diligence as before, in the custody after performing the main

duties), may, if paid by the bailee, be covered by his lien. 65 Ill. 72; 2 Sawyer (U. S.), 428.

[1] § 123; Tucker *v.* Taylor, 53 Ind. 93; Hale *v.* Barrett, 26 Ill. 195; Robinson *v.* Larrabee, 63 Me. 116; 1 Daly (N. Y.), 112.

[2] § 123; 12 Nev. 276; 12 Neb. 66; 63 Me. 116; Vinal *v.* Spofford, 139 Mass. 126; Fitzgerald *v.* Elliott, 162 Penn. St. 120. But local statute sometimes modifies the rule. A wrongful misuse or misappropriation of the thing may displace the lien. But an honest mutual intent is not to be lost sight of; and a dispossession which is fraudulent or by force does not displace one's lien. As to estoppel by acts or conduct, see Blackman *v.* Pierce, 23 Cal. 508; 58 Ala. 165; Rogers *v.* Weir, 34 N. Y. 463. A lien, once surrendered, cannot be resumed at will, though a new lien may always be created by mutual agreement. 63 Me. 116.

[3] § 124; 48 Ga. 96; 53 Ind. 93; 24 Ill. 99. See Lehman *v.* Skelton, 46 Ala. 310; Hale *v.* Barrett, 26 Ill. 195.

service; though, once in clear default, our bailee becomes strictly liable, even for casual losses happening after he should have surrendered possession.[1]

103. The common-law means of enforcing a lien are somewhat imperfect; for one might hold or detain, and nothing more. But the contract of parties, as well as legislation, will sometimes confer the power of sale on default.[2] A power to sell, being in derogation of common law, must be exercised in strict conformity with the contract or statute permission, not greedily, nor reckless of the bailor's interests, nor so that the bailee shall gain a surreptitious advantage; and the surplus of a fair sale (which is usually at auction) must be turned over, less costs and the bailee's due recompense.[3]

104. Priority among liens must sometimes be adjudicated; and especially where goods have not intrinsic value enough to recompense all lien claimants in full. The hired bailee's lien under *bona fide* possession, without notice of prior claims, being the closest, and for the most immediate benefit of the thing, should rank above those by way of subsequent mortgage, attachment, execution, and the like; unless, indeed, the bailment acceptance was upon some different understanding, or the bailee, by some such act as part-

[1] § **125**; Russell *v.* Koehler, 66 Ill. 459.

Under many circumstances of bailment the hired bailee ought to give his bailor notice when his service is performed; and, at all events, he should heed a demand for the thing. 75 Iowa, 294; Claflin *v.* Meyer, 75 N. Y. 260. Where a rightful and seasonable demand is made upon him, the bailee if he has a claim *in rem* for unsettled recompense ought promptly to assert it: and so if insufficient recompense be tendered him; that his reason for detaining may be understood. If he refuse to surrender unless paid for what the lien does not lawfully cover, he puts himself in the wrong. See 58 Ala. 165; Roberts *v.* Weir, 34 N. Y. 463; Roberts *v.* Yarboro, 41 Tex. 449; 4 B. & S. 460. See also 2 Gray, 369 (bailor's waiver of right to sue).

[2] § **126**; Whitlock *v.* Heard, 13 Ala. 776; Stephenson *v.* Price, 30 Tex. 715. Local legislation gives frequently the right of sale to warehousemen, etc., as well as carriers. See 40 N. H. 88.

[3] *Ib.*

ing possession, has afforded to another party a superior equity.[1]

105. As to the general right of recompense for valuable services rendered, the simple employment of a bailee about his usual business will sufficiently import an agreement on the bailor's part to pay what the service was reasonably worth. But the private arrangement of the parties themselves, if not fraudulent, may bind the bailor to remunerate at a standard far above or below what the service ought in justice to command.[2]

[1] § 127; 21 La. An. 402; 21 Kans. 217; Dobbins *v.* Clark, 59 Ga. 709; Marseilles Co. *v.* Morgan, 12 Neb. 66.

The bailee's lien is subject to prior liens; as where a chattel, mortgaged for more than its worth, is bailed for repair or work. Burrow *v.* Fowler, 68 Ark. 178.

[2] § 128; Graves *v.* Smith, 14 Wis. 5, 8; Southern Steamship Co. *v.* Sparks, 22 Tex. 657. See 73 N.Y. 156. The impolicy of allowing a bailee to charge extra storage for his bailor's delay does not apply to bailments expressly and originally for storage. 53 Fed. (U. S.) 401.

As to evidence and burden of proof, in litigation between bailor and bailee, the law of Common Carriers (Part VI, *post*), best develops the doctrine by decided cases. Here, as elsewhere, conceding the general burden of proving culpable negligence in the bailor, it is frequently asserted that the burden of explaining or exonerating himself rests upon the bailee, who cannot produce the thing, or who produces it with marks of injury imputing fault to himself and not his bailor. Hildebrand *v.* Carroll, 106 Wis. 324. But where bailee shows loss or injury by an excepted or excusable cause, the burden shifts to the bailor to show fault on the bailee's part, as the proximate and moving cause of the loss. Taussig *v.* Bode, 134 Cal. 260. See *ante*, 12 Part VI, *post*.

CHAPTER III.

HIRED USE OF A CHATTEL.

106. **Our former classification** may still be conveniently used for this chapter: I. Matters preliminary, including delivery in bailment. II. Accomplishment of the bailment purpose. III. Termination of the bailment.

107. I. **Matters Preliminary. In the bailment for hired use,** the bailor, technically styled the "letter," shifts over into the party entitled to recompense, while the hirer, in return, becomes bailee. This bailment, like its correlative already examined, the gratuitous loan, contemplates the temporary beneficial use of a chattel which the bailee must eventually return; and the only essential point of difference is that in the former case the bailee was to have the use for nothing, while here he is bound to make recompense of some sort.[1]

108. **The manner and period of rightful hired use** are ascertainable from the agreement, duly and voluntarily made by competent parties, as rationally interpreted. The true and

[1] § **130.** Compensation or mutual inducement puts parties on so much more even a footing and harmonizes so much better with the average expectation of mankind, that bailments for use are much more readily classed under the present than the former head. Cf. Part III, *ante*. Proof of possession with the right to use at pleasure supports a claim for use. Reilly *v.* Rand, 123 Mass. 215.

A sale "on trial" (so called) with its preliminary bailment comes under the present head. So does the bailment for use of a horse in distinct consideration of its keep. Chamberlin *v.* Cobb, 32 Iowa, 161. But cf. Bennett *v.* O'Brien, 37 Ill. 250. Where a picture is loaned for an exhibition, circumstances may or may not render it a bailment for mutual advantage. See Prince *v.* Alabama Fair, 106 Ala. 340; Vigo Society *v.* Brumfiel, 102 Ind. 146. Few as are the reported cases, the instances of hired use are familiar: as in the hire of a sailboat, of a piano, of a sewing machine, of furniture or a furnished apartment, of rolling stock leased by one railway to another. See 18 Ch. D. 30 (hired furniture).

rational intent of the bailment becomes, throughout, our guide on such points.[1]

109. **Upon the mere bailment contract of hire,** which, unlike that of mere loan, is upon sufficient mutual consideration, each party becomes obliged to a performance in the delivery and acceptance, whose breach gives the injured one the right of legal redress; since neither non-feasance nor misfeasance is permitted. But an actual or constructive delivery and acceptance are needful, or, at least a receipt of the thing in bailment, in order that they may stand on the full footing of bailor and bailee, letter and hirer.[2]

110. II. **Accomplishment of the Bailment Purpose. The hirer's duties are, chiefly,** to use the thing with due care and diligence, and for no other purpose than the letter may have sanctioned, expressly or by implication; to deliver it back or over at the appointed time; and to yield the intended recompense for such use. Nor, as concerns third persons, should the thing be injuriously used.[3]

111. **As to the measure of care and diligence required,** the hirer for use is, like all other mutual-benefit bailees, bound to exercise ordinary or average care and diligence; and for nothing less than ordinary negligence, or the failure to exercise such care and diligence as persons of average prudence bestow toward such property or upon their own property under like circumstances, is he, while confining himself to the terms of the bailment, legally responsible. This, in each case, becomes, as in other bailments, a question of fact upon all the evidence.[4]

[1] § 131. Thus, a horse may be hired for a certain time, or *pro rata* for a time at the bailee's discretion, or so as to accomplish a particular journey. Of course the bailment use of a thing for hire is inconsistent with its consumption. See *ante*, Part III.

[2] § 132. And see *ante*, 11, 22, 78.

[3] § 133.

[4] § 134. Inevitable accident or superior force excuses the bailee; or the natural deterioration or spoliation of the thing; or the sickness and death of a hired animal; or loss of the hired chattels by robbery, theft, the escape of a hired animal and the like. But where such loss, destruction, or calamity is traceable to the bailee's carelessness or fault — *i. e.*, to his

112. The instance of a hired horse affords by far the most familiar illustration in our courts under the present head. Now, unless the bailee took the animal for too short a time, or under a special arrangement whereby the bailor was to look after his own property, he ought to provide the creature regularly with proper food and drink, afford due shelter and repose, and, in general, take reasonable heed that the animal, while resting, is so fastened up that it may not readily run away or be stolen. While putting the horse to active use he should not harness carelessly, overload, overdrive, be heedless of what he perceives to be the creature's frailties, nor fail to supply, prudently, wants essential to its health and good condition. If disease or bruise be discovered during the bailee's term, he should be discreet in its treatment, and in extremity call in some farrier or expert; or else, informing his bailor promptly, throw the responsibility, as he may generally do, upon the owner. He should not take dangerous risks of travel. During his whole term of use the bailee ought to act honorably, humanely, and with such reasonable regard for preserving the animal's value unimpaired as from prudent men might be expected.[1]

misconduct or want of ordinary care and diligence as the moving cause — the bailee is answerable for the loss or injury. As to the civil or continental law on this subject, see § **135**.

[1] § **136**. The hirer of a horse has in numerous instances been deemed wanting in ordinary diligence. As, where the loss is caused by his improper feeding or omitting to feed. Handford *v.* Palmer, 2 B. & B. 359; Eastman *v.* Sanborn, 3 Allen (Mass.), 594. And see Cross *v.* Brown, 41 N. H. 283. Or by overdriving and overheating. Edwards *v.* Carr, 13 Gray, 234; Wentworth *v.* McDuffie, 48 N. H. 302; Rowland *v.* Jones, 73 N. C. 52; Ray *v.* Tubbs, 50 Vt. 688; Buis *v.* Cook, 60 Mo. 391. Or by overloading. See M'Neill *v.* Brooks, 1 Yerg. (Tenn.) 73; 3 Barb. 380. Or by trying to ford a swollen stream. United Co. *v.* Cleveland, 44 Kan. 167. Or by securing the horse improperly. See Jackson *v.* Robinson, 18 B. Mon. 1. Or by continuing his journey carelessly, or administering quack remedies, after he finds that the animal is sick. Thompson *v.* Harlow, 31 Ga. 348.

But circumstances, such as the length of term of use, and the opportunity of summoning the bailor, may be material. And so long as the hirer fairly behaves, on the whole, and faithfully observes the terms of his engagement, it is the bailor and not he who must bear all loss of the

113. Other illustrations under the present head are furnished by the latest English and American decisions.[1]

114. As to elements which may affect such issues, much, as in other bailments, must depend upon the nature of the chattel, its incidental exposure to loss or destruction, and its actual condition at the time of delivery. Nor should the hirer's personal reputation be wholly ignored, nor his skill and opportunity for good performance, as brought to the bailor's knowledge. And naturally the bailee's skill and personal qualifications are less likely to be considered here than in one's hire of services upon his chattel, for one may be a hirer as the person answerable, rather than the active and sole user of the thing.[2]

115. Where the hirer transcends the bailment instead of keeping within the terms of the bailment, as every bailee ought to do, even though he has promised a recompense, he may render himself liable for the thing beyond the limit already laid down. In brief, putting the chattel to a use more extensive or materially different from that mutually agreed upon is deemed a breach of faith, on the hirer's part, so gross as, in most instances, to make him very strictly answerable, and

animal in the course of its use. 3 Barb. (N. Y.) 380; 60 Mo. 391; 67 Ill. 272; 19 S. C. 30. So, too, injuries which result from the horse's own nervous or vicious nature cannot be visited upon a hirer who is ordinarily prudent and careful in using the animal. Stacy *v.* Ice Co., 84 Wis. 614; 45 Minn. 85.

[1] See as to the loan of a picture or other chattel for a loan exhibition, a county fair, and the like, Prince *v.* Alabama Fair, 106 Ala. 340; Vigo Society *v.* Brumfield, 102 Ind. 146. If mutual advantage is to be thus derived (such as competition for a prize or advertising) the standard for the bailee should be ordinary care and diligence, but if the bailment be solely for the benefit of the bailee — *i. e.* the exposition — great care (in the absence of special stipulation) should be the criterion. Cf. Part III.

[2] § **138.** Any person whom the letter plainly perceives to be physically or mentally incapable, as a young child, an imbecile, a paralytic, or one who has lost an arm, cannot be presumed the hirer of a horse or a boat to manage in person with average skill. But it is held that one who makes a business of letting horses on hire may well accommodate his customers so far as to risk injury to the thing he lets out, trusting to the hirer's pecuniary responsibility for fulfilling his contract. Mooers *v.* Larry, 15 Gray (Mass.), 451.

sometimes absolutely so, for all loss and injury thereupon ensuing.[1]

116. Yet doubtful cases may thus arise, where the alleged deviation or breach of duty was not wilful, reckless or wanton, nor even without some justifying conditions; and here we find that, the bailee, if all the while using ordinary or average care of the thing is not visited, in case of loss or injury, with the harsh consequences of a positive misappropriation.[2]

[1] § **139.** Thus, it is held, that, if one hires a horse for a specified journey, and drives it beyond the place designated, or on a different course, he so takes upon himself the consequences that inevitable accident does not excuse him nor the horse's fault in running away; for here the misuse or wrongful deviation of the hirer is treated as the occasion of the loss or damage. Lucas *v.* Trumbull, 15 Gray (Mass.), 306; Wentworth *v.* McDuffie, 48 N. H. 402; 17 N. Y. Supr. 474; 38 Wis. 693; Ray *v.* Tubbs, 50 Vt. 488. So, too, where one who hires a horse for a fixed time continues to use it much longer; or, who, engaging animals for a certain moderate purpose, puts them to a different and more exhausting use. Stewart *v.* Davis, 31 Ark. 518; De Voin *v.* Lumber Co, 64 Wis. 616. And see as to a minor, who cannot be sued for breach of contract, as in careless driving to the place agreed upon, but is held liable, because of a tort, in driving wrongfully elsewhere. Homer *v.* Thwing, 3 Pick. (Mass.) 492.

In general, at common law a hirer engages to put the thing hired to no other use than that for which it was hired; if he does so, and the thing is injured, lost or destroyed, he is liable in trover. Malone *v.* Robinson, 77 Ga. 719. The letter's suit in trover is liberally regarded in such cases; not perhaps for a conversion, in the strictest ancient sense, but at least because of a tort. See Wentworth *v.* McDuffie, 48 N. H. 402; Lane *v.* Cameron, 38 Wis. 603; Lucas *v.* Trumbull, 15 Gray (Mass.), 306; 108 N. C. 606; 5 B. & C. 609. And see § **140**, as to the right to dispossess, or to sue in case or trespass in certain cases of this sort.

[2] §§ **140, 141.** Whatever, in such cases, may have been the expression of the court, the evidence, in almost every instance, shows the hirer to have been negligent in fact, or even wilfully or wantonly misconducting himself; he was overdriving, perhaps, or breaking the Sunday laws, or destroying or ruining the property. Hence, the assertion of an absolute responsibility under circumstances of unpermitted use becomes, in reality, the convenient means of confirming a righteous verdict against a defendant who has otherwise hurt his case. On the other hand, it is not difficult to conceive that technical misuse might occur without an actual abuse of the terms of hire, and where it would be harsh

In such cases a fair interpretation of the bailment may often permit of a discretionary deviation or rather enlargement of the bailment term stated.[1]

117. **The hirer's attempt to sell, pawn, or otherwise transfer full title** in the thing hired, without permission, by way of misappropriation, is a violation of duty so palpable as justifies the bailor in treating the bailment as ended, though it were for a fixed term, and in pursuing the chattel at once as his own; and this, too, would appear to render the bailee absolutely accountable in the premises. The letter may, in such event, sue in trover without making a demand.[2]

to visit deviation with such disastrous penalties. Both Sir William Jones and Story suggest possible exceptions to the doctrine that one *in morâ* must respond absolutely; which position they fortify, not by Pothier and the civilians alone, but by the analogies of the common law. See Story, Bailm. § 413 c. In truth, the leaven of common sense, which keeps our law in constant ferment, is here at work, recalling the injustice of visiting blameworthy and blameless deviation with the same penalties of absolute or insurance accountability. One hires a horse for a given journey, but unexpectedly encounters a friend, and turns off to visit him, using, all the while, a prudent care of the animal; or he finds obstructions in the road, and changes the point of destination to another which must have equally suited his bailor, or he misses his way. Such instances are matters of every-day occurrence. And how few imagine, in hiring a horse or a sailboat, that for a little longer or a little different ride, they incur an extra risk, beyond that of paying, possibly, an extra hire. See, in confirmation of this writer's views (though the conclusion may have been reached by a different process of reasoning), Spooner *v.* Manchester, 133 Mass. 270; Harvey *v.* Epes, 12 Gratt. (Va.) 153. A justifiable deviation "of necessity" is plainly recognized under the law of carriers. And it has been lately laid down, positively, that to establish conversion by the bailee the deviation must be to such an extent as to assert dominion or ownership inconsistent with the bailor's title. Direct Nav. Co. *v.* Davidson, Tex. Civ. 1903. But cf. as to a mere borrower, 4 Fed. (U. S.) 152.

[1] § **141**. A just interpretation of the contract of hire may often enlarge the scope of discretionary use permitted. Judge Story has suggested another form of defence sometimes available — viz. that the loss must have occurred with or without such deviation. Story, Bailm. §§ 409, 413-413 d. And see Farkas *v.* Powell, 86 Ga. 800. But cf. 13 Gray (Mass.), 306. And see 3 Barb. (N. Y.) 380; 115 Mass. 326.

[2] § **142**; Marner *v.* Banks, 16 W. R. (C. P.) 62; Johnson *v.* Willey, 46 N. H. 75; Dunham *v.* Lee, 21 Vt. 432.

But with the hirer's assignment of his beneficial interest alone, the rule appears to be different; and such a transfer, if made with due reservation of the bailor's permanent ownership, ought not to be treated as a conversion, but rather upheld, unless the use stipulated was to be strictly personal or precarious, and assignment without the owner's assent was forbidden.[1]

118. Illegality and turpitude going to the foundation of a bailment contract for use puts the party who is out of possession, and seeks redress, necessarily at disadvantage. And any letter of a thing, who would avail himself of his hirer's fraud or unlawful conduct, must himself be free from blame.[2]

119. As to remedies and the burden of proof in case of loss or injury the rule elsewhere discussed would seem to apply. What constitutes due care and diligence is usually for the court to rule; and whether the bailee has, upon all the proof, exercised such due care and diligence, is for the jury to determine.[3]

120. The bailee's responsibility for his sub-users or agents in a case of hired use may afford an interesting discussion, in the absence of authoritative pronouncement at our law. As the hirer must answer, not only for loss and injury of the thing by himself in person, but for loss and injury which others may have occasioned where he was culpably remiss, so is he treated as the party ultimately responsible to his letter for the injurious acts of those whom he voluntarily admits, so to speak, to the use of the thing. And this responsibility ap-

[1] Nash *v.* Mosher, 19 Wend. (N. Y.) 431; 13 Pick. (Mass.) 294; Bailey *v.* Cobb, 34 N. H. 29.

[2] § 143. Cf. as to letting a horse on Sunday, Frost *v.* Plumb, 40 Conn. 111; Stewart *v.* Davis, 31 Ark. 518; Horne *v.* Meakin, 115 Mass. 326; Logan *v.* Mathews, 6 Penn. St. 417. Where the turpitude is not fundamental, but the bailee, who hires a horse on Sunday for a permissible use, puts the animal to a secular and prohibited use, the letter's remedy is clear. Fisher *v.* Kyle, 27 Mich. 454.

[3] § 144. Rowland *v.* Jones, 73 N. C. 52; *ante*, 12, 105 note. Cf. 17 N. Y. Supr. 474; Carrier *v.* Dorrance, 19 S. C. 30. As to the letter's waiver of his remedy, see Lucas *v.* Turnbull, 15 Gray (Mass.), 306; Bigbee *v.* Coombs, 64 Mo. 529; Austin *v.* Miller, 74 N. C. 274.

plies not only to technical servants or one's sub-agents employed about the thing, but to sub-users, to all such as the hirer may allow to participate in the benefit he enjoys; in general to domestics, members of his family, boarders, guests, and the like.[1] But whether, after all, our common law differs essentially from the Roman law, in this respect, and does not really recognize the usual limits of the rule of agency, elsewhere discussed, may be doubted.[2]

121. The liability of joint hirers may arise in a case of culpable carelessness where two jointly hire and either or both occasion the mischief.[3]

[1] § **145.** In Story, Bailm. §§ 400, 401, the superiority of the common law over that of Justinian's age is asserted in this respect.

[2] See *ante*, 9, 86. Here, as contrasted with the loan for use, we are considering a bailment use which is not strictly personal in most cases, but may be shared in by others upon the bailee's contract for recompense. For this writer's discussion of the subject, in advance of positive decision, see §§ **145–147.** Towards the conclusion that the rule of agency as in other bailments limits a hirer's responsibility, where his sub-user deviated or acted wrongfully, unless he himself was otherwise at fault, see Holder *v.* Soulby, 8 C. B. N. S. 254; 3 E. & B. 144; 6 Daly (N. Y.), 33.

To take the instance of a horse and carriage driven by the hirer's servant, it is admitted that for the driver's careless or reckless driving not positively wilful or wanton, the hirer must respond, upon the usual principle, § **147.** McDonald *v.* Snelling, 14 Allen (Mass.), 290; Philadelphia R. *v.* Derby, 14 How. (U. S.) 468. But the decisions show a repugnance to holding the hirer liable for his servant's wanton, malicious, and criminal acts inflicting injury, or where he took the horse and carriage without permission or wantonly deviated; but to place the liability upon the servant personally, unless the master was at fault in employing him or otherwise contributed to the wrong. And this, too, complies with the rule of agency. See L. R. 2 Q. B. 534; Storey *v.* Ashton, L. R. 4 Q. B. 476; Evansville R. *v.* Baum, 26 Ind. 70; Vanderbilt *v.* Turnpike Co., 2 N. Y. 479; 2 Mich. 519. But in the late English case of Coupè Co. *v.* Maddick (1891), 2 Q. B. 413, which was admitted to be novel, the court held the hirer liable for injury of the horse and carriage where the hirer's own driver had deviated from directions and driven in another direction for his own purposes. The court conceded that for injury to some third party the decision would have been different.

[3] § **148.** 4 Esp. 229; 2 Speers (S. C.), 495. But if only one hires, while the other rides as a mere passenger or friend, taking no part in controlling, it is the hirer only who should respond. Dyer *v.* Erie R., 71

122. For injury done to a third person, the bailee for hired use is responsible as in other bailments for recompense; and with respect to third persons and the general public one should use the hired chattel with such honor and general discretion and care, as to injure neither the person nor the property of any one wantonly or negligently.[1]

123. The letter's duties or the hirer's rights occasion very little litigation. As between himself and his letter, the hirer acquires an exclusive right to use the thing conformably to the mutual understanding, without hindrance or molestation, during his term, so long as he properly behaves. If the term be more than a precarious one, terminable at pleasure, the letter should, after once delivering the thing, refrain from whatsoever acts tend to interrupt his bailee's peaceable possession and unobstructed use. Such, too, is the doctrine in hire for a precarious term; only that, by virtue of his right to put an end to the bailment at any time, the letter may retake possession without regard to the hirer's good or bad conduct.[2]

124. How far a warranty against incumbrances and for quiet enjoyment is implied in a bailment for hired use, on the letter's part, our common law is silent. The civilians assert that an obligation exists sufficient, at all events, to indemnify the hirer, should a stranger legally put him out of possession. Even the lender of a thing must act honorably, delivering nothing as his property which he knows another owns and may reclaim; and, at our law, the hirer for a term, whom another, having a better title than his letter, lawfully dispossesses, ought in fairness,

N. Y. 228. But where one races a horse to death while the other rider abets him, it is otherwise, and so with joint contributors generally to a mischief or injury. Banfield *v.* Whipple, 10 Allen (Mass.), 27. Cf. 4 B. & C. 223; 5 Cush. (Mass.) 592.

[1] § **149**. And see, *ante*, 87. Where the hirer causes culpably such injury to another it is he and not the letter or owner who should respond in damages. Smith *v.* Bailey (1891), 2 Q. B. 403.

[2] § **150**. Hickok *v.* Buck, 22 Vt. 149. Receiving the chattel again for some temporary purpose, the letter is bound to return it when that purpose is accomplished; and his creditors should not intervene to deprive the hirer of his rights. 2 Taunt. 268; Hartford *v.* Jackson, 11 N. H. 145.

unless he specially assumed such risks of title, to be able to sue such letter as for breach of the bailment contract, or to recoup his damage against the claim of compensation.[1]

125. How expenses on the thing should be borne is a matter of common sense and the just intendment and expectation of the parties. Without an undertaking shown by express contract or usage, the hirer is not, presumably, bound to keep the thing in repair, and yet he must pay his agreed recompense.[2] The unforeseen and extraordinary expense, as to which mutual understanding never probably closed, the law may well favor placing upon the letter, if his reversionary interest will be the more valuable for it, and the hirer was not at fault; but otherwise if the hirer was at fault, or gains all the substantial benefit by the outlay.[3]

126. The letter is responsible if he lets injuriously, by bestowing for hire a chattel which he knows is unsuitable for the bailment purpose.[4] Upon such an issue, the superior knowledge of the bailor may be presumed such that he is bound, if he lets at all, to give the hirer knowledge of defects or faults in the thing, not obvious, which may cause injury to the hirer or to third parties, in course of the bailment. The ground of liability appears to be not so strictly a warranty as that the

[1] § **124**. Every common-law lease of land imports a covenant, on the lessor's part, for quiet enjoyment. But for tortious disturbance or dispossession by a stranger, the lessee must have recourse to his remedy against the wrong-doer.

[2] § **125**; Central Trust Co. *v.* Wabash R., 50 Fed. 857; 39 Hun (N. Y.), 617; 2 B. & B. 359. The rule of the civil law appears to have been different in this respect. *Ib.*

[3] Jones *v.* Morgan, 90 N. Y. 4. But the pressure for immediate outlay should be strong, and opportunity should be wanting for previous consultation with his bailor, to justify such bailee in expending largely without in some way securing permission. Where the lender was in fault, as in letting to hire a sick animal, the needful expense borne should unquestionably be put upon him. § **152**. 3 Barb. (N. Y.) 380; 49 N. J. L. 682; 1 Moo. & R 234. And see next section.

[4] § **153**. Horne *v.* Meakin, 115 Mass. 326 (as in letting a vicious horse or a defective carriage or harness); Hadley *v.* Cross, 34 Vt. 586; Fowler *v.* Lock, L. R. 7 C. P. 272. And see 59, *ante*. The relation of bailor and bailee should be here distinguished from that of master and servant.

hirer must trust to the letter's private knowledge of the thing's intrinsic qualities; for, where the injury to the hirer is caused by some hidden defect in the chattel, which careful examination could not have disclosed, the letter is excused. Doubtless, a hirer who would, in his action, recover damages for his letter's negligence ought not to appear wanting in ordinary diligence to avert the injury complained of.[1]

127. As against the public, a hirer's right of action is more extensive than a borrower's; and his special property in the thing, founded in valuable consideration, enables him to sue all third parties in his own name for damages suffered in respect of the thing while in his rightful possession, whether it be in tort or for breach of some privity with him. It is no excuse to the tortious invader of a hirer's rights that the letter has not interposed, nor the hirer made good the damage.[2] And, if the hirer has done nothing so inconsistent with the undertaking as to justify his letter in treating the bailment as at once ended, and the bailment is not precarious, the letter cannot, as it appears, interpose to sue the stranger himself. At all events, the hirer is, under these circumstances, the proper party to sue in trover or replevin, while case would be the letter's technical remedy under the old practice, as for an injury to the reversion. But, if the hirer recover full damages, he should satisfy his bailor from the fund.[3]

[1] Hadley *v.* Cross, 34 Vt. 586. Cf. Windle *v.* Jordan, 75 Me. 149.

A bailee for hired use who ascertains some dangerous defect in the thing ought either to repair it or inform the letter and put the responsibility upon him; and he should not continue to use what he perceives is dangerously defective. Higman *v.* Camody, Ala. (1896). And see 49 N. J. L. 682.

[2] § **154**. See *ante*, 60; McGill *v.* Monette, 37 Ala. 49; 86 Ala. 372; 48 Barb. (N. Y.) 339; Woodman *v.* Nottingham, 49 N. H. 387; Brewster *v.* Warner, 136 Mass. 57; Hopper *v.* Miller, 76 N. C. 402; White *v.* Bascom, 28 Vt. 268; 119 Fed. (U. S.) 487 (leased cars).

[3] § **154**; 18 N. H. 457; 4 Jones (N. C.), 139.

In a proper case, the court will so control the fund recovered in damages by the hirer, as to secure the bailor's share by way of reversionary interest. See 11 C. B. N. S. 850; 54 Barb. (N. Y.) 417. Wherever the bailment may rightfully terminate, the bailor may sue the aggressor by

128. **By special contract,** not only may the use of the thing be restrained as to time or method of enjoyment, but the bailor may gain security against stated perils, or, indeed, against all accidental damage whatsoever.[1] For public policy does not forbid such an assumption of risks by the bailee. Any special stipulation, in short, which does not militate against sound policy and good morals may be made by the bailment parties; and this, as in other bailments, whether it lessens or enhances the usual risks of the bailee; but it must be established by proof.[2]

129. III. **Termination of the Bailment. This bailment may terminate in a variety of ways,** like that of a gratuitous loan for use: by accomplishment of the bailment purpose or expiration of the period of hire; by the thing's entire loss or destruction; by rescission of the contract, whether by mutual consent or because of misuse or other gross violation of duty by the one party, of which the other rightfully avails himself; and by operation of law, as where the hirer becomes full owner of the thing. Whatever the method of termination, the bailment parties are not absolved from their past obligations, but must make adjustment upon the usual contract principles.[3]

130. **As for putting hirer or letter in default, if** it be uncertain whether a bailment for hired use had terminated or no, the bailor should, before regarding his bailee as in default, make

virtue of such termination. 18 N. H. 457; 7 Cow. (N. Y.) 752; 67 N. C. 107. A full recovery by bailor or bailee bars the other party's action; and where bailor and bailee are in accord as to which shall sue, the injuring party cannot complain. § **155**; 136 Mass. 57; Dumas *v.* Hampton, 58 N. H. 134.

[1] § **155**; Collins *v.* Bennett, 46 N. Y. 490; Harvey *v.* Murray, 136 Mass. 377; Austin *v.* Miller, 74 N. C. 274; Chicago R. *v.* Pullman Car Co., 139 U. S. 79 ("all accident or casualty") 63 Hun (N. Y.), 632.

[2] § **155**. But in contracts so harsh, the intention of the hirer should be manifest by apt words, which *semble* was hardly true of 136 Mass. 377. Cf. Young *v.* Leary, 135 N. Y. 569; 3 Barb. (N. Y.) 380; 56 Me. 121; 22 Mo. 187. And as to an express guaranty by a third person, see 54 Minn. 6.

[3] § **156**. As to the effect of a hirer's death in course of the bailment mutual intendment should determine, where the hire was not strictly personal to the hirer. *Ib.*

a demand or notify him to return the thing. But no demand or notice is needful as the preliminary of bringing his suit where the bailment was distinctly fixed for a certain time, and the period has lapsed without the grant of further extension; nor where the thing has been converted wrongfully or destroyed.[1] On the other hand, the bailee has the corresponding duty of tendering the thing back and offering whatever recompense may be just. Where no duration of the term was agreed upon, the bailment may be terminated at the will of either party.[2]

131. The hirer has two general duties to perform, upon termination of the present bailment: (1) to deliver the thing back or over, which is most commonly to restore it to his letter; (2) to make final recompense for its use, if not made in advance.

(1) The thing should be restored in as good plight as it was when received, except for that deterioration which ensues, in the course of using, from ordinary wear and tear, and for any injury or loss which may have occurred without culpable negligence or misconduct on the hirer's part. And the delivery should be promptly made, to the letter personally, or to his agent duly empowered, his personal representative, or transferee, according to the circumstances.[3] (2) Recompense for the use of the thing, which is commonly, but not of necessity, in money, ought to be duly rendered in accordance with the hirer's undertaking; and this, doubtless, may have involved payment in advance, though recompense when the bailment ends is more common; or again it may be by periodical payments. Definite agreement may have fixed a definite compensation; otherwise, that is due which reason and usage prescribe.[4]

[1] § **157**; Learned Co. *v.* Fowler, Ala. (1896); 21 Ala. 151; Negus *v.* Simpson, 99 Mass. 388; Ross *v.* Clark, 27 Mo. 549; Morse *v.* Crawford, 17 Vt. 499.

[2] § **158**, **159**; *ante*, 61.

[3] § **159**.

[4] § **160**. As to the Roman rule of apportionment, see *ib.*; United States *v.* Shea, 152 U. S. 178.

132. **The hirer should volunteer no claim of title adverse to his letter** on behalf of himself or another, nor hire under a title which he knows to be infirm and then set up the infirmity against his bailor afterwards; though, like any other bailee, he may justifiably protect himself against claims of ownership, preferred by third persons, which have been so brought to his notice while he holds custody, that he cannot, without peril, ignore them.[1] The actual accomplishment of the bailment purpose, usage, or the parties' express contract, may determine when the hirer is bound to redeliver; otherwise redelivery should promptly follow the letter's rightful demand.[2]

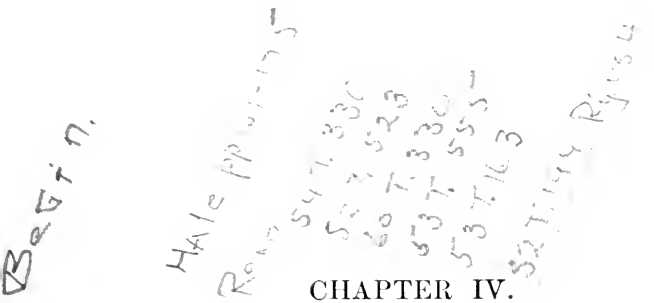
133. **As to paying recompense and indemnifying,** a hirer who returns the thing before his term has expired, need not pay hire-money beyond the time the owner lets it anew or sells it.[3] A hirer at fault may doubtless have to make good the damage occasioned by his remissness, in addition to giving the promised recompense. Yet our law is commonly satisfied with making the injured party whole under his contract; and on a familiar principle, applied in other relations of life, he who pays as for a total loss or destruction of the thing ought to be subrogated to the rights of the former owner.[4]

[1] § 159; *ante*, 61; Davies, *ex parte*, 19 Ch. D. 86; 10 C. B. N. S. 860 (demand of a subsequent mortgagor). See Erwin *v.* Arthur, 61 Mo. 386. There are instances under which it would be dishonorable for the bailee to acquire a title adverse to his bailor; but exceptions may arise. Hadley *v.* Musselman, 104 Ind. 459 (purchase under a public tax sale).

[2] Failing to return the thing hired amounts, unless satisfactory excuse be given, to conversion on the bailee's part, so as to justify the recovery of damages for the detention, besides the compensation due; or, perhaps, a continuance of recompense at the same rate. See Benje *v.* Creagh, 21 Ala. 151; 99 Mass. 388; Vaughan *v.* Webster, 5 Harring. (Del.) 256.

[3] § 161; Wright *v.* Melville, 3 C. & P. 542.

[4] Austin *v.* Miller, 71 N. C. 274 (sum received by sale of the injured thing an offset to claim for injury); Bigbee *v.* Coombs, 64 Mo. 529. And see *post*, Part VI, c. 8.



CHAPTER IV.

PLEDGE OR PAWN.

134. By pledge or pawn is denoted the bailment of a chattel, as security for some debt or engagement. Transactions like these belong to the mutual-benefit class under consideration; the benefit to the pledgor or pawnor being represented by that debt or engagement, which he is bound to make good, and the benefit to the pledgee or pawnee consisting in the additional means thus afforded him of obtaining the desired satisfaction or fulfilment thereof. The pledge or pawn arises necessarily upon contract and the bailment itself is of a unique mercantile description.[1]

135. The common law of pledge or pawn has grown apace with the development of personal property as a species of wealth, every newly created class of such property giving the subject a fresh expansion. Money, for obvious reasons, must always have been an inappropriate, though not positively unfit, subject-matter of pawn, being the end, rather than the means, of security; and, as for ships and vessels, our maritime law derived names and its hypothecary system from the codes and usage of those Mediterranean powers with whom England carried on her infant commerce. If a nobleman had been forced, in the extremity of war, to leave his family plate and jewels with the lender upon usury, in order to get the means of equipping his followers, he scored his account, when he could, upon his creditor's flesh. Borrowers and lenders alternated in hatred and fear of one another, as our pawn business anciently went on; and, socially, they were strangers, the capitalist being the inferior in caste. But most Anglo-Saxon transactions of this kind, upon personal chattel security, three centuries ago, were petty; and,

[1] § 162. Bouv. Dict. "Pledge," "Pawn."

managed as they were, underhand and at oppressive rates, we should have found the lenders small capitalists, usually of Jewish extraction, and their customers needy wretches, at the last pinch, who shrank from disclosing their names. For individuals of wealth who aspired to rank might invest on bond and mortgage security, or, in England, take attendant terms, as their titled debtors enabled them to do, and purchase lands; and though ready to buy things personal, according to their needs, such capitalists so shunned putting out their money on such security that, as a rule, borrowers on pledge had to visit the pawnbroker's shop.[1]

135 a. **But ere this day, loans on the security of chattels personal** have become of constant and open occurrence in our community, largely engaging the attention of bankers and investors. And the social rise of this transaction is curiously indicated by the changing use of English terms to denote it. The terms "pawn" and "pledge" in our language appear interchangeable, and law-writers so employ them. But "pawn," which is the more characteristic of the particular transaction, and was almost always applied in the humbler days of this bailment, keeps its unpleasant savor; for the modern disposition has been to use, in its stead, "pledge," a term admitting of various senses, some of them truly Norman, where the transaction may be detached from the three golden balls. And, once more, commercial paper and personalty of other incorporeal kinds are now found so highly convenient for pledge, that brokers and bankers have put us lately to using still another term, that of "collateral security," or "collaterals." [2]

[1] § 163. As to attendant terms, see 1 Schoul. Pers. Prop. § 43.

[2] § 164. See 2 Bl. Com. 157; 3 *ib.* 274, 280. We may find this third expression used in some of the later reports in an uncertain way, as though courts were bewildered in distinguishing between the pledge and chattel mortgage, or wished to use some convenient term which did not commit them to a distinction. See Smithurst *v.* Edmunds, 14 N. J. Eq. 408; First Nat. Bank *v.* Kelly, 57 N. Y. 34; Fraker *v.* Reeve, 36 Wis. 85. The better view is that "collateral security" embraces in its broadest sense both pledge and chattel-mortgage transactions, while more appropriately applied to the former class, and in the stricter phrase

136. We shall here apply the generic word "pledgee" to all of these bailees, alike in their general pursuit, and to private parties who may, in special cases, take chattel security for accommodation; the corresponding party being styled the "pledgor."

137. Our English pawn or pledge corresponds with the Roman pignus, a word whose origin civilians have thought significant of the manual delivery which necessarily accompanied the transaction; for if possession remained with the debtor, although by naked agreement the property was placed in security, the civil law styled it *hypotheca*. Some, however, have said that the difference between *pignus* and *hypotheca* was one of sound only. Like our pledge, the Roman *pignus* appears to have been confined to personal property or movables.[1]

to pledges of incorporeal personalty alone. See "collateral security" used in the sense of a mortgage in Matthews *v.* Warner, 145 U. S. 475. As a chancery phrase, "collateral security" came long ago in other connections to denote some security given in addition to the principal security. See 16 Ch. D. 211, 217 (as, *e. g.*, where one borrows money on mortgage and also deposits bonds); 11 Penn. St. 120. Giving one's simple promissory note for a loan, and bonds, stock, or other notes with indorsement, might seem a proper instance under the same head: and hence, perhaps, the true origin of the mercantile use of the phrase, which, however, has no rigid application at the present day.

And now that the modern pledge is so commonly made of great things as well as small, of mercantile, as well as household articles, the great capitalist who invests money in staple merchandise, bonds, stocks or commercial paper refuses blood brotherhood with the primitive lender upon garments, animals, furniture, and personal ornaments; and while the pawnbroker still plies, under license, the individual trade with misery and humble station, a proud corporation lends and invests its immense capital upon "collateral security" at the great centres of finance and trade.

[1] § **166.** Our commercial law speaks of "hypothecating" ships and vessels, rather than "pledging" or "mortgaging" them; and this (naturalizing civil rules and civil terms together) because a bottomry bond makes the ship's keel or bottom a creditor's security, without requiring a bailment transfer and retransfer of visible and tangible possession, which would be troublesome, even if practicable, in such a case. See The Grapeshot, 9 Wall. (U. S.) 129.

138. Pledge is to be distinguished from the chattel mortgage, which it much resembles. Every chattel mortgage, like a mortgage of real estate, carries over to the party whose security is intended, a transfer of legal title to the property, with a proviso by way of defeating it; and the mortgagee becomes, technically speaking, the owner of the thing, subject to a condition of title divestment upon the mortgagor's faithful and complete performance of the main undertaking whose security was intended. But, under a pledge, the secured party is a mere bailee of the thing, while the main undertaking ripens. Nor is actual possession of the property placed in security so essential to a mortgagee, who stands upon a transferred title, as it is to a pledgee, whose strength consists in possessory rights.[1]

[1] § 167; 5 Pick. 59; 39 Me. 45; Thompson *v.* Dolliver, 132 Mass. 103; Lenz *v.* Harrison, 148 Ill. 598; Coty *v.* Barnes, 20 Vt. 78; 8 Johns. 96, per Kent, C. J. This theoretical distinction, however, is not well kept up in modern practice; for equity subjects all mortgages to foreclosure and a possible right of redemption, so that, pending full performance by one party, the other has hardly a more available *jus disponendi* than any pledgee. Moreover, our local legislation tends constantly to assimilate the two transactions, especially in requiring a fair and *bona fide* sale, upon default, for realizing upon the security. A chattel mortgage depends much upon the suitable form of writing, which imports a sale with a proviso for defeasance; while the mortgagee, remaining usually out of actual possession until a default, secures himself against third parties by having his written instrument recorded, in compliance with local statute. In a pledge, on the other hand, the writings, if any, may be of a most informal character, and there is no public record of them; but the essence of the security is in the delivery of the thing, and a holding by the pledgee in bailment; such possession constituting, when perfected, a sufficient notice against the world for protecting one's security. See Delivery, *post:* 2 Lowell (U. S.), 519; Thompson *v.* Dolliver, 132 Mass. 103; 119 Ill 75; Morgan *v.* Dod, 3 Col. 551; 101 Fed. (U. S.) 11; 33 E. L. & Eq. 43; 10 Met. (Mass.) 7. The leading principle to be here deduced is, that an actual or constructive change of possession, where chattels are given in security, better comports with the character of pledge than of chattel mortgage. And, apart from the question of changing possession, if the transaction for security imports the mere giving in security, with no immediate change of title, it will be presumed a pledge rather than a mortgage; while, on the contrary, if it

139. Pledge is also to be distinguished from the mere lien already considered. In short, there are three kinds of security to which personal property may be subjected. The lowest is the "lien" whose essence consists in the right of holding back or detaining the thing until one's demand is satisfied.[1] The next is the pledge, now to be considered, whose additional advantage is the common-law right to sell for default and apply the proceeds to the pledgee's demand. The third, and theoretically the highest, is the mortgage, where the security holder is treated as conditionally the absolute owner of the thing in case of his debtor's default.[2] Of the three transac-

assumes to transfer the legal title at once by intendment to the creditor or obligee, accompanied perhaps with terms of defeasance, and yet so that the title shall become absolute in him through the other's mere non-performance of his condition, then there is a mortgage instead of a pledge. § **168.** The intent of the parties should govern such transactions, if clearly and consistently manifested. See general works on Chattel Mortgages; 1 Schoul. Pers. Prop., etc. As more particularly between the parties themselves, a difference of procedure for enforcing the security on default of the debtor or obligee; and meanwhile a difference of personal responsibility as concerns the thing itself, because custody is transferred in the one case and not usually in the other, — these remain the fundamental points of separation between these two great classes of chattel security transaction; classes for which the Roman *pignus* and *hypotheca* appear better-fitting epithets on the whole than the English "pledge" and "chattel mortgage."

[1] As to a bailee's lien, see *ante*, 99–104; *post*, Part VI, c. 7; and see generally 1 Sch. Pers. Prop.

[2] See preceding section. It is, however, to be observed that our courts of law look at no other owner than the mortgagee under a chattel mortgage whose condition has not been performed, unless the local statute has otherwise prescribed; while courts of equity have done little here to mould the law to their own theory, as compared with their constant interposition where real-estate mortgages are concerned. And hence this practical difference has widely obtained between mortgages of real estate and mortgages of personal property, though more, perhaps, for the past than the future: that those of the former kind follow the equity rule regardless of form, so as to confer no legal title at once upon the mortgagor, but to serve rather as mere security until breach of condition; whereas those of the latter kind pass the legal title at once to the mortgagee, subject to defeasance, agreeably to the legal rule. See Jones, Chattel Mortgages, § 1.

tions that for pledge commends itself as the fairest for the mutual advantage of the parties concerned, and hence its great popularity among business men at the present day.

140. **A transfer apparently absolute may be shown to be intended for security,** so far as personal property is concerned, and our courts leave the intention of the parties quite freely open to interpretation, in this respect, notwithstanding the writings that may have passed and their literal expression.[1] Whether one is a purchaser or pledgee depends upon the true intent of the transaction.[2]

141. **The classification of the present chapter** follows that of the three preceding chapters, to which the present bailment is analogous. We shall here consider: I. The pledge contract. II. Delivery in pledge. III. Bailment in pledge pending maturity of the secured undertaking. IV. Bailment in pledge at maturity on the pledgor's default, or upon fulfilment of the secured undertaking.[3]

142. I. **The Pledge Contract. To the pledge contract are these three essentials:** (1) A subject-matter; (2) A debt or engagement; (3) Mutual assent that this subject-matter shall be handed over in bailment to secure payment or fulfilment of this debt or engagement. Let us examine these essentials in detail.[4]

143. (1) **As to the subject-matter.** In pledge, as in all other bailments, our transaction is necessarily confined to personal property. And of personal property, except for the peculiar rules of maritime law which are applicable to ship-

[1] § 169. Taking negotiable paper for an existing indebtedness looks like accepting absolutely that mode of payment; yet the parties may show that the paper was taken simply in pledge. 10 Johns. (N. Y.) 471; Comstock *v.* Smith, 23 Me. 202; Partee *v.* Bedford, 51 Miss. 84; Wood *v.* Matthews, 73 Mo. 477. And often has a bill of sale, or a transfer certificate of stock, been shown to be intended only as part of a pledge transaction. See Rohrle *v.* Stidzer, 50 Cal. 207; 38 Neb. 39; Smith *v.* Beattie, 31 N. Y. 542; Barber *v.* Hathaway, 169 N. Y. 575.

[2] § 169; 47 Minn. 417; Harris *v.* Lombard, 60 Miss. 29; Wilkie *v.* Day, 111 Mass. 68 (word "guaranty" used in sense of security or lien).

[3] § 170.

[4] § 171.

ping, all kinds which are visible and tangible may be pledged; and, besides, the various incorporeal species, so far, at least, as concerns those which are evinced by instruments in writing, whereby a transfer of possession may take place. In the earlier days of our law, only corporeal kinds, and those a few of the simple sort, were put in pawn; and in the leading case of Coggs *v.* Bernard, Lord Holt is found laying down the law with particular reference to jewels, wearing apparel, and domestic animals. No such brief list would now avail; for courts of this day constantly recognize the interchange in pledge, not only of merchandise, stock in trade, and household goods of every modern description, but also of incorporeal chattels; and an enumeration here may be suggestive in defining the scope of bailment transactions generally.[1]

[1] § 172; 2 Kent, Com. 577; Story, Bailm. § 290; 2 Ld. Raym. 909, 917. A pledge may be made of rails laid for a temporary purpose upon another's land, as well as of the railway rolling stock, since they are all personal property. Woodward *v.* Exposition R., 39 La. An. 566.

Among our incorporeal chattels whose bailment in pledge is frequently recognized may be mentioned the following: Bills and Notes, 12 Johns. (N. Y.) 146; 3 Penn. St. 381; 21 La. An. 555; 14 Minn. 27. Other negotiable and *quasi*-negotiable instruments, like coupon bonds and government securities. L. R. 1 Q. B. 585; 1 App. Cas. 476; 72 Ill. 623; 45 N. Y. 718. Municipal claim vouchers. 93 U. S. 321. Shares of stock and scrip certificates, 34 Md. 182; 42 N. H. 424; 57 Penn. St. 474; 54 Tex. 330; L. R. 3 Ex. 299. Title deeds, 62 Ga. 413; L. R. 8 Eq. 331; though not in the sense of creating a legal lien on land, for equity must intervene to enforce. Atlantic Trust Co. *v.* Nelms, 115 Ga. 53. A stock margin, 41 N. Y. 235. A savings-bank deposit, 67 Me. 587 (possession of the book). A judgment, or bond with warrant to confess judgment, 78 Penn. St. 334; 161 Penn. St. 469. Bonds secured by a mortgage on personal property and corporate franchises, 50 N. H. 57; 10 R. I. 1. Chattel mortgages of every description, 36 Wis. 35; 94 U. S. 734. Even a lease may be thus taken, for leases are but chattels real, 8 Cal. 145; L. R. 10 Eq. 92. And see 76 Mo. 605 (tenant pledging his furniture for the rent due). Or a mortgage of real estate, which before foreclosure is personal property, 9 Bosw. (N. Y.) 322; 53 Vt. 1; 66 Cal. 480; 94 U. S. 734. Or unlocated land certificates, 54 Tex. 330. A life insurance policy may be taken in pledge; 31 Ark. 476; 69 Iowa, 189; 45 Barb. (N. Y.) 111; 72 N. H. 112; L. R. 5 Ch. 32. And so may a fire or marine insurance policy, 9 Allen (Mass.), 29; L. R. 17 Eq. 205.

That which is incapable of delivery cannot, logically speaking, be the

143 a. That which does not actually exist cannot in strictness be the subject-matter of a pledge: as where a thing has ceased to exist, or has not yet come into being. Thus, the pledge contract of goods which prove already burned up is void; and so is it with the pledge to-day of an animal that died yesterday. For, though parties might agree to place a heap of ashes, a carcass, or a skeleton, in security, the identity of that to which assent is given must be preserved throughout, and a new product does not answer for the perished thing whose pledge was mutually intended.[1] The case of a thing not yet come into being presents some difficulty, for equity has much diluted the strength of the common-law rule in this respect. Granting the rule, it yet appears that the chattel product *in futuro* of that to which one holds a right *in esse*, like the prospective earnings of a voyage or of some existing contract of service, the year's wool on one's sheep, the milk from one's cows, the severed crops from one's land, a reversionary right as heir, are all deemed assignable interests at this day, and capable of sale; and, if capable of sale, they must be capable of pledge or mortgage. And it is still more broadly asserted that chattels in which one has a potential interest may now

subject-matter of pledge or other bailment; but since money rights, not negotiable, or mere choses in action may at least be assigned, so that delivery of the muniment or voucher shall answer the purpose of a bailment, this reservation is unimportant in modern practice. See 1 Wheat. 236; Gay *v.* Moss, 34 Cal. 125; Dunn *v.* Meserve, 58 N. H. 429; Talty *v.* Freedman's Savings Co., 93 U. S. 321. One's interest in a limited partnership may be pledged. 107 Penn. St. 590. Or, by a suitable writing of assignment, any open account or book debt. 105 Cal. 467. Or some claim or demand. 161 Mass. 550. Or even by equitable assignment the fractional part of a claim. Fairbanks *v.* Sargent, 117 N. Y. 320.

The pledge with due indorsement of a bill of lading of goods in transit by land or water, transfers, under mercantile usage of the present day, the special property therein against third parties as well as against the pledgor himself. 87 Ill. 296; 124 Mass. 311; 71 N. Y. 353. And a warehouse receipt may likewise be given in pledge so as to carry the goods it represents. 167 N. Y. 121; 40 Ohio St. 176. And see § **173**; 167 N. Y. 329 (equitable pledge of receipts).

[1] § **174**. The same rule applies to sales. 2 Schoul. Pers. Prop. § 207–209. Benj. Sales, bk. 1, pt. 1, c. 4.

be transferred, though not, of course, any mere possibility coupled with neither potential nor actual interest.[1] We may here distinguish between future obligations, such as a pledge contract might seek to impose upon the parties concerned, and obligations which, to prevail as a pledge or bailment, ought to be in present force; between rights which one may require the other party to recognize when opportunity offers, and yet may not fully enforce to the lawful hindrance of immediate third parties in interest.[2]

144. Natural increase of a pledge goes as accessory *in futuro* to the pledge itself, the pledgee duly acquiring and holding the increments as they vest. For as soon as the thing comes into existence, the bailee's possession takes effect: though here once more he should, as regards the public, make and keep his possession perfect.[3]

145. But there are some things whose pledge is usually forbidden; as, for instance, the pensions, bounties, and pay of soldiers and sailors, a class of persons whom the law seeks to

[1] The pledge contract of a particular life-interest in a sale is also, under our general rule, null, if that life has already expired. Strickland *v.* Turner, 7 Ex. 208.

[2] § **175.** A chattel mortgage cannot operate upon an ungrown and unsevered crop, for this is real estate. 7 Wis. 159. And the rule is strictly asserted against the pledge of an overgrown and unsevered crop. Gittings *v.* Nelson, 86 Ill. 591. But *semble*, the pledge would hold good if under his contract the creditor severed and held possession as of personalty, before other rights intervened. *Ib.* See also 54 Kan. 674. But to take personal chattels simply, contracts for pledging future accessions of bricks or of furniture have been given full effect, so that the pledgee's right shall vest at once upon getting possession before others have attached. Macomber *v.* Parker, 14 Pick. (Mass.) 497; Smithurst *v.* Edmunds, 14 N. J. Eq. 408; Ayers *v.* Banking Co., L. R. 3 P. C. 548. Equity inclines to protect the secured creditor under such circumstances. And we may, perhaps, correctly assume that the pledge contract of after-acquired chattels, or chattels by accession, so far as courts sustain the arrangement, gives the pledgee a right strong as against his pledgor, but which, as against third parties, he must perfect, when opportunity offers, by taking possession before other creditors attach it. See Delivery, *post.*

[3] § **176**; and cf. preceding note. See also 1 Hughes (U. S.), 17; Smith *v.* Atkins, 18 Vt. 461.

protect, as commonly improvident and out of easy range of the courts.[1] And yet, as to necessaries, or articles exempt from attachment or execution, these can be pledged or pawned at the common law; and it is no uncommon thing for a person in distress to take garments to the pawnbroker which ought to be on his own back.[2]

146. (2) **As to the debt or engagement.** This may be primary or secondary, on the pledgor's part, absolute or conditional, for the payment of money or for any other lawful performance of an engagement. The pledgor may be bound to the debt or engagement as indorser or surety for another, or as himself the maker or principal.[3] So, too, may the security be taken by the pledgee for the repayment of money loaned (which is the usual case) or so as to indemnify him for becoming an indorser or surety at the pledgor's instance.[4]

[1] § 177; 3 T. R. 681.

[2] Frost *v.* Shaw, 3 Ohio St. 270; Scott *v.* Reid, 83 Minn. 203. The rule of necessaries, or of exempt articles, applies only as to a selection of things in such a sense; and an owner may waive such selection. Public policy also may be found to check or prohibit pledge transactions — *e.g.*, in respect of banks — except upon certain terms; and so as to the pawnbroking business. See 11 Wall. (U. S.) 369.

While contract rights may now be generally pledged, one cannot pledge a cause of action growing out of a personal wrong. Pindell *v.* Grooms, 18 B. Mon. (Ky.) 501.

[3] § 178; Brick *v.* Freehold Co., 37 N. J. L. 307; Stewart *v.* Davis, 18 Ind. 74; Wilcox *v.* Fairhaven Bank, 7 Allen (Mass.), 270.

[4] See Blackwood *v.* Brown, 34 Mich. 4 (a surety to be indemnified); Gilson *v.* Martin, 49 Vt. 474; Third Nat. Bank *v.* Boyd, 44 Md. 47 (an indorser for the pledgor); 9 Mart. (La.) 519.

As to pledge for a pre-existing debt, there is still conflict; some authorities holding that there is here no valuable consideration. 111 Penn. St. 291; 60 Conn. 463; 152 Mass. 189, 199; while others rule that there is. 108 Ind. 183; 102 U. S. 14; 46 Kan. 536.

The pledge contract holds good for just what it is mutually agreed to secure and no more. One may give security for the payment of $10,000 out of his debt of $17,000; and after he has paid $10,000 he is entitled to a return of the security. Fridley *v.* Bowen, 103 Ill. 633. Where one gives to a banker a pledge to cover certain drafts or overdrafts, discounts, etc., the banker cannot hold the pledge for other indebtedness to him. 84 Ky. 135; Duncan *v.* Brennan, 83 N. Y. 487; 159 Mass. 51; Biebinger *v.* Continental Bank, 99 U. S. 143; 86 Va. 690; Bowes, *Re*, 33

In every case some lawful debt or engagement which is or may be owing the pledgee constitutes the foundation of the security upon which the thing is given. Whatever the security, the pledgee has no right to apply it as another or greater security than what was mutually intended, without the pledgor's free assent.[1]

147. (3) **As to mutual assent that the particular subject-matter be handed over to secure** payment or fulfilment of the particular debt or engagement. Mutual assent, whether formally expressed in written or spoken words, or inferable from the acts and conduct of the parties, presupposes a contract which parties enter into conformably to the law of contracts. This contract should be between parties legally competent thereto; neither disqualified, as are insane persons, and, to a certain extent, infants and married women; nor, like certain kinds of corporations, placed under special statute disabilities in this respect.[2] It must not be made under circumstances involving

Ch. D. 586. If the pledge was given for A's note, it does not presumably secure the renewal of A's note. 96 N. Y. 125. On the other hand, where the pledge is to secure a general balance the pledgor cannot reclaim the pledge on paying only a specific part; and pledgor and pledgee may agree that a security shall stand for renewals as well as for the original notes secured. Merchants Bank *v.* Demere, 92 Ga. 735; Shrewsbury Institution's Appeal, 94 Penn. St. 309.

[1] In short, mutual intendment regulates; and the object may be to secure all or part of what one owes, a general or a specific indebtedness; to protect what is now outstanding from the pledgor, or so as to include future liabilities as they may arise in favor of the same pledgee; to cover obligations for a fixed or for an indefinite period — provided always, that the transaction be not, as against third parties, a device for defrauding them. Or §§ **178**, **187**; Third Nat. Bank *v.* Boyd, 44 Mo. 47; Moors *v.* Washburn, 147 Mass. 344; Stearns *v.* Marsh, 4 Denio (N. Y.), 227; Cross *v.* Brown, 17 R. I. 568; Berry *v.* Gibbons, L. R. 8 Ch. 747. As to the question of fact, see 75 Md. 546. "Other subsequent indebtedness" applies presumably to that of pledgor to pledgee and not to claims of pledgor outside, which the pledgee buys up. 160 N. Y. 549.

[2] §§ **179**, **186**. 1 Holmes (U. S. Cir.), 180; Faulkner *v.* Hill, 104 Mass. 188. As to married women, see Schoul. Dom. Rel. § 142. As to partnerships, see Liberty Bank *v.* Campbell, 75 Va. 534; 107 Penn. St. 590; 87 Ala. 644 (part owner); Rogers *v.* Batchelor, 12 Pet. (U. S.) 221. See further, as to corporations, 15 N. Y. 9; Bank *v.* Lanier, 11 Wall. (U. S.) 369; L. R. 10 Eq. 381; L. R. 3 P. C. 548.

force or fraud or essential error; for this would render it voidable by the injured party.[1] Nor, with reference to the pledgor's other creditors and third parties generally, ought such agreements to be fraudulent; else the party wronged might have the transaction set aside. Whether mutual assent has closed, or there is, instead of a pledge contract, a mere unaccepted offer to pledge, the law of contracts will determine.[2]

148. Illegality of the pledge contract is another cause of avoidance; rendering it, indeed, utterly null in purview of the law. But since, apart from regarding each culprit's own criminal accountability, the fact that illegality practically puts out of court the party who seeks to enforce the contract tainted with it, one's disadvantage might, to his opponent, prove a positive advantage.[3]

149. Pledge by one who is not the owner is recognized here as in other bailments, in respect of requiring the pledgee to honor his pledgor's title and to volunteer no objection to it. But in the present transaction, unlike most bailments, the question of a bailee's rights may involve a very large consideration with which he has parted on security of the thing, and this upon a transaction which, with its various renewals, may last for a considerable period. A pledgee may have advanced, on security of the thing, all or nearly all its real mer-

[1] § 179.

[2] See Providence Thread Co. *v.* Aldrich, 12 R. I. 77; 126 Ala. 194; Harrison *v.* Clark, 71 Conn. 18.

As already intimated, no express contract is essential to a pledge, since the transfer or possession with suitable mutual interest is largely relied upon. Modern transactions show often a vast or very complex pledge transaction where the contract was oral, or possibly expressed tersely in the pledgor's note which went with the security; but delivery made the bailment complete and aided oral proof of the mutual intention. See, *e. g.*, Means *v.* Bank of Randall, 146 U. S. 620.

[3] § 180. The civil maxim is *in pari delicto potior est conditio possidentis.* Hence, if the delivery in bailment has already taken place, the pledgee has the advantage of his possession when the pledgor would recover; but, if the transaction rests merely in an unexecuted contract, the advantage lies with the pledgor. See King *v.* Green, 6 Allen (Mass.), 139; Curtis *v.* Leavitt, 16 N. Y. 9; Taylor *v.* Chester, L. R. 4 Q. B. 309.

cantile worth. Hence it behooves him to take heed that the pledgor, if not owner, had at least some sort of right or authority to deliver it in security; and our modern courts, moreover, aided by legislation and the infusion of equity principles, seek, as far as possible, to give a just and reasonable scope to the law of pledge, so as to aid so convenient a mercantile transaction. How far, then, effect may be given rightfully to a pledge transaction, on a *bona fide* pledgee's behalf, where the pledge was given by one not the owner, becomes a matter of preliminary inquiry.[1]

150. Personal property cannot be pledged as against the true owner without his consent or authority; and this old rule of the common law, applicable more particularly to corporeal, or visible and tangible, chattels, concedes that the rightful owner may overtake and recover his own chattels, wrongfully pledged by another, were the pledgee never so honest on his part, and may disregard the amount such pledgee may have advanced upon them as security to the thief or wrongdoer. Such is the fundamental rule, and it should be borne in mind.[2]

151. But where the pledgor assigned, in effect, some valuable interest of his own in the thing, having its rightful possession and not being a mere thief, our law in modern times is disposed to protect the *bona fide* pledgee to that extent as to his own advances upon the security. As, where the pledgor was a hired bailee with a just lien for services rendered upon the thing, or a bailee for hire with a valuable term of enjoyment not yet expired; or in the case of a factor or broker, who had made advances on the chattels in his charge, having been employed to sell but not to pledge.[3] For here the true owner is

[1] § 181.

[2] § 181. Gottlieb *v.* Hartman, 3 Col. 53; Branson *v.* Heckler, 22 Kan. 610; Small *v.* Robinson, 69 Me. 425; Singer Man. Co. *v.* Clark, 5 Ex. D. 37. A similar rule applies to the wrongful sale of a chattel personal; the old rule of markets overt having no recognized application, in this country at least. As to delay, laches, etc., in pursuing on an owner's part, a tortious possession for years does not confer title on the pledgee. 107 N. C. 189.

[3] §§ 184, 185. One who has a limited title to a chattel, or a special interest therein, such as a life owner or a lien-creditor, is allowed to

no worse off than he would have been had his bailee or agent acted honestly; and it is just that to the extent of such valuable interest in the tortious pledgor the *bona fide* pledgee should be protected.

152. Where, again, the pledgor was the owner's agent in possession, under a scope of authority, as held out to third persons, sufficient to justify one in advancing upon the pledge of the thing, the *bona fide* pledgor should be protected correspondingly in his security, whether the agent's actual authority, as between himself and his own principal, was sufficient or not.[1]

153. Again, under the peculiar rules of negotiable instruments not overdue, any *bona fide* third person, without previous notice of an infirmity of title or intended misappropriation such as should put prudent men on their guard, is protected to the extent of his advances by way of pledge to the holder of such property. This is a broad and general rule, which covers the sale or pledge of negotiable instruments, even by one who has stolen them.[2] And where a fiduciary party misappropriates

pledge to the extent of his title, though not beyond it. Hoare *v.* Parker, 2 T. R. 376; 4 Camp. 121. As to factor or broker, see First Nat. Bank *v.* Boyce, 78 Ky. 42, where the subject of his tortious pledge is fully discussed. See also *post*, as to sub-pledge by a pledgee.

Where a factor advances money and takes a bill of lading in his own name he becomes owner rather than pledgee. Moors *v.* Kidder, 106 N. Y. 32. But the strict common law discountenanced the pledge by a factor or broker, though he might sell. § **184.** But modern legislation and the modern decisions abate this rigor. *Ib.;* L. R. 4 C. P. 93; 67 Fed. (U. S.) 469; 165 Mass. 552; 24 N. Y. 521. Cf. 99 Fed. (U. S.) 525.

[1] §§ **181, 184;** 13 Mass. 105; Goldstein *v.* Hort, 30 Cal. 372. Clearly an authorized agent may pledge or contract to pledge on behalf of his principal; an officer, in the name of the corporation he represents; and a holder generally, under the owner's consent. Agency, express or implied, confers authority; in any case it is sufficient that the owner consented to have the thing pledged; and a transaction may, as against the true owner, amount constructively to a pledge. All this accords with the general law of bailments elsewhere considered. § **181.** And see *ante*, 11, 18.

[2] §§ **181, 184 a;** Bealle *v.* Southern Bank, 57 Ga. 274; 39 La. An. 90; Fisher *v.* Fisher, 98 Mass. 303; 4 Mo. App. 59; 43 Neb. 680; Farwell *v.* Importers' Bank, 90 N. Y. 483; 131 N. Y. 595; 1 App. Cas. 476; Sheffield

thus on the pledge of such chattels incorporeal in his possession, we should distinguish between notice that he pledges avowedly for his own debt and notice that he pledges as though on behalf of his fiduciary.[1]

154. And, once more, from the blended consideration of these last two elements, — ostensible agency given to pledge and a *quasi*-negotiable character of the instrument, — we find a number of recent cases, where a fiduciary had abused his trust in pledging to a third party, but nevertheless the *bona fide* pledgee who was misled into advancing money was protected, against the true owner, as having the superior equity for his claim; for, where of two persons equally innocent one must suffer, it should be he who enabled the mischief to be done.[2] And hence, from either one of the four causes thus

v. London Bank, 13 App. Cas. 333. But observe the limitation of such a rule, as stated in the text; the pledgee must be a *bona fide* party for value who advanced without previous notice of infirmity. See People's Bank *v.* Clayton, 66 Vt. 541 (notice that the note given in pledge was of an accommodation character); 8 Taunt. 100 (ear marks of true title on the instrument); Sheffield *v.* London Bank, 13 App. Cas. 333 (where negotiable instruments are brought in block for pledge by one known to be a broker, one should be suspicious and make inquiry); Bentwick *v.* Joint Stock Bank (1893), 2 Ch. 120. Cf. Smith *v.* Savin, 141 N. Y. 315. One is not a *bona fide* holder entitled to protection who has seasonable notice of infirmity and disregards it. Nor can overdue paper or negotiable securities with suspicious erasures be safely taken in pledge; nor, apparently, negotiable instruments, which, though genuine, have never been put into circulation; nor public securities which have been paid, and instead of being cancelled, are improperly reissued. § **181**. There is furthermore a distinction to be observed between the *bona fide* holder for value without notice of infirmity, before and after maturity of the negotiable instrument which is transferred without right or title; for, after maturity, title depends upon true ownership, as in non-negotiable chattels. See 61 Tex. 365; 7 Wall. (U. S.) 435. And see Colson *v.* Arnot, 57 N. Y. 253; 79 Ga. 547; Hambleton *v.* Central Ohio R., 44 Md. 551; 3 Edw. Ch. (N. Y.) 182; Board of Education *v.* Sinton, 41 Ohio St. 504.

[1] § **184 a.**

[2] §§ **182**, **184 a.** With respect to stock, which is the creature of local statute, the rule of negotiability is in some States strongly upheld; but not so, in others. Cf. Sewall *v.* Water Power Co., 4 Allen (Mass.), 272, 282; Burton's Appeal, 93 Penn. St. 214. As to whether a stock certificate expressed in the name of "A.B. Trustee," etc., should put one on inquiry,

enumerated the true owner may be retarded from recovering his own personal property without first making good, to the extent indicated, the amount actually and *bona fide* loaned by the pledgee, and relying for his own indemnity, if any, upon the person who took advantage of his possession.[1]

155. The pledge given stands as security for the whole and for every part of the debt or engagement, unless it has been

cf. Shaw *v.* Spencer, 100 Mass. 382; 4 L. T. N. S. 845; Thompson *v.* Toland, 48 Cal. 99. Where the treasurer of a company pledges stock newly issued in his own name for his private debt, the pledgee is put upon inquiry. 150 Mass. 406; Moore *v.* Citizens Bank, 111 U. S. 156. And see Ryman *v.* Gerlach, 153 Penn. St. 197.

But whether stock is to be deemed strictly negotiable or not, the modern inclination is to uphold the equity of a *bona fide* pledgee without notice of infirmity, where the certificate, with the true owner's assignment in blank on the back (with suitable power of attorney), was intrusted by him to the party who abused his opportunities by pledging it. See Cherry *v.* Frost, 7 Lea (Tenn.), 1; 66 Cal. 74, 402; Merchants Bank *v.* Livingston, 74 N. Y. 223; Burton's Appeal, 93 Penn. St. 214; Fifth Ave. Bank *v.* Ferry Co., 137 N. Y. 231. But cf. Taliaferro *v.* Baltimore Bank, 72 Ind. 164; 4 Woods C. C. (U. S.) 464. And for the general application of the equity principle stated in the text, see 2 Black (U. S.), 372; Babcock *v.* Lawson, 4 Q. B. D. 394; Hakes *v.* Myrick, 69 Iowa, 189; 36 La. An. 585; Stone *v.* Brown, 54 Tex. 330.

Executors, guardians, and other fiduciary officers are permitted so wide a range of authority in the ordinary exercise of their trust, that one need not question their general power to pledge personal assets of the trust fund. § 183; 7 Johns. Ch. (N. Y.) 150; 11 S. & R. (Penn.) 377; 3 Allen (Mass.), 217; 13 Rich. Eq. (S. C.) 269; Gottlieb *v.* Bank, 131 N. Y. 595 (bonds standing in his name as "executor"). But it is otherwise where the party dealing with such officer is chargeable with notice of his breach of trust; as if, manifestly, the pledge of fiduciary assets is for his private advantage. Thompson *v.* Toland, 48 Cal. 99; Shaw *v.* Spencer, 100 Mass. 382. Akin to this doctrine is that applicable to agents having large general powers for managing the principal's personal estate. 27 La. An. 149. As to pledge by husband, of his wife's property, in excess of authority, see 62 N. H. 673; 108 Penn. St. 377.

The standard for inquiry is that of persons ordinarily prudent, and false information given in response, such as might lull the suspicion of such persons, may be acceptable for protecting the pledgee's interest. 7 Johns Ch. (N. Y.) 150; 13 Met. (Mass.) 355. And see Berry *v.* Gibbons, L. R. 8 Ch. 747 (*lis pendens*).

[1] § 184 a.

otherwise stipulated between the parties.[1] And a number of securities may be taken for the same debt or engagement, leaving the secured party to his election as to enforcing any or all in case of default, but with the right of only one possible satisfaction.[2]

156. II. **Delivery in Pledge. Until an actual transfer of possession has taken place,** there is, to speak with precision, no pledge, no bailment; but, instead, an executory pledge contract upon sufficient consideration, which each may hold the other bound to perform. Damages for non-performance will be awarded the aggrieved party who sues as for breach of the contract; or perhaps equity would decree a specific performance.[3] For, under a pledge contract, there is no transfer of an owner's title, as in the case of sale or mortgage, but the essence of the pledgee's preference consists in a transfer of possession, or what we term delivery. In general, to create a pledge, the pledgee should have the possession and actual control of the property.[4]

157. Delivery, in order to be effectual against the world, should be followed by an acceptance of possession; and methods of delivery and acceptance differ, according to the subject-matter and the local situation of the thing. For corporeal chattels in possession there should be usually a delivery of those chattels to the pledgee at once. But constructive delivery and acceptance is in modern times much favored in such transactions.[5]

[1] § **187.** But a security taken for a precise purpose should be applied to that precise purpose alone, unless the parties modify, as of course they may. See *ante*, 147. And see 28 Conn. 420; 10 Md. 373; 81 Ky. 527; 2 Johns. Ch. (N. Y.) 418.

[2] § **187**; 1 Ala. 23; Buchanan *v.* International Bank, 78 Ill. 500; 2 Wheat. (U. S.) 390. But the presumption is, where successive loans are made upon successive pledges, that each transaction shall stand by itself. 69 Ill. 32.

[3] The latter remedy is not always available. See 33 Conn. 476; 60 Conn. 463; 38 Ga. 391; 37 Me. 543.

[4] § **188**; Corbett *v.* Underwood, 83 Ill. 324. Distinguish between a pledge and a contract for a pledge. 74 Conn. 18; 12 R. I. 77.

[5] § **189.** A delivery in pledge need not always be contemporaneous with the loan of money, but such delivery within a reasonable time will

158. If the chattels for pledge be already in the pledgee's possession, for some other purpose, no formal change of possession is needful, since the pledge contract can operate as a constructive transfer.[1] And, where A and B are in joint

suffice, so far at least as the immediate parties are concerned. Hilton *v.* Tucker, 39 Ch. D. 669. Cf. 77 Mo. 423.

As for constructive delivery, the transfer of the bill of lading of a ship at sea or the delivery of a warehouse key has long been considered symbolical as a transfer of possession. And so is it, at this day, with the transfer of bills of lading or way bills, on inland transit, or of warehouse receipts, etc. Even the delivery of such muniments without a formal indorsement or assignment has, in deference to mutual intent and the loose usages of business, been frequently upheld as constructively sufficient, at all events between the parties themselves. 17 Wis. 359. And see 164.

Advancing on the security of merchandise in transit or when stored at a warehouse is very common at the present day; and the transfer of such bills of lading or documents is upheld as a constructive pledge of the goods therein represented, both as against the pledgor and the public. § 190; First Nat. Bank *v.* Kelly, 57 N. Y. 34; Brent *v.* Miller, 81 Ala. 309; 54 Ark. 225; Hathaway *v.* Haynes, 124 Mass. 311; 76 Wis. 502; Dows *v.* First Nat. Exchange Bank, 91 U. S. 618. And the exercise of further dominion over the goods by such pledgor without his pledgee's consent is tortious and ineffective. 71 N. Y. 353. But the pledgee should seasonably follow up such constructive delivery and pursue his opportunities of making the corporeal transfer complete; for a symbolized transfer stands for something whose possession may be made more complete, and in fact should be, in order to hold firmly against all third parties. See 167 N. Y. 121 (examining goods in warehouse is not taking control). Such pledgees run certain risks, besides; for a bill of lading is sometimes issued in duplicate or triplicate, and the carrier may deliver in good faith to the holder of one bill, not knowing that the other bill was held in security. Glyn *v.* East India Dock Co., 7 App. Cas. 59, distinguishing Barber *v.* Meyerstein, L. R. 4 H. L. 317. But special stipulation or a local statute may give priority to the first or original bill over any duplicate. Nat. Bank *v.* Missouri R., 132 Mo. 492. Moreover the receipt or description of goods in such documents is *prima facie* only and does not amount to a guaranty that the goods are as described. Shaw *v.* Merchants Bank, 101 U. S. 557. Even though a local statute should make such instruments "negotiable," the full advantages incident to a negotiable instrument do not follow. Missouri Pacific R. *v.* McFadden, 154 U. S. 155 (putting fraudulently into circulation). As to goods in a warehouse, see 137 N. Y. 110; 24 N. Y. 521.

[1] § 191.

possession, the pledge to either of them is good, if both have knowledge and give assent that the property shall be held thenceforth for the pledge alone.[1]

159. Delivery may be through the medium of agents as well as by their principals in person; as, by a factor or commission merchant; or, to speak more generally, by any party whom the pledgor has held out as having due authority to accomplish the transfer on his behalf. And, as against the principal pledgor himself, it is held sufficient that his agent has been intrusted with the primary document of transfer, according to the course of business, and that the pledgee acts upon faith of such document. Agency, express or implied, confers authority; and in any case it is sufficient that the owner consented to have the thing pledged.[2]

160. As to agency on a pledgee's behalf, delivery may be to some third person for delivery over to the creditor. And there may be a binding acceptance by the pledgee's agent, acting for him; for, where property has been pledged as security, it is quite immaterial whether the pledgee holds it in person or some third person holds it for him.[3] An agent of the pledgor, too, holding the thing in his temporary possession, such as a warehouseman, safe depositary, or hired workman, may, without any local removal of the thing, attorn over, and, as the pledgee's custodian, hold it against all the world; and this, even though the agent is to do some additional work on the thing pledged, which the pledgor is expected to pay for.[4]

161. The pledgor may sometimes hold as his pledgee's agent; and what complicates pledge delivery in this connection is the modern doctrine, that the agent to take and keep legal possession for the pledgee may be no other than the pledgor

[1] Parsons *v.* Overmire, 22 Ill. 58; Brown *v.* Warren, 43 N. H. 430.

[2] § **192**; Cartwright *v.* Wilmerding, 24 N. Y. 521.

[3] § **192**; Woodward *v.* Exposition Co., 39 La. An. 566; Boynton *v.* Payrow, 67 Me. 587; Brown *v.* Warren, 43 N. H. 430. See 46 La. An. 1036.

[4] Sumner *v.* Hamlet, 12 Pick. (Mass.) 76.

himself.[1] But, as the law declares, a pledgor's possession on his pledgee's behalf should not be a mere device for the purpose of defrauding his other creditors; nor, as we may conjecture, ought the transaction to indicate that one, a pledgee by right, has simply waived or abandoned his opportunities of accomplishing a transfer to his own possession. And, whether the pledgor's agency for his pledgee can be set up to disconcert *bona fide* attaching creditors or purchasers with claims *in rem*, we may still question: for to permit this doctrine of a pledgor's agency to operate, except as between the parties themselves, and, perhaps, the general public, is practically to dispense with delivery altogether, and nullify the fundamental rule of bailment.[2]

162. **The element of notice to another** has sometimes to be considered in connection with delivery. Where an agent of the pledgor holds the thing which is pledged by the transfer of symbol or muniment of title, some notice to this custodian may be needful, in order that he may attorn over, and so give the pledgee's claim a clear operation. So, too, is the transfer of certain kinds of property attended with peculiar solemnities not unlike in character. Indeed, what we may call notice to the fundholder, custodian, or indebted party is often an important element in completing the security of a pledgee.[3]

[1] § **193**; Cooper *v.* Ray, 47 Ill. 53; 2 Lowell (U. S.), 519; Parshall *v.* Eggert, 54 N. Y. 18.

[2] § **193.** See 38 Ga. 391; 6 La. An. 516. To this subject we shall presently recur. See *post*, 168, 169. But here we may add that this dangerous doctrine of a pledgor's holding as his pledgee's agent is checked in some of the latest cases, which still maintain that possession by the pledgee is of the very essence of a pledge, so that where the pledgee never had clearer possession there is, as to third persons like *bona fide* transferees or attaching creditors of the pledgor, no lien or security, more than under a mere contract for a pledge. Casey *v.* Cavaroc, 96 U. S. 467; Thompson *v.* Dolliver, 132 Mass. 103; 18 Hun (N. Y.), 187.

[3] §§ **194, 195.** See People's Bank *v.* Etting, 108 Penn. St. 258. Stock in a chartered company, for instance, may pass, for some purposes, by a mere delivery of the scrip or certificate; but, in order to make a complete transfer, as against the world and the company itself, formalities of registry or transfer at the company's office may be found essential. See Newton *v.* Fay, 10 Allen (Mass.), 505 (statute changed in 1884); Wilson

163. Other formalities, such as registry, are sometimes required as against the public and more particularly lien-creditors of the pledgor in certain pledge transactions; though commonly, if the pledgee gains full possession before conflicting liens attach to the thing, such actual and continuous possession on his part is fully effective.[1]

164. Indorsement or formal assignment of the incorporeal thing is always desirable in order to give the pledgee a controlling possession; yet informalities or omissions in this respect are lightly regarded by the courts, so long as the

v. Little, 2 Comst. (N. Y.) 443; Pinkerton *v.* Railroad, 42 N. H. 424; 5 Penn. St. 41; 98 U. S. 514. Local policy is variable in this respect; but there should be at least a delivery of the pledgor's certificate of stock. See 31 La. An. 149; 7 Lea (Tenn.), 149; 45 Fed. (U. S.) 452; 4 Woods C. C. (U. S.) 464. Notice to the company is an element of corresponding importance in the pledge delivery of some other incorporeal kinds of chattels. Bruce *v.* Garden, L. R. 5 Ch. 32 (assignment of insurance policy); 88 N. W. 925 (Wis. 1902); Hewins *v.* Baker, 161 Mass. 320; 132 Mass. 277 (of a savings bank book). Timely notice to the carrier or warehouseman of one's claim may establish his duty, as against parties with duplicate instruments, etc.; and so, too, to the debtor on a bond or note, as fixing the party to whom he is liable for payment. See 7 App. Cas. 475; 92 Penn. St. 518.

In short, such seasonable notice to fundholder, custodian, or debtor may be of much importance in completing a delivery and retention of possession as against third parties under the circumstances of a given case; though less so, certainly, as between the pledge parties themselves. As to the element of seasonable notice to one intending to buy or advance upon the pledged thing, while the pledgee is out of possession, see *post*, 168, 169. As to registry of bonds received in pledge, as an act of prudence on the pledgee's part, see 109 Fed. (U. S.) 16.

[1] § **196.** See local legislation, 15 La. An. 165; 30 La. An. 943. And see 7 La. An 225; 32 La. An. 586 (code requiring a pledge of movable property to be in writing, in order to affect third parties). It is more commonly a result of the cardinal distinction between pledge and chattel mortgage, that the latter sort require registration, while the former neither require nor admit of it; and registry may usually be dispensed with in either case, wherever the secured party holds visible and tangible possession of the thing; nor should statute notice to the world be held indispensable as between the security parties themselves. Local statute permits the public record of a pledge for general protection, where the pledgor retains possession. 99 Ill. App. 284.

thing itself, the muniment or voucher, was duly handed over with the intent of pledge.[1]

165. Under suitable circumstances there is rather a permissive taking by the pledgee than any active transfer of possession; but mutual assent is, at all events, essential to pledge contracts, however informally it may have been expressed.[2]

166. Two leading conclusions may be drawn from the precedents which form the modern mosaic of pledge delivery. 1. That in the growing complexity of commercial and mercantile transactions, with so many new classes of incorporeal rights coming into the list of things personal, the disposition increases to apply to all chattel transfers the test of mutual intent on equitable considerations; so that the English and American courts, while abating little of the common-law theory that full change of possession must attend every pledge transaction, have come to swerve very far from it in practice. 2. That, with the present laxity of construction, pledge delivery seems to comport itself differently under these three leading aspects: (*a*) as between the pledge parties themselves, (*b*) as between the pledge parties and the pledgor's general creditors, and (*c*) as between pledge parties and those like a pledgor's attaching creditors or purchasers, or new parties lending on security of the thing, who acquire intervening rights *in rem* without notice.[3] Moreover, as we

[1] § 197. See Gay *v.* Moss, 34 Cal. 125; Fluker *v.* Bullard, 2 La. An. 338; White *v.* Platt, 5 Denio (N. Y.), 269; Dunn *v.* Meserve, 58 N. H. 429. Savings bank book given in pledge held sufficient, as against trustee process, though not formally assigned with notice to the company as rules required. Taft *v.* Bowker, 132 Mass. 277. And see Boynton *v.* Payrow, 67 Me. 587; Holmes *v.* Bailey, 92 Penn. St. 57.

[2] § 198. See Parsons *v.* Overmire, 22 Ill. 58; 6 Mass. 339 (assent of insolvent's creditors needful to his pledge for their benefit).

[3] § 199. As between the parties themselves, their executory contract so upholds the transaction, while manual delivery continues incomplete, that the pledge security holds by construction, though accompanied by no actual change of possession. As between the pledge parties and general creditors, such transactions can only be attacked by the latter for fraud upon them; and if there be a *bona fide* pledge contract, ineffectual for want of delivery, the pledgee may, at any time, take full possession, and maintain his priority over them; for here, at all events, is an execu-

have seen, (*d*) the element of notice to stakeholder, custodian, or debtor, is in many transactions a vital one; and the pledgee's rights as concerns such a party require consideration.[1]

167. III. **Bailment in Pledge Pending full Accomplishment of the Secured Undertaking. The situation of the pledge parties** towards the thing, after the transfer of possession has been virtually completed, becomes that of bailor and bailee under a mutual-benefit bailment. What, then, are the pledgee's duties, and what his rights, while the debt is maturing, or the engagement outstanding, for which the pledge was given?[2]

168. The pledgee's first duty is to keep possession. What at once impresses us as characteristic of this bailment is, that principal and collateral work along together towards one primary attainment: namely, the discharge of some debt or duty which is owed to the bailee; so that to disjoin the two would be fatal to the pledge. Of the first importance is it, then, to every pledgee to keep the bailment in force by maintaining the pledge possession he has acquired. For whenever, by delivering back the thing to his pledgor, he manifests a willing-

tory contract in his favor. But, as to those acquiring intervening rights *in rem*, without notice of the pledge, the pledgee who has not taken full possession generally fails to gain precedence; though to this might sometimes be opposed the suggestion that the pledgor continues in possession as his pledgee's *bona fide* agent; or, possibly, that the delay in completing certain formalities of delivery had occurred without fault on the pledgee's part, or that such formalities were under the peculiar aspect of the case needless. *Quaere*, whether, as among third parties with intervening rights *in rem*, one who buys or advances does not stand on a stronger footing than a mere attaching creditor of the pledgor.

[1] In general, we may add, the position of a pledgee is far less favorable for maintaining his cause where he is out of full personal control, and must take the offensive, than where he has such control and has only to defend. Our modern courts incline to balance carefully the equities of all who maintain conflicting lien rights against one another; determining upon all the circumstances which party should have priority. Possession *bona fide* acquired and maintained on the faith of a valuable service or payment is a most decisive circumstance in such cases; and especially needful is a delivery or procuring possession of the thing where the pledge transaction rests upon parol proof of words and conduct.

[2] § 200.

ness to abandon such possession, the benefit of his security is lost, and bailment and pledge come to an end; notwithstanding which the principal debt or obligation continues as before, and to secure it there might be some later pledge contract with a new taking of possession.[1] We are still to observe, however, that a pledgor may gain repossession as the pledgee's authorized bailee or agent, or wrongfully; and in either case the pledgee's right would not necessarily be lost. Hence, the fact of redelivery or repossession remains open to explanation.[2]

169. But only as between the pledge parties themselves can the pledge continuance in such cases be confidently asserted. Whether, under circumstances of dispossession or of redelivery without intending to abandon his security, the pledgee can follow the thing into the hands of some *bona fide* holder for value, to whom the pledgor has meantime transferred it, is quite another matter; and in some instances he manifestly cannot.[3] Here reappear those distinctions lately dwelt upon, which favor the pledgee not in full possession, more especially as against his pledgor; with whom, even were one pledge

[1] § 201. See as a peculiar instance in point, Citizens' Nat. Bank *v.* Hooper, 47 Md. 88. And see in general, Casey *v.* Caveroc, 96 U. S. 467; Black *v.* Bogert, 65 N. Y. 601.

[2] § 202. If the thing was redelivered for a temporary purpose only, and on the understanding that it was to be afterwards returned, the pledgee may demand and recover it again. 5 Bing. N. C. 136; 14 Pick. (Mass.) 497; 47 Ill. 53; Hutton *v.* Arnett, 51 Ill. 198. Nor will the pledgee be out of control if he lets his pledgor keep or regain possession or control, merely as his agent or for some other purpose consistent with his own lien. 2 Lowell (U. S.), 519; 101 Mass. 254; 114 Mass. 116; Moors *v.* Wyman, 146 Mass. 60. The pledgor's wrongful repossession of the thing, whether by force or stratagem, cannot debar the pledgee's rights, and may, if obtained with felonious intent, be punished as larceny. Henry *v.* State, 110 Ga. 750; Bruley *v.* Rose, 57 Iowa, 651 (larceny); 11 Me. 436; 12 Gray (Mass.), 465; Coleman *v.* Shelton, 2 McCord Ch. (S. C.) 126 (equity jurisdiction to compel redelivery); 126 Ala. 194. And see as to suing bailor for conversion, 5 Denio (N. Y.), 269; 146 Mass. 60; Bank *v.* Poynter, (1895) App. Cas. 66.

[3] § 202. Way *v.* Davidson, 12 Gray (Mass.), 465, 467; Bodenhammer *v.* Newsom, 5 Jones L. (N. C.) 107.

allowed to end, the executory contract for another might subsist. And here, too, we see the pledgee favored as against the pledgor's general creditors, where he might not have been had a single creditor attached, nor could he as against payments or advances by third persons who may have acquired rights *in rem* honestly and without notice, while the pledgee is intentionally and carelessly out of possession.[1]

170. Once more the element of seasonable notice confronts us. By vigilance and seasonable notice of his claim to third parties before they acquire adverse claims upon the thing, a pledgee may preserve his rights unimpaired, even though not retaining strict personal possession thereof; for thus is the third party deprived of that *bona fide* character which gives him a priority, as one misled to his detriment without fault and innocently.[2]

171. Where the pledgee receives possession again, after having redelivered the thing to the pledgor for some temporary purpose, the pledge will prevail once more over liens on the thing afterwards acquired by third persons; for, even were the old pledge no more, a new and valid one would thus be completely constituted. And so, too, would it be where the

[1] *Ante*, 166. See Moors *v.* Wyman, 146 Mass. 60; Bank *v.* Poynter, (1895) App. Cas. 56. Pledge no longer of avail against subsequent purchaser, pledgee, etc. Kimball *v.* Hildreth, 8 Allen (Mass.), 167; Shaw *v.* Wilshire, 65 Me. 485; Babcock *v.* Lawson, 5 Q. B. D. 284. Cf. 5 Bing. N. C. 136; Clare *v.* Agerter, 47 Kan. 605 (subsequent mortgagee of the chattel). Yet, whenever the pledgee's dispossession by his pledgor is under circumstances imputing to himself no fault or delay, nor a voluntary consent, we presume that, unless the property be of that negotiable character which gives to every *bona fide* holder for value a clear title, the pledgee will be allowed to regain the thing, even as against intervening lien-creditors of the pledgor, who had supposed the property unincumbered. § 202. And see American Co. *v.* German, 126 Ala. 194.

[2] § 202. Palmtag *v.* Doutrick, 59 Cal. 154; Carrington *v.* Ward, 71 N. Y. 360. In general, notice to an intending pledgee (or purchaser) of something adverse to the pledgor's right to pledge or raise money cannot prudently be disregarded by him. See 150. In any case, a third party charged with notice, at any stage, must deal fairly by the pledgee under the circumstances. See Withers *v.* Sandlin, 36 Fla. 419; Hazard *v.* Fiske, 83 N. Y. 287.

pledgee regained possession of what had been wrongfully or deceitfully taken from him.[1]

172. **We next inquire what degree of care and diligence towards the thing pledged** our law exacts. The rule is essentially that which applies to the other bailments for mutual benefit already examined: namely, by reason of delivery and acceptance and a transfer of the thing to his keeping, the pledgee becomes bound to exercise ordinary care and diligence towards it, and, to a corresponding extent, is answerable for negligence.[2] Ordinary diligence is a relative term here as elsewhere, and signifies that diligence which persons of common prudence usually bestow towards such property or upon their own property at the time and place in question and under like circumstances; or, if the pledge be to bankers or others whose vocation implies skill or unusual facilities, such diligence as those commonly prudent of that class are wont to observe in such affairs.[3]

173. **More than a mere custody is** presumable on a pledgee's part in certain instances; and the true intendment of the transaction should prevail. Thus, when promissory notes or other negotiable instruments are taken as collateral, which

[1] § **203.** Cooper *v.* Ray, 47 Ill. 53; 47 Kan. 604.

[2] § **204**: *ante*, 79, 111; cases *post.*

[3] It follows that, if the pledge be lost by casualty or unavoidable accident, or be taken or destroyed by superior force, or if it perish from some intrinsic defect or weakness, and no act was done or omitted by the pledgee in the premises which can be construed into culpable negligence or misconduct contributing to the loss, the pledgee cannot be held answerable. Nor is a pawnbroker liable for pawned articles stolen from his shop by burglars if he exercised ordinary diligence. 56 How. Pr. (N. Y.) 68. But on the other hand a bank, failing in ordinary care toward pledged negotiable bonds and paper, for guarding against the special danger of burglary or embezzlement, must be held liable for loss. Ouderkirk *v.* Central Bank, 119 N. Y. 263 (failing to keep record or examination of such securities). As against false tests, it may be said that theft establishes of itself neither responsibility nor irresponsibility in a bailee. § **204.** And see Petty *v.* Overall, 42 Ala. 145; Third Nat. Bank *v.* Boyd, 44 Md. 47; Dearborn *v.* Union Nat. Bank, 61 Me. 369; Scott *v.* Crews, 2 S. C. N. S. 522. As to burden of exonerating and presumptions generally, our usual rule applies. See 119 N. Y. 263; 98 Penn. St. 80; § **205.**

must mature before the principal obligation, it should be presumed that the pledgee was expected to take heed to present and try to collect upon their maturity and apply the proceeds on account to the secured debt or engagement.[1] And so, too, where book debts or other demands of the pledgor, already due, are received in pledge.[2] But wherever the pledgee is bound to take active measures upon his security, ordinary diligence continues the full measure of his responsibility under all the circumstances; and to demand more would require an express engagement on his part. The duty thus exacted can hardly be presumed to extend beyond a prudent attempt to collect by presentment and dunning, short of the personal risk and expense of a suit; and if such measures fail he may notify his pledgor of the situation and throw upon the latter the burden and risk of further proceedings.[3]

174. So, too, the duty of realizing the increment of the pledge may rest, according to the same measure, and under corresponding circumstances upon the pledgee, by way of account with his pledgor.[4] Animals and their progeny must be looked

[1] § **206**. As to the duty of presenting and trying to collect short-time paper, see Reeves *v.* Plough, 41 Ind. 204; May *v.* Sharp, 49 Ala. 140; 72 Md. 441; Whitten *v.* Wright, 34 Mich. 92; 71 Iowa, 671; 50 Fed. (U. S.) 798; 34 W. Va. 721; 12 Minn. 232; 30 Kan. 386; 19 Mich. 132; Hanna *v.* Holton, 78 Penn. St. 334.

[2] 10 Bosw. (N. Y.) 208; 5 Sneed (Tenn.), 79; 16 W. Va. 717.

[3] § **206**. For his supine negligence (especially in failing to present a note so as to charge an indorser) the pledgee may well be answerable. See cases *supra;* Mauck *v.* Trust Co., 113 Ga. 242; Sample Co. *v.* Detwiler, 30 Kan. 386. But, otherwise, if using ordinary care and diligence, there is no liability. The pledgee does not, by suing upon the collateral note in his own name, become the surety of his pledgor. Should the principal debt be meanwhile paid him, or the secured engagement fulfilled, the pledgee ought rather to return such securities than continue to hold and attempt collecting them; since no pledgee can be forced to accept such security in part payment of the principal undertaking. Cardin *v.* Jones, 23 Ga. 175; 8 Me. 383; Reeves *v.* Plough, 41 Ind. 204; Burrows *v.* Bangs, 34 Mich. 304. See Culver *v.* Wilkinson, 145 U. S. 265.

[4] § **207**. McCrea *v.* Yule (N. J. Supr. 1902); Whitin *v.* Paul, 13 R. I. 40 (ordinary diligence in collecting periodical interest or coupons on note or bond). Increments go in aid of the pledge, 44 A. 526.

after; and in various other instances there is more than a mere custody expected of the pledgee.[1]

175. In employing his own agents about the pledge, the pledgee, like a hired custodian or workman, is ordinarily bound to the pledgor for their negligence as for his own; though not for their torts, as it would appear, unless his own negligence or wrong contributed to the loss. Where liable to the pledgor for the negligence of his own agents, the pledgee may treat the agent as liable to himself; but he is not answerable for the negligence of those whose agency is derived from the pledgor.[2] Where the pledgee has not taken

[1] See 45 Barb. (N. Y.) 111 (keeping up insurance premiums by agreement); Second Nat. Bank *v.* Sproat, 55 Minn. 14 (carrying on a manufacture).

So strongly does the law defer to the mutual intent of the pledge parties, that an obligation on the pledgee's part to collect, sue, or do more than keep custody of the securities is, when enforced, more frequently because they evidently so intended, than as a matter to rest upon mere presumption. The pledgee of stock is not to watch the market fluctuations and sell on good opportunity, but the pledgor should at least notify him when he deems it prudent to sell. Richardson *v.* Ins. Co., 27 Gratt. (Va.) 749. And see *post*, remedies on default of pledgor. Receiving in pledge long paper or other negotiable collaterals which are not to mature until considerably later than the principal debt or engagement, justifies the presumption that the pledgee was not to wait and collect, but might sell them like any other pledge, should the pledgor be in default. And even where bound to collect the security at all, the pledgee's responsibility, we must bear in mind, is limited to the actual loss to which his negligence may have contributed. He would apparently be justified under any circumstances in returning the collaterals seasonably to the debtor and getting altogether rid of the burden of attempting to realize upon them; forfeiting thereby a pledge of little or no advantage to him. See § **208**; Morris Canal Co *v.* Lewis, 1 Beasl. (N. J.) 323; 3 Johns. Ch. (N. Y.) 614; Androscoggin R. *v.* Auburn Bank, 48 Me. 335; 36 Wis. 85.

The damages in case of a culpable loss of the pledge by the pledgee is the difference between the value of the pledge and the secured debt due himself, principal and interest. Union Nat. Bank *v.* Post (Ill. 1901), 61 N. E. 507.

[2] § **209**; 6 Cal. 643; Androscoggin R. *v.* Auburn Bank, 48 Me. 335. But as to liability for his lawyer's negligence or misconduct, see 1 La. An. 344. These general doctrines apply in the case of a corporate pledgor or pledgee, as well as to individuals who choose to become principals in

full possession, but gives the pledgor access, it is the pledgor's duty to exercise ordinary care and diligence against loss on his own part, or else, as in other instances of a mixed custody, he cannot hold the pledgee liable for a loss.[1]

176. **Every pledgee is bound to exercise good faith,** as well as due diligence, with reference to the chattel in his keeping. He should not transfer it as the full owner thereof, nor misappropriate, nor put it to a different use from that mutually intended, nor refuse to deliver up the pledge without good excuse upon the pledgor's fulfilment, or offer to fulfil, all that the principal engagement bound him to; and if the pledgee so misconducts, he will be held strictly answerable for the safety of the pledge as a tortious possessor.[2] Nor should a pledgee as against his pledgor volunteer the title of a third person to the thing.[3] Neither income or produce, nor the capital of the thing pledged, can be rightfully diverted to other uses than the secured undertaking contemplated.[4]

177. **The pledgee's right to use the pledge** has been sometimes considered. And, notwithstanding some trivial distinctions laid down by the earlier authorities, we apprehend that the true principle here is, that a pledgee has neither the right to derive personal profit from the pledge, nor is under obligation to incur personal charge about it; but that, on a final reckoning, the profit or beneficial use goes really to the credit of the pledgor, while the pledgee's charges, suitably incurred in course of the bailment, go to his own credit. And the fairness of this distinction we perceive at once when we

such a bailment while employing agents. See 48 Me. 335; Third Nat. Bank *v.* Boyd, 44 Md. 47; 78 N. Y. 454; Oudekirk *v.* Central Bank, 119 N. Y. 263.

[1] Willetts *v.* Hatch, 132 N. Y. 41.

[2] § **210**. Lawrence *v.* Maxwell, 53 N. Y. 19; 2 Pick. (Mass.) 206. But cf. 184, *post*.

[3] 49 N. Y. Super. (N. Y.) 226. And see 8, *ante*.

[4] It is wrongful for the pledgee to surrender the security to the party liable thereon without any authority from the pledgor. Upham *v.* Barbour, Minn. (1896); Manton *v.* Robinson, R. I. (1896). But cf. Donnell *v.* Wyckoff, 49 N. J. L. 48; Jeanes's Appeal, 116 Penn. St. 573, as to substituting other genuine stock for that originally given.

consider subjects of considerable value — such as a herd of cattle, instead of a single animal — placed in pledge.[1] It follows that if the pledge consist in good stock, or other valuable securities, yielding dividends and profits, the pledgee cannot avail himself of such dividends and profits, save as in discharge *pro tanto* of the secured debt or engagement, and (if such there be) of accruing interest.[2] A personal use of the pledge by wearing is not presumably allowed, in case of pawned garments or jewels.[3]

178. Antichresis, or keeping down interest or usury by the profits of the pledge in course of its use, is a peculiar transaction of ancient times not favorably regarded at this day and scarcely known; for the true course of pledge parties is to agree upon a certain rate of interest to be settled by the pledgor, as well as the principal.[4]

179. While a pledgee has the right to hold both pledge and increments as security, he is accountable for both when the pledge is extinguished.[5]

180. Necessary and proper expenses incurred by a pledgee about the thing pledged must be reimbursed by the pledgor;

[1] § **211**. For various petty distinctions as to milking a cow, etc., see Story, Bailm. §§ **329**, **330**; 2 Ld. Raym. 909, 917; Owen, 123. Where the use is merely an offset to the trouble of keep, or an understanding may be presumed in trivial matters of pawn, the law manifests little concern.

[2] § **212**. Androscoggin R. *v.* Auburn Bank, 48 Me. 335; 8 Mo. App. 118; 53 N. Y. 19. And so, too, as to net profit made by letting the pledged chattel to hire. 15 Ala. 562; Hunsaker *v.* Sturgis, 29 Cal. 142; Gilson *v.* Martin, 49 Vt. 474.

[3] For, though positive injury might not ensue, such wear must be humiliating and otherwise distasteful to a cleanly owner. § **211**. See Scott *v.* Reid, 83 Minn. 203. Cf. 176 Mass. 433.

[4] § **213**. To this Roman *antichresis*, the unpopular "Welsh mortgage" of our law largely corresponded. It is probably more because of its oppressiveness to the debtor than any inconvenience which the creditor might suffer, that we find so little trace of this transaction in modern jurisprudence.

[5] § **214**. See Thompson *v.* Patrick, 4 Watts (Penn.), 414; Merrifield *v.* Baker, 9 Allen (Mass.), 29 (pledgee liable for return premiums received on an insurance policy).

and this includes the reasonable charges incurred for its keep and preservation, for protecting the title, or for making the security available on maturity. For all such expenses the pledge becomes security; including, as it would appear, even those which are extraordinary, if needful and proper under the peculiar circumstances; but expenses and charges excessive in amount, or incurred out of the line of the pledgee's duty, are, unless the pledgor authorized them, chargeable neither against the latter personally nor upon the pledge. As to charges for the pledgee's own services, this is a matter of delicacy, and must depend largely upon mutual intent and the peculiar circumstances of each case.[1]

181. The pledgee of stock has no right, apparently, to vote upon it as owner; and at all events, he ought not, where, under the mode of acquiring transfer, he has escaped the liabilities of a stockholder.[2]

182. The pledgee has the right to an undisturbed possession of the thing pledged to him during the full accomplishment of the bailment purpose; and hence may sue, not only the pledgor, but all third persons who wrongfully invade this right. He may seek to recover the chattel in replevin, or sue

[1] § 215. Assessments rightfully paid upon pledged stock are a proper charge for adjustment with the pledgor. McCalla *v.* Clark, 55 Ga. 53. A pledgee's personal use of the thing, incidentally to its custody, should here be taken into account against him, nor ought compensation for ordinary performance to be readily allowed, in the absence of usage or some suitable stipulation in advance. The allowance of interest on the principal debt fulfils in many pledge transactions the object of such compensation; but interest or special compensation, wherever properly allowable to a pledgee, will be covered by the security; and, where benefit accrues to the pledgor from the pledgee's special and reasonable exertion, a special remuneration might not unreasonably be claimed.

[2] § 216; McDaniels *v.* Manuf. Co., 22 Vt. 274; 10 Allen (Mass.), 505; 26 Hun (N. Y.), 453 (pledgee restrained from voting). But voting thus is not a conversion of the pledge, and a pledgor may make the pledgee his proxy. 103 Cal. 357; 39 Wis. 147. One duly registered as "pledgee" of stock has not a stockholder's liability. 58 Fed. (U. S.) 666; 7 C. C. A. 422. But otherwise in a colorable transfer, where a mere pledgee allows his name to appear on the book as full owner. Rankin *v.* Fidelity Ins. Co., 189 U. S. 242. And see 131 U. S. 317; (1901) 2 Ch. 314.

in damages as for its tortious dispossession.[1] None can obstruct his prompt pursuit and recovery, under such circumstances, save the party who can show a better title; and any interest derived in the thing through a wrong-doer, however honestly acquired by some third person, and handsomely paid for, must, as a rule, yield to the pledgee's right of precedence.[2]

183. A waiver or subordination of the pledgee's lien may occur through the pledgee's own acts or conduct; though such waiver or subordination on his part should duly appear in evidence.[3] But a constructive waiver or subordination is not favored from merely negative acts or upon a misunderstanding.[4]

184. The effect of the pledgee's overdealing or sub-pledge is sometimes considered at this day, with a judicial disposition, as in the case of a tortious original pledge, to regard the equities of rival claimants and work out the whole transaction as beneficially as possible. It has long been admitted that a pledgee may assign over the pledge so that the assignee shall take it subject to all the responsibilities under the original pledge transaction; or may deliver it into the hands of a stranger for safe custody; or may assign in form for his own purposes of enforcement; or may convey his interest conditionally by way of pledge to another person; in all of which cases his security will not be destroyed or impaired.[5]

[1] § 217; Treadwell *v.* Davis, 34 Cal. 601; 5 Binn. (Penn.) 457; Ayers *v.* South Australian Banking Co., L. R. 3 P. C. 548. This accords with our general law of bailments.

[2] U. S. Express Co. *v.* Meinto, 72 Ill. 293; Adams *v.* O'Connor, 100 Mass. 515; Noles *v.* Marable, 50 Ala. 366. As to the measure of damages recoverable, see § 217; 100 Mass. 515; 34 Cal. 601; 13 Ill. 466; 4 Barb. (N. Y.) 491; 18 C. B. N. S. 479.

[3] Treadwell *v.* Davis, 34 Cal. 601; 20 Pick. (Mass.) 399. The right of pledgee to the pledge is subordinate to the special lien of one whom he employs upon it. Cooley *v.* Minnesota R., 53 Minn. 327 (bailee employed to transport and store the goods pledged). Cf. 34 Cal. 601; 59 Fed. (U. S.) 249.

[4] Gunsel *v.* McDonnell, 67 Iowa, 521; Radigan *v.* Johnson, 176 Mass. 433; 53 Minn. 327; 73 Tex. 612; 18 Fed. (U. S.) 677.

[5] § 218; Whitney *v.* Peay, 24 Ark. 22; Shelton *v.* French, 33 Conn. 489; 101 Cal. 445; Belden *v.* Perkins, 78 Ill. 449; Van Blarcom *v.*

But any such act on the pledgee's part is understood to be subject to all the original restrictions; for to attempt to pledge property beyond the pledgee's own demand, or to make transfer as though he were the absolute owner, is regarded as a breach of trust and a fraud upon the original pledgor; so that the pledgee's creditors can in general acquire no title in the property beyond that of the original pledgee himself.[1] Whether, however, the pledgee's transfer in breach of trust shall so impair his security as to give the pledgor a right to reclaim the chattel on other or better terms than before the transfer, and regardless of what he owed, is quite different. Indeed, the later equitable rule, frequently asserted in English and American cases, is that a pledgee's overdealing by sale or sub-pledge does not utterly annihilate the pledge contract nor extinguish the pledgee's interest in the chattel thereunder; but simply makes the transfer so far inoperative against the pledgor that the latter may recover possession by tendering what he owes.[2] And even the pledgee, when sued for his wrongful transfer, may, in general, recoup the secured debt in the damages.[3]

Broadway Bank, 37 N. Y. 540; Proctor *v.* Whitcomb, 137 Mass. 303. And see 18 Blatch. (U. S.) 555; 99 Mich. 121 (executor of deceased pledgee).

[1] § **218**.

[2] § **219**; Babcock *v.* Lawson, 4 Q. B. D. 394; Johnson *v.* Stear, 15 C. B. N. S. 338; Donald *v.* Suckling, L. R. 1 Q. B. 585. And see 150–154, *ante*. See also First Nat. Bank *v.* Boyce, 78 Ky. 42; Belden *v.* Perkins, 78 Ill. 449; 83 Ill. 169; 74 N. Y. 223; Lewis *v.* Mott, 36 N. Y. 395; Talty *v.* Freedman's Savings Co., 93 U. S. 321. The foregoing rule is mostly applied to mercantile chattels, such as corn, marketable commodities, and securities generally which are easily replaced or paid for. But as to certain kinds of chattels whose intrinsic qualities were presumably regarded, such as a valuable work of art, ornaments, or private garments, a transfer to strangers at the mere discretion of the pledgee, apart from his pledgor's permission, may be hindered by a fair construction of the mutual intendment. §§ **218**, **219**; L. R. 1 Q. B. 585, 615, 618; 83 Minn. 203.

[3] Belden *v.* Perkins, 78 Ill. 499. The cases have usually assumed that, in all such overdealing, the third party, whose interest was protected, acted *bona fide* in the transaction, and was not charged with previous notice. See *ante*, 150–154. As to a sub-pledgee not *bona fide*

185. The pledgor has, on his own part, a right to sell or assign his own interest in the thing pledged, subject to the pledgee's rights; in which case the transferee will stand in his place with the right of redeeming the pledge and holding the pledgee to due performance.[1] So may the pledgor pledge and then mortgage his property, making a junior incumbrance upon the thing.[2]

186. A pawn or pledge could not be attached, at the common law; but local statutes permit of such attachment, subject to the pledgee's prior right of satisfaction from the proceeds of an execution sale.[3]

187. A pledgor's bankruptcy, insolvency, or death does not affect injuriously his pledgee's lien, apart from the latter's consent. But in any such case, the pledgee cannot share as a general creditor in his pledgor's estate without turning his security into the general fund.[4]

188. The extent of the pledgor's right to sue strangers for wrongfully taking or injuring the pledge has not been fully determined; but while it may be theoretically true that either the party having the special property, or the general owner, may recover full damages against an intermeddler, courts

but chargeable with notice, see German Bank *v.* Renshaw, 78 Md. 475. And see 29 La. An. 329; Waddle *v.* Owen, 43 Neb. 489.

See further, Shelton *v.* French, 33 Conn. 489 (no conversion by pledgee where he is prepared to restore the pledge at the proper time).

[1] § **220**; 7 Me. 28; 3 Fost. (N. H.) 38; Van Blarcom *v.* Broadway Bank, 37 N. Y. 540; (Neb. 1901) 88 N. W. 175.

[2] 13 B. Monr. (Ky.) 432; Taylor *v.* Turner, 87 Ill. 296; First Nat. Bank *v.* Root, 107 Ind. 224.

Where the original pledgee retains possession any subsequent transferee of his pledgor must respect his priority. Carrington *v.* Ward, 71 N. Y. 360.

[3] § **221**; Coggs *v.* Bernard, 2 Ld. Raym. 909; Swire *v.* Leach, 18 C. B. N. S. 479 (no distraint for rent); 31 La. An. 865; 120 Mo. 127; 1 Comst. (N. Y.) 20; 95 Penn. St. 432.

[4] § **222**; Yeatman *v.* Savings Institution, 95 U. S. 764 (refusal to surrender to pledgor's assignee in bankruptcy); 57 Fed. (U. S.) 821; L. R. 3 Ex. 299; Bennett *v.* Stoddard, 58 Iowa, 654 (death of pledgor); Bryan Shoe Co. *v.* Block, 52 Ark. 458 (turning in the pledge security).

obviously incline, in practice, to prefer the pledgee; so that at all events the pledgor, whose principal debt remains unpaid, or principal engagement unfulfilled, may not oust him of his security.[1]

189. A warranty of title by the pledgor is given to the pledgee by the act of pledging, unless previous notice is given to the contrary, that the pledgor was true owner or, at least, had the right to pledge; and for breach of such engagement on his part, the pledgee may hold him liable in damages.[2] A pledgor of property which he does not own is estopped from setting up any title afterwards acquired during the continuance of the pledge.[3] And for the pledgor's fraud, affecting injuriously his pledgee's interest under the pledge contract, the latter may likewise claim indemnity.[4]

189 a. Variation by special contract within the range of public policy is always permissible in a pledge transaction, as in other bailments. Thus the mutual stipulation may require that the pledge be kept, until default of the pledgor, in some particular place or by some particular custodian; or that the pledgee shall hold possession of negotiable collaterals for the bailor to collect, and not try himself to collect them; or that no assignment of the pledge shall be made before default without the pledgor's assent.[5] And if the pledgee expressly undertakes absolutely to redeliver, on satisfaction of the pledgor's debt, either the pledge or its money equivalent, his

[1] § **223**. Probably, whichever party first sued the aggressor, the court would, on application, protect the interest of the other out of the damages recovered; but, unlike other bailees, the pledgee has often an interest in the thing greater than his bailor.

[2] § **224**; Mairs *v.* Taylor, 40 Penn. St. 446.

[3] Goldstein *v.* Hort, 30 Cal. 372.

[4] Way *v.* Davidson, 12 Gray (Mass.), 465; White *v.* Platt, 5 Denio (N. Y.), 269. See Baker *v.* Arnot, 67 N. Y. 448 (effect of pledgee's intervention).

[5] § **225**; St. Losky *v.* Davidson, 6 Cal. 643; Lee *v.* Baldwin, 10 Ga. 208; Lawrence *v.* McCalmont, 2 How. (U. S.) 426. Various special stipulations may be introduced (*e. g.*, 107 Ind. 224). And special stipulations regarding the pledgee's remedies on default will presently appear.

rash promise must be kept, even though the thing perished on his hands without his fault.[1]

190. IV. **Bailment in Pledge on the Pledgor's Default, or upon Fulfilment of the Secured Undertaking. Let us now suppose that the pledgor has failed** to pay the secured debt on maturity, or that he otherwise defaults in performance of the principal undertaking. At the common law a pledge does not, in such event, become the absolute property of the pledgee; but he may avail himself of the security for his own satisfaction, or sue upon the main engagement, pursuing both modes, or either. Nor is mere indulgence or forbearance by the pledgee a waiver of his legal rights where the pledgor remains in default.

191. **As for proceeding upon his security, there are two remedies** open to his election: (1) To file his bill in chancery, and obtain a judicial sale under a regular decree of foreclosure.[2] (2) After giving reasonable notice of his intention to the pledgor, to sell the thing publicly and fairly (the pledgor's default continuing), without judicial process at all. This latter summary proceeding, which, though jealously watched by the courts, is commonly preferred as altogether the more expeditious and inexpensive method of gaining satisfaction, deserves examination in detail.[3]

192. **The non-judicial sale must be upon due notice** and demand, reasonably clear and with reasonable details.[4]

[1] Drake *v.* White, 117 Mass. 10.

[2] § 226. This tedious and expensive process, less favored now than in early times, is chiefly to be commended where the pledged property is of much value and powerful conflicting elements are at stake, or where there are many claimants and a doubtful title should be cleared up. See Gilb. Eq. 104; 1 Ves. 278; Hart *v.* Ten Eyck, 2 Johns. Ch. (N. Y.) 62, 100; Boynton *v.* Payrow, 67 Me. 587; Chafee *v.* Sprague Man. Co., 14 R. I. 168. And see 195, *post*, as to peculiar transactions.

[3] §§ 227, 228; cases *post*. The pledgor's interests are here guarded in two main particulars: (1) he has a final opportunity given of making his principal engagement good, and so preventing a sale; (2) the sale, when made, is so conducted as to bring most likely all the thing is worth. And the most scrupulous good faith is exacted on the pledgee's part.

[4] § 229. However informal the notice (aside from a formal demand when needful) it should convey the idea of selling at a certain time and

193. The non-judicial sale should be fairly and openly conducted, and at common law should be at public auction.[1]

194. But possible defects of sale may be waived by the pledgor himself, as where his own subsequent conduct amounts to a ratification; especially if the result has not been injurious to his own interests.[2] Lapse of time in connection with circumstances puts a bar to all claims which may tend to disturb a title.[3] And even assuming a sale on the pledgee's part to be wrongful, before or after a default, the modern tendency is to require the pledgor at all events to make good whatever he owes under the pledge contract, as a prerequisite to punishing, for the wrong itself, either the pledgee or an improper transferee of the pledge.[4]

place, not unreasonably fixed. Gay *v.* Moss, 34 Cal. 125; Stevens *v.* Hurlbut Bank, 31 Conn. 146; Cushman *v.* Hayes, 46 Ill. 145; 25 Minn. 202; Bryan *v.* Baldwin, 52 N. Y. 233; Conyngham's Appeal, 57 Penn. St. 474; 3 Col. 551; 165 Mass. 467. If the pledgor give actual and timely notice, a formal notice may be dispensed with. Alexandria R. *v.* Burke, 22 Gratt. (Va.) 254. As to newspaper or other constructive notice in extreme cases, see Potter *v.* Thompson, 10 R. I. 1; 72 Ill. 428; 1 Holmes (U. S. Cir.), 180; Stearns *v.* Marsh, 4 Denio (N. Y.), 227. And see as to demand, 70 Mo. 290; 11 C. B. N. S. 730; Pigot *v.* Cubley, 15 C. B. N. S. 701; 72 Ill. 428; 87 Ala. 644. Sale without notice is wrongful, in the absence of stipulation. 59 Neb. 124.

[1] §§ **230, 231**; Strong *v.* Nat. Banking Assoc., 45 N. Y. 718; 3 Col. 551; 165 Mass. 467; 31 Conn. 146 (oppressive or underhand sale not favored). A sale on default, and after due notice, which has been fairly and openly conducted cannot be afterwards impeached for low price, bad market, etc. 9 Wis. 348; 36 N. Y. 395; 133 Mass. 482; 58 Tex. 669. A sale to the pledgee by collusion with a sham purchaser, or a sale otherwise colorable and irregular, does not affect the pledgor's right as against any one not standing upon peculiar equities, unless the pledgor chooses to treat the sale as valid. 84 Me. 72; Ogden *v.* Lathrop, 65 N. Y. 158; 4 Met. (Mass.) 25; 14 Fed. R. (U. S.) 801; 41 Minn. 146; Glidden *v.* Mechanics' Bank, 53 Ohio St. 588.

[2] § **232**; 41 Cal. 519; Hamilton *v.* State Bank, 22 Iowa, 306; 20 La. An. 70; Chouteau *v.* Allen, 70 Mo. 290.

[3] Earle *v.* Grant, 14 R. I. 228; 116 Penn. St. 573; Downer *v.* Whittier, 144 Mass. 448; 45 Fed. (U. S.) 712.

[4] § **231**. And see *ante*, 184. There can be no damages awarded to the pledgor, except for the possible surplus over and above making good that which the pledge was meant to secure. As to the failure and

195. **There are peculiar remedies for enforcement on default,** under peculiar kinds of pledge; since each mercantile transaction of this kind should go by its own reasonable intendment.[1]

196. **As regards negotiable securities like bills, notes, and coupon-bonds,** two pledge peculiarities are noticeable: (1) Availability of title to a *bona fide* holder for value, when not overdue, even though lost, stolen, or otherwise put out of the original owner's control, without his fault or knowledge.[2] (2) Application, in many instances, to a pledgee's satisfaction agreeably to the understood mutual intent, without any sale of the pledge whatever. On this latter point the rule deducible from a number of late decisions is, that the pledgee of negotiable securities not only has the right, but is bound, in the exercise of ordinary diligence, to make presentment for collection on their maturity, and then apply the proceeds on the pledge account; and if loss arises from a failure to do so upon reasonable knowledge and opportunity, the pledgee

utter dissolution of a pledging company in affecting the formalities of a sale, see 1 Holmes (U. S.), 180. As to waiver of the tort and requiring the money from the sale to be duly applied, see 78 Me. 465. If the pledgee sells in good faith, and with due care and diligence, damages for irregular sale are not favored where no actual damage is shown. 175 Mass. 365. See further, 175 Mass. 320.

[1] § **233**. As to sales on a broker's "margin" and whether the strict relation of pledgor and pledgee here applies, in the formalities requisite, cf. 41 N. Y. 235; McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325; 130 N. Y. 615; 25 Md. 242. 269; 41 Cal. 519; Comm. *v.* Cooper, 130 Mass. 285; 105 Fed. (U. S.) 493.

As to sales of pledged stock, see § **234** and cases cited.

Mortgage bonds or notes taken in pledge may require or permit of an enforcement of their special security. § **235**; 30 La. An. 1060; 77 N. Y. S. 252; 174 N. Y. 514; 12 Bush (Ky.), 673; 121 Fed. (U. S.) § 192; 7 Allen (Mass.), 23; 67 Miss. 770. A deposit of title deeds as collateral security does not create such a lien on the land as can be foreclosed at law; but a bill in equity will lie to subject the land to the security. English *v.* McElroy, 62 Ga. 413; 20 Fed. (U. S.) 65. Cf. Carter *v.* Wake, 4 Ch. D. 605 (otherwise as to railway mortgage bonds, etc.); 115 Ga. 53. See further, 196, 197.

[2] § **236**.

must bear that loss.[1] And it has even been held wrongful for one to sell a negotiable note pledged to him, instead of collecting it; notwithstanding a contrary usage among brokers.[2] But this rule of collection applies mainly to short-time paper, or that which matures before or contemporaneous with the principal obligation; nor is the reasonable intendment of any pledge transaction to be here disregarded.[3]

197. Enforcement of debts, claims, and demands held as security regards likewise the apparent and reasonable intendment of the parties.[4]

[1] Reeves *v.* Plough, 41 Ind. 204; City Sav. Bank *v.* Hopson, 53 Conn. 453; Wheeler *v.* Newbould, 16 N. Y. 392; 18 Minn. 232; 71 Iowa, 671; Lazier *v.* Nevin, 3 W. Va. 622.

[2] Markham *v.* Jaudon, 41 N. Y. 235. The debtor on the note must regard the pledgee's rights, and whatever the pledgee may thus collect, be it in whole or in part, goes to the account of the pledge, the surplus, if any, going to the pledgor. Houser *v.* Houser, 43 Ga. 415; Rice *v.* Benedict, 19 Mich. 132; 34 Mich. 92, 279; Hancock *v.* Franklin Ins. Co., 114 Mass. 155. See further, Benoir *v.* Paquin, 40 Vt. 199; 98 Mass. 303; 90 N. Y. 483. While the pledgee may sue and collect he cannot compromise on his sole responsibility, nor make a careless or faithless settlement against his pledgor's interest; yet ordinary care and diligence, with good faith, is the general standard to be applied. 98 Ill. 613; Union Trust Co. *v.* Rigdon, 93 Ill. 458; 92 Ill. App. 95; 113 Ga. 242; 9 Lea (Tenn.), 63. And in the renewal of notes and demands, and on doubtful points generally, the pledgee ought if possible to consult the pledgor. 165 Mass. 402; Girard Fire Ins. Co. *v.* Marr, 46 Penn. St. 504.

[3] §§ **237**, **238**. Presumably the rule of collection instead of sale is limited thus: for where the paper taken in security has a long time to run, and may be sold meanwhile in market, the presumption is rather in favor of sale upon default, if the pledgee so elects. See 1 Beasl. (N. J.) 323; Water Power Co. *v.* Brown, 23 Kan. 676; 8 Me. 383; 114 Mass. 155; Union Cattle Co. *v.* Trust Co., 149 Mass. 492; 8 Me. 383; 36 Wis. 85.

In any case the pledgee's liability for remissness should be limited to the actual damage sustained by his pledgor. 71 Iowa, 671. Authority to sell short-time paper whose presentment is dishonored has sometimes been conceded; though in any sale of negotiable paper taken in security the usual formalities should apply for the pledgor's due protection. 10 R. I. 1, 8, 10; Goldsmidt *v.* Church Trustees, 25 Minn. 202.

[4] § **239**. Overdue claims and debts are usually taken in security upon the understanding that the pledgee shall try to collect and apply, to the extent at least of dunning the claimants, without awaiting his pledgor's

198. In fine, every security should be enforced according to its nature and the mutual intent, wherever enforcement becomes necessary, since the pledge contract implies that the thing shall be put reasonably and fairly, though not fraudulently or oppressively, towards discharging the pledge obligation. Increments of the pledge retained by the pledgee may be sold on default, as well as the original pledge itself; and in the conduct of a sale once undertaken upon the pledgor's default, as well as in collecting the security, good faith and ordinary diligence should be exercised.[1]

199. The usual rules of priority should be observed, in adjusting the rights of various lien-creditors to the fund derived from the sale of a pledge on default, or its due reduction to cash; though such doctrines, in the present connection, receive but slight attention from our courts.[2] The law as to a creditor leaves the appropriation of payments largely to his own choice; and where the pledge was given to secure various obligations, the pledgee may apply the proceeds of his security in the manner most convenient to himself, unless expressly restrained; though only, of course, to such debts as the pledge was meant to secure.[3]

default. See Rice *v.* Benedict, 19 Mich. 132; Kittera *v.* Estate, 17 Penn. St. 116. See further, Boynton *v.* Payrow, 67 Me. 587 (savings' bank book security); Merchants Bank *v.* Thompson, 133 Mass. 482 (stock of a land company, etc.); 37 Neb. 766 (warehouse receipts); 16 W. Va. 717 (city scrip or orders); Fairbanks *v.* Sargent, 117 N. Y. 320 (fractional part of a claim).

[1] § 240; 66 Cal. 480; Colquitt *v.* Stultz, 65 Ga. 305; McQueen's Appeal, 104 Penn. St. 595.

[2] § 241; 12 Bush (Ky.), 673. If the proceeds be insufficient for discharging the secured indebtedness and indemnifying the pledgee, the deficit should constitute a personal charge against the pledgor, recoverable against him. 72 Ill. 428; 104 Mass. 188. But if, on the other hand, the pledgee obtain entire satisfaction, and there should remain a surplus, this belongs to the pledgor, or to subsequent lien-holders in his right, and the pledgee must account accordingly. Rohrle *v.* Stidger, 50 Cal. 207; 37 N. Y. 540; 114 Mass. 155; 126 Mass. 209; 14 Wis. 331; Fletcher *v.* Harmon, 78 Me. 465; Union Bank *v.* Roberts, 45 Wis. 373.

[3] § 241; Wilcox *v.* Fairhaven Bank, 7 Allen (Mass.), 270 (though some notes have solvent indorsers and others have not). Naturally,

200. So, too, where several securities were taken for the same principal undertaking, each, by both the civil and the common law, will be deemed liable for the whole debt or engagement, and the pledgee has much freedom of choice among them.[1] But though there may be many securities, the pledgee can obtain, on his pledgor's default, but one satisfaction.[2]

201. The rules of subrogation and contribution apply, under equity guidance, whenever justice so requires; as where some third party who is bound under the security, such as a surety or indorser, discharges the pledge obligation, or where contribution is justly due from the other securities, one security alone having been enforced by the pledgee.[3]

202. But a pledgee, we now observe, is not in general bound to sell on his pledgor's default; while, on the other hand, the pledge will not become his absolute property where he fails to do so. His omission to enforce his right under the security simply leaves the thing a mere pledge as before; and under these circumstances the pledgee will remain bound to restore it to the pledgor whenever full payment or satisfaction of the secured undertaking has been made or tendered him, subject, of course, to the doctrine of limitations.[4] But since he is not bound to sell, neither will he be held liable, while his pledgor remains inert, for the mere depreciation of the

however, the proceeds of a sale, when not sufficient to liquidate two or more debts, are applied proportionally, if the pledgee's interests so permit. 2 Ind. 488; 10 Pick. (Mass.) 129. And see 10 Md. 373; 153 Mass. 415 (specific or general indebtedness); 6 Vt. 536.

[1] § 242; Buchanan *v.* International Bank, 78 Ill. 500; 23 Me. 202; 37 N. J. L. 307; Heid *v.* Vreeland, 30 N. J. Eq. 591. And see 152 Mass. 189 (ordinary paper for security to be used before accommodation paper); 199 Penn. St. 17.

[2] Hence excessive sales ought not to be enforced where the securities are separable. 32 Ark. 742; 88 Ill. 275; New England Trust Co. *v.* Belting Co., 166 Mass. 42; 78 Me. 465; 45 Wis. 373.

[3] § 243; 11 Conn. 112; 7 Allen (Mass.), 270, 272; New England Trust Co. *v.* Belting Co., 166 Mass. 42; 18 Ind. 74; Brick *v.* Freehold & Co., 37 N. J. L. 307; 162 Penn. St. 504.

[4] § 244. See *post* as to pledgor's right of redemption.

unsold pledge on his hands.[1] In other words, it is usually the pledgor himself who should keep on the alert and take the initiative, in order to get what he deems the most advantageous disposal of what he has given in pledge, indemnifying the pledgee against new expenses which might otherwise burden him, or seeking the court's aid to enforce his own desires.[2] And this brings us to the pledgee's remaining remedy on his pledgor's default.

203. The pledgee may sue the pledgor personally, like any other creditor, upon the pledgor's default, without resorting to the security at all,[3] and he may even attach the pledged property in his suit, as in ordinary actions.[4] Recovery of judgment in his suit, whether upon the security or the principal debt, does not discharge the pledge; for actual satisfaction is what the law seeks ultimately on a pledgee's behalf.[5]

[1] This rule is frequently asserted of stock and the like chattels of fluctuating market values but long existence. See § **244** and numerous cases: 63 Me. 205; 48 Ill. 345; 11 Iowa, 410; 37 Penn. St. 402; 34 Vt. 89.

[2] § **245**; 114 Mass. 155; 165 Mass. 467. One should not be inert as pledgee where debts and claims, already overdue, are taken in security, and limitation statutes to a suit are running. Yet his active initiation need not go far on matters of collection; and ordinary care and diligence is enough. Where stock is held in security, the pledgee is not bound to sell on default, without at least notice from the pledgor or facts indicating a necessity; and in some cases the pledgor must resort to the court to compel a sale. See 65 Ga. 305; 68 Ga. 637; Newsom *v.* Davis, 133 Mass. 343; O'Neill *v.* Whigham, 87 Penn. St. 394. Though, if the pledgee should undertake to sell or enforce his security, ordinary care and diligence should be exercised, and good faith under all circumstances. 68 Ga. 637; 42 Minn. 210; 104 Penn. St. 595. In short, without a special undertaking on his own part, the pledgee is not bound to sell even when the pledgor requests him to do so, except for the limit of ordinary care applicable to the condition and character of the property, which might involve him in culpable negligence if he disregarded a notice; for his power of sale is a right rather than a duty.

[3] § **246**. The mere taking of security imports no promise to pursue the security first. 15 Wend. (N. Y.) 218; 34 Vt. 89.

[4] Arendale *v.* Morgan, 5 Sneed (Tenn.), 703; 69 Ark. 271; 68 Iowa, 460 (the lien of the pledge is thereby abandoned). This is, however, a matter of local practice.

[5] § **246**. Pledgee may continue to hold the security and treat his

204. **The pledgee's whole or partial relinquishment of security** which he holds does not in other respects impair his right to realize otherwise upon the secured demand; and it is, moreover, a general principle, which our bankrupt and insolvent laws recognize, that the just balance due a pledgee over and above his securities may be judicially pursued like the claim of an ordinary creditor.[1]

205. **Local statute or special contract regulates to a considerable degree** this whole subject of remedies on the pledgor's default. As to local legislation (aside from regulating the petty business of pawnbrokers) various provisions are found of local importance.[2] And with respect to special contract of the parties themselves, there is ample scope permitted of which capitalists in their vast transactions are not slow to take advantage.[3] Not only by special contract before default, but by ratification or mutual assent after a default

judgment as additional or cumulative security. Smith *v.* Strout, 63 Me. 205; Fisher *v.* Fisher, 98 Mass. 303; Charles *v.* Coker, 2 S. C. 122. See 30 Kan. 386; 51 Vt. 378.

[1] § **247**; 2 W. & S. (Penn.) 463; 104 Mass. 188. Wherever suit is brought on the principal demand, the pledgee should be prepared to restore the pledge on satisfaction, or duly account for non-production; and counter-claim is allowed the pledgor in this respect. 98 Penn. St. 80; 78 N. Y. 454; 95 Ga. 731; 49 N. J. L. 48.

[2] § **248**; 62 Cal. 426; 6 Minn. 550.

[3] § **248**. In the vast volume of large mercantile loans at this day by chartered companies on the pledge of marketable securities, special advantages are commonly stipulated by contract with the pledgor, as expressed in his note or otherwise. Thus, the power to sell has been expressly conferred, the time and manner of such sale fixed, and even the right conferred on the pledgee to sell upon default with newspaper notice, or without any notice, or optionally at private sale, or with clear permission to be himself a purchaser. *Ib.;* 50 Cal. 207; 11 Iowa, 410; 80 Iowa, 638; 124 Ill. 491; 133 N. Y. 660; 107 La. An. 236; 12 Wis. 413; 70 Mo. 290; 139 N. Y. 660; 79 Md. 41; 52 Kan. 195; 162 Mass. 527 (agreement with third person as to a contingent default). See also 128 Ill. 533; 95 Ga. 731.

Special contract is seen also to give the pledgee a special right to apply the surplus of a sale to more than the specific indebtedness. Hallowell *v.* Blackstone Bank, 154 Mass. 359 ("drag-net" stipulation); Cross *v.* Brown, 17 R. I. 568.

or even a sale, the usual bailment terms may be found modified.[1]

206. Yet oppressive stipulations violate public policy, and public policy, as we have seen, places a limit to special stipulations in bailments of every kind.[2] All bailment stipulations, in fact, are to be tested by sound policy and good sense; and the same holds true of mercantile customs which are claimed to modify or control such transactions.[3]

207. Now, as concerns the pledgor's right of redemption. Where the pledge has once been disposed of on the pledgor's default, either under some decree in chancery or by a non-judicial sale regularly conducted, the same being in full compliance with law and the just and rational contract of the parties, the pledgor's right of redemption is utterly gone. So is it in the case of pledged incorporeals, such as negotiable paper or money claims, which the pledgee has rightfully collected. But otherwise, — as if the pledgee refrain from selling or collecting, or sell irregularly, or buy in the thing for himself where he has no special permission to do so, or make a wrongful transfer of it to some third party whom the pledgor is not legally debarred from pursuing, — the pledgor's right of redemption will continue, notwithstanding his own delinquency. And so greatly are the equities of all pledge transactions now regarded, that courts look through the form to the substance of a transaction for determining whether a pledgor is debarred or not.[4]

208. The just period of limitations should be considered in this connection. It is said that where no time was limited for redemption of the pledge, the pledgor has his own lifetime to

[1] See *ante*, 194.

[2] § 249.

[3] Provision void that on default the pledgee shall hold absolutely as his own. 3 Tex. 119; Dorrill *v.* Eaton, 35 Mich. 302 (thus giving the effect of a chattel mortgage at common law). The pledgor's rights are not to be sacrificed upon vague and doubtful forms of expression. 25 Minn. 202. Nor for that matter, are a pledgee's just rights. 78 Ill. 449. Nor can pledgee and pledgor by their accord obstruct the just rights of a true owner where the pledge was wrongful. 141 N. Y. 315.

[4] § 250.

redeem, unless quickened by a notice *in pais*, or through the intervention of a court of equity; consistently with which rule the pledgee's death would afford him no hindrance. But modern prescription runs rather by lapse of years than the uncertain span of a human life; and while, supposing the lapse of no unreasonable period from the pledgor's default, nor a waiver of redemption, the right to redeem may pass to the representatives of a deceased pledgor, time puts an absolute barrier to the pursuit of all such remedies, irrespective of the living or dead.[1] A pledgor, moreover, may waive, in effect, his right of redemption, by his acts or consent after a default; though his right to any balance over and above what the pledge may realize in satisfaction of the secured undertaking is always favored.[2]

[1] § **250**. See 60 Fed. (U. S.) 690, (redemption by the representatives of a pledgor, who died soon after the pledge was made); Chambers *v.* Kunzman, 45 A. 599 (N. J. Ch.).

Strictly speaking, the Statute of Limitations does not run against a pledge; but, inasmuch as it runs against the pledgee's enforcement of the secured debt or engagement, so will equity decline to entertain the pledgor's bill for redemption if he or his representatives bring it unreasonably late; for the property will then be conclusively presumed to have vested in the pledgee, or, at least, to have been duly disposed of. See 26 Ohio St. 131 (six years); White Mountains R. *v.* Bay State Iron Co., 50 N. H. 57 (fifteen years); Hancock *v.* Franklin Ins. Co., 114 Mass. 155. But cf. 31 Penn. St. 161; 103 N. Y. 680; 58 Miss. 261. Local statute may designate the limit; but otherwise it is largely a matter of judicial discretion, dependent on the circumstances, when more than six years have elapsed. Equity regards with greater favor a bill to compel the account of a certain surplus, after a long lapse of time, than a bill to practically make profit by some late rise in the market value of securities which the pledgor had presumably sacrificed on his default. See 114 Mass. 155; 50 N. H. 57.

The pledge having been made and possession kept, the pledgor cannot, though limitation has run against the debt, recover possession in any event without payment or tender of the debt. And it is to be borne in mind that the pledgee, even upon the theory of a bailment through the whole intervening period, might not be actually chargeable if the thing were lost. See Roots *v.* Mason Co., 27 W. Va. 483; Hudson *v.* Wilkinson, 61 Tex. 606.

[2] § **251**; Fletcher *v.* Harmon, 78 Me. 465; 114 Mass. 155; Loew *v.* Austin, 140 Penn. St. 41; 52 N. J. Eq. 400.

209. The pledgor's general right to the pledge on fulfilment of the secured undertaking is liberally recognized at our law. For the rule is, that a pledge ceases to be operative when its object is effected (the pledgor not having debarred himself already from redemption) and the whole beneficial interest in the security given vests then absolutely in the equitable owner, whether the secured enjoyment was fulfilled on his part voluntarily or by compulsion.[1]

210. Hence, a tender of whatever is due under the pledge, made rightfully and seasonably, although after maturity of the engagement, will put an end to the pledge relation, and render the pledgee's longer detention of the thing inexcusable, and his refusal or unreasonable delay to produce and give it up on demand is tantamount to conversion, unless he can exonerate himself for its loss or injury.[2] And as a pledgee by his unreasonable delay or refusal transcends his bailment, he thus becomes liable absolutely for all subsequent loss or depreciation of the pledge while in his custody.[3]

[1] § 252; Ward *v.* Ward, 37 Mich. 253; 34 Mich. 4; 131 Mass. 14; Stuart *v.* Bigler, 98 Penn. St. 80.

[2] § 253; Lawrence *v.* Maxwell, 53 N. Y. 19; McCalla *v.* Clark, 55 Ga. 53; 41 Minn. 146; Mayo *v.* Avery, 18 Cal. 309; 17 Fed. (U. S.) 776. The pledgee's sale or retention for non-compliance with conditions which he had no right to superadd, or after the pledgor has made tender or satisfaction of all that was rightfully due under the pledge contract, is certainly tortious. Pigot *v.* Cubley, 15 C. B. N. S. 702; 1 Hun (N. Y.), 317.

[3] Loughborough *v.* McNevin, 74 Cal. 250.

Considering the disadvantage of a pledgor, while his pledgee baffles him in a re-delivery to gain something further for himself, the courts are sedulous on his behalf against wrong or oppression. He need not, after his tender has been made and refused, keep his tender good nor bring the money into court; any informality on his part as to a *bona fide* tender is taken favorably for his rights, if the pledgee did not raise the point of objection at the time. See Wyckoff *v.* Anthony, 90 N. Y. 442; 100 N. Y. 248; 91 N. Y. 531; 74 Cal. 250; 17 Fed. (U. S.) 776. Delay by the pledgee with apparent intent to evade his legal duty is taken against him. 104 Mass. 259. And unreasonable non-compliance with the pledgor's sufficient tender is available not only to the pledgor, but to those acquiring rights under his title. 41 Minn. 146. But a bare offer to redeem on the pledgor's part is not sufficient; nor is any partial tender; nor is the

211. The pledgor may seek repossession or damages. Upon full satisfaction of the secured indebtedness, or the tender thereof, besides a demand for the pledge, followed by the pledgee's refusal without good reason to redeliver, the pledgor may sue for the thing pledged in trover, or perhaps replevin. And, if he once gets repossession of the thing under such circumstances, he has good cause for maintaining it.[1] The damages recoverable in trover are such as will make the pledgor whole; or, in general, the value of the pledge less what may prove due from him to the pledgee under the bailment.[2]

212. In all such cases the obligations of pledgor and pledgee are mutual, concurrent, and reciprocal; either party is entitled to performance as a condition of his own performance. And the refusal of either to perform, where performance is tendered by the other, furnishes good ground for action, while at

pledgor favored in any effort to obtain redress short of discharging all that he owed under the security. 10 R. I. 1; 154 Mass. 359; 17 Penn. St. 416; Hinckley *v.* Pfister, 83 Wis. 64. And a reasonable opportunity to produce the pledge or to consider and consult as to his own duty, ought to be allowed a pledgee, especially where the pledgor has been in default, before wrong can be imputed to him. See 6 Wend. (N. Y.) 22; McCalla *v.* Clark, 55 Ga. 53; Dewart *v.* Masser, 40 Penn. St. 302.

[1] § **254**; Geron *v.* Geron, 15 Ala. 558; M'Lean *v.* Walker, 10 Johns. (N. Y.) 471; Fisher *v.* Brown, 104 Mass. 259. Demand and tender are sometimes dispensed with or lightly regarded as a useless formality under the circumstances. See 4 Denio (N. Y.), 227; 3 Tex. 119. But cf. preceding note; Auld *v.* Butcher, 22 Kan. 400; 142 Mass. 342. The pledgee's counterclaim of his own demand when thus sued is favorably regarded. Donald *v.* Suckling, L. R. 1 Q. B. 585; L. R. 3 Ex. 276; Talty *v.* Freedman's Savings Co., 93 U. S. 321; 31 Conn. 339; 37 N. Y. 540; 78 Ill. 449; 39 Penn. St. 243. Cf. 45 N. Y. 718 (transfer of claim).

[2] § **254**; L. R. 6 Eq. 165; 29 Cal. 142; 46 Ill. 145; 141 N. Y. 315 (damages discouraged where no real loss was suffered); 113 Mass. 548; 114 Mass. 155; 57 Penn. St. 474; 49 Vt. 474. The pledgor may elect to abide by the sale or collection, and sue, as for money had and received, to obtain the rightful surplus due him. § **260**; 36 Ala. 666; 4 Denio (N. Y.), 227; 114 Mass. 155; 126 Mass. 516; 45 Wis. 373. And see 51 Vt. 378 (surplus recovered by way of set-off when pledgor is sued).

the same time neither can safely stand upon a mere willingness as the standard of his rights.[1]

213. No pledgee can claim to retain the pledge in order to secure new debts, nor so as to apply it to different objects than those for which it was confided to him.[2] And as a rule he has no right to dispute his bailor's ultimate title to the thing; but to this an exception may arise where the true owner makes such a demand upon him that he cannot disregard the paramount title without peril; for as between his own pledgor and strangers thus asserting title, his only safety is in neutrality.[3]

214. Accumulating interest, if any, and all reasonable and necessary expenses incidental to the pledgee's possession, are understood to be protected by the pledge as security.[4] As to covering future advances to be made or liabilities to be incurred, the mutual intent of the pledge parties must govern; since at all events a pledge transaction with reference to a certain debt or engagement does not justify the pledgee in holding the pledge arbitrarily for another and different debt or engagement.[5]

215. Equitable remedies are sometimes applied on a pledgor's behalf, to compel the specific delivery of things in pledge

[1] Cass *v.* Higenbotam, 100 N. Y. 248.

[2] § **255**; Post *v.* Tradesmen's Bank, 28 Conn. 420; 27 La. An. 110. Nor are technical objections to be set up against a due restoration of the pledge when the pledgor makes or tenders satisfaction. Blackwood *v.* Brown, 34 Mich. 4; *ante*, 210.

[3] Cheesman *v.* Exall, 6 Ex. 341; 15 Ala. 601. This is the usual rule of bailment. *Ante*, 11, 95.

[4] § **256**; 16 Neb. 592; 147 Ill. 570; 22 Fed. (U. S.) 183. Expenses properly and reasonably incurred in realizing on the pledge or in protecting it against prior liens and taxes and in rendering it available are thus allowed. So may be a reasonable attorney's fee. 67 Fed. (U. S.) 837. Extra compensation may sometimes be properly claimed. Goodwin *v.* Mass. Trust Co., 152 Mass. 189. As to allowing interest through the unjust delay of the pledgor, cf. 8 H. L. Cas. 338, 345 (unfavorable); L. R. 8 Eq. 331; 22 Fed. (U. S.) 183; 44 Md. 47.

[5] § **257**; Woolley *v.* Louisville Banking Co., 81 Ky. 527; 15 Mass. 389; 4 Conn. 158; Van Blarcom *v.* Broadway Bank, 37 N. Y. 540. And see 219, *post*.

whose loss cannot well be compensated in damages; though commonly an action at law, for repossession of the pledge or damages as for its loss or detention, affords him in general an ample remedy as a party aggrieved.[1]

216. What should be restored when the bailment ends, is, in general, the identical thing pledged; and this should be restored in good condition, subject, however, to such loss or damage as may possibly have occurred, imputing to the bailee neither dishonesty nor the lack of ordinary care and diligence in the course of the transaction.[2] The net income, profits, increase and advantages, derived from the pledge, ought also to be restored with the pledge, or duly accounted for.[3]

217. Should the pledge be lost or injured through the pledgee's failure to use due care and diligence or other remissness of duty, the pledgor has his legal redress, though not to the avoidance of what he owed under the secured undertaking.[4] And should it appear that loss or injury to the pledge was wholly without the pledgee's fault, the pledgor must not only lose the value of what he gave in security, but be held liable, besides, for what he owed on the secured undertaking, like any other debtor.[5]

[1] § **258**; Taylor *v.* Turner, 87 Ill. 296; 6 Ire. (N. C.) 309. Family relics and other things of intrinsic value may thus be pursued in equity; or a bill may be proper in complex transactions where various rights are entangled. See Brown *v.* Runals, 14 Wis. 693; Squier *v.* Squier, 30 N. J. Eq. 627; Knox *v.* Turner, L. R. 9 Eq. 155.

[2] § **259**. See 48 Cal. 99; Squier *v.* Squier, 30 N. J. Eq. 627; Lawrence *v.* Maxwell, 53 N. Y. 19; Thompson *v.* Toland, 48 Cal. 99 (title acquired to the thing on settling for its full value).

[3] § **259**; 29 Cal. 142; 49 Vt. 474.

[4] §§ **260, 261**. Proceedings for account, in equity or otherwise, may be desirable in complicated cases to determine as to the pledgor's balance or surplus. 54 Penn. St. 474; 104 Mass. 188. Or for enjoining a sale.

[5] See May *v.* Sharp, 49 Ala. 140; Reeves *v.* Plough, 41 Ind. 204; 67 Me. 570; 18 Minn. 232; Sheldon *v.* Southern Express Co., 48 Ga. 625. And see 32 Ark. 742; 37 N. Y. 540. If a pledgee without his pledgor's consent renews, extends, surrenders, or substitutes a note pledged as collateral, he must account to his pledgor in full. 41 Neb. 754.

218. In fine, the transaction of pledge becomes extinguished, according to universal principle, by the complete discharge and satisfaction of the debt or engagement thereby secured, together with such incidental charges or expenses as may have lawfully accrued. And since discharge and satisfaction may take place, not only by one's receiving complete payment and fulfilment, but by his taking a higher or different security, by releasing and waiving his rights, or through operation of law, it will readily be inferred that the pledge contract may be extinguished in a corresponding variety of ways.[1] After the discharge and extinguishment of the pledgor's main debt or engagement, in any of these modes, the pledged property will presumably revert at once to the pledgor, and the pledgee, as such, can have no further right to hold it.[2] And as to the proceeds of pledge securities sold or collected, which remain in the pledgor's hands, the rule is similar.[3]

219. But a mere renewal or extension of the note or obligation which the pledge was meant to secure, is to be distinguished from discharge and satisfaction; and such renewal or extension is not presumed to discharge the security.[4] And novation, or the taking of new security, will operate, if so intended by the parties, as simply a continuance, or, perhaps, a renewal of the pledge contract by substitution.[5] So far as concerns pledgor and pledgee alone, there might be a series of obligations incurred and of pledges for security, stretching on indefinitely; and the main issue throughout is that of their mutual intention.[6]

[1] § 263. As where the pledgee accepts other property in full settlement of the secured debt. Dupee *v.* Blake, 148 Ill. 453.

[2] 148 Ill. 453; 18 Cal. 309; 62 Ga. 271; 131 Mass. 14.

[3] *Ib.*; 41 N. Y. Super. 467.

[4] § 263; 132 Ill. 120; 70 Md. 343; Thompson *v.* Toland, 48 Cal. 99; 34 La. An. 927; Cotton *v.* Atlas Bank, 145 Mass. 43; 94 Penn. St. 309; 4 Col. 138; 53 Fed. (U. S.) 41; 2 Leigh (Va.), 493; 62 Neb. 689.

[5] § 263; 87 Ga. 339; Girard Ins. Co *v.* Marr, 46 Penn. St. 504.

[6] The modern transaction of pledge or collateral security, we may finally add, involves often some intricate details; but general maxims of equity in aid of the principles we have set forth in this chapter will readily

solve them for the most part; a further difficulty arising from the application of those rules to so many modern kinds of incorporeal personal property. The fair priorities among parties in or out of possession, *bona fide* conduct pursued to one's disadvantage without some notice which another who claims adversely should have given but did not, and the convenient practice of simplifying remedies in court by allowing one to recoup and counter-claim, all find scope in our present law of pledge; and the object to be steadily kept in view, in comparing such cases, is to do justly and equitably by all concerned, so far as the circumstances permit. § 264.

PART V.

EXCEPTIONAL BAILMENTS FOR MUTUAL BENEFIT.

POSTMASTERS AND INNKEEPERS.

CHAPTER I.

POSTMASTERS.

220. The exceptional character of the bailments to which the present volume will henceforth be confined consists in nothing unique in the bailment itself; but the law asserts an exceptional rule, from a regard less to the private intention of the bailment parties than to the pregnant circumstance that the particular bailee has accepted the thing while in the exercise of an important vocation which, consistently with the public welfare, must be treated as a public trust. The exceptional bailment of the thing is made to one who shall perform, not on his simple individual undertaking, but as one of a well-recognized class. And here our three classes are Postmasters, Innkeepers and Common Carriers.[1]

221. Such a bailment necessitates, however, a hiring, an employment for reward. For, should an innkeeper give a stranger a bed in his house out of charity, or a common carrier take a package gratuitously to its destination, this would constitute a bailment out of his course of business; and, the common incentive of a business compensation wanting, his bailment responsibility would not be such as we are now to consider, but that of a mere private individual, and, in fact, of a gratuitous bailee.[2]

[1] § 264. [2] § 265.

222. Postmasters, Innkeepers and Common Carriers are here to be considered in order, in all of which vocations the bailment is regularly for recompense. But in the case of Postmaster, there is a vocation exercised by government, by the public, so that a bailee's legal accountability to his bailor must be exceptionally small; while with Innkeepers and Common Carriers there is a vocation carried on by private parties, but guarded peculiarly by public policy, and hence one's legal accountability is exceptionally great.[1]

223. The three distinguishing elements of a public bailment vocation are these, as the courts have defined and applied the law: (1) The bailee must serve the public alike and not select patrons at pleasure; a condition quite unlike the usual pursuit of business by private individuals. (2) He is held to an exceptional degree of responsibility, which approximates insurance. (3) By way of offset or limitation to these conditions, the bailee may always claim his reasonable recompense in advance; and hence his service to the public alike does not compel him to take any risk of pecuniary loss from strange patrons. These three elements where private persons exercise, will be developed in discussion later.[2]

224. The exceptional responsibility of a Postmaster, or rather his legal accountability to the sender of a letter or package in the mails, comes from this admitted state of things in Great Britain and the United States: that government carries on the post-office; and the sovereign authority, on broad reasons of policy, refuses to submit its conduct to judicial inspection, or to respond to the suit of any private individual. The bailor who suffers from maladministration may have abstract

[1] § 266.

[2] § 266 a. A legislature may by enactment give the like character of public vocation wholly or partially to other analogous pursuits where favoritism would be injurious to the public; and indeed as to the first and third elements alone we see an inclination to apply the law of the text to the business of telegraph, telephone, gas and water companies, not strictly of the bailment character, but subject to like considerations of policy. See Western Union Co. *v.* Dubois, 128 Ill. 248. And as to sleeping-car companies, see 106 Ill. 222.

right on his side; but the courts are shut to him, and consequently his legal injury is without the means of redress. As for the individual postmaster, he is but a public agent, or servant of the government, and under the usual rules of master and servant he should not answer personally to bailors for the merely careless performance of his master's business. In a word, the legal situation is that of a truncated agency: of an agency where legal process cannot reach the principal, if the bailor suffers an injury through careless transmission.[1]

225. Thus closely is our postal system subservient to sovereign power; carried on, in fact, by a principal who, like one within a military fortress, refuses to be served with civil process. But to a partial extent statutes now afford legal redress to individuals who encounter injury in the course of their contract dealings with supreme authority.[2] Should a common-law country ever submit to a legal exposition the rightful standard of government responsibility to individual bailors as a mail-carrier, the courts would not probably reckon

[1] § **267.** The business of mail transportation is essentially forwarding, or, as the law would now term it, carrying things; and formerly, on our Pacific slope, before railways spanned the American continent, private companies took a large share of this business and its profits, because they had better facilities than government for making quick delivery, and afforded more ample insurance against loss. See 23 Cal. 185. Government carries the mails as the bailee of chattels; and not only may a letter enclose money and valuable papers, but letters themselves are personal property; so, too, are newspapers, cards, manuscripts, packages of merchandise, etc. The government, represented by designated public officers, becomes the bailee, and the postal stamp indicates the bailment compensation, taken in advance, which constitutes, we are to observe, the revenue, not of the officer, but of the government which employs him. For the progress of mail transportation, as a public vocation pursued and monopolized by the government, see § **268**; 16 Fed. (U. S.) 609; 17 Fed. (U. S.) 837.

[2] § **269**; Jackson *ex parte*, 96 U. S. 727 (general power of Congress to regulate at discretion); 187 U. S. 94. Recent statutes permit of petty claims for indemnity upon the government where the mail was registered and culpable loss occurred in transmission. English legislation was earlier in this respect. And as to the Court of Claims see 1 Am. Law Rev. 653.

this at the extraordinary standard of a common carrier, since widely different considerations of public policy apply. But that a bailment duty of some sort co-exists on the part of government, apart from the adequate means of enforcing it, we cannot reasonably doubt.[1]

226. The individual postmaster, or the postmaster-general, therefore, while acting honestly and committing no wilful injury, is not personally liable to the sender of articles by mail for negligent losses; and this rule extends to the duly appointed and sworn deputies and assistants, to mail contractors, mail carriers and the like, who are engaged in such business; for they are all servants of the government, performing certain duties in connection with other public servants, and must answer to their master or principal alone.[2]

227. But the usual limits of agency here apply; and for loss or injury occasioned to the sender, outside the exercise of this public vocation, or by negligence in managing one's own private business, or through one's wilful, wanton and tortious misconduct, the postmaster or public agent is not protected against his bailor.[3]

[1] § **269.** Were government lawfully and constitutionally to monopolize railway traffic, the same practical bailment immunity would at once result, unless Congress ordered it otherwise, in which case a vast burden of public litigation would ensue, all of which suggests a strong argument against making government a common carrier at all.

[2] § **270**; Whitfield *v.* Despencer, Cowp. 754, 765, per Lord Mansfield; Keenan *v.* Southworth, 110 Mass. 474; Central R. *v.* Lampley, 76 Ala. 357; 13 Ohio, 523; 2 Fost. (N. H.) 252. And as to money order funds see 58 Fed. (U. S.) 766.

[3] § **271.** As to assistants, private or not duly qualified, see Ford *v.* Parker, 4 Ohio St. 576; Sawyer *v.* Corse, 17 Gratt. (Va.) 230. A postmaster is liable for losses really occasioned by the careless management of his own private store or dwelling, where he happens to keep the post-office. Raisler *v.* Oliver, 97 Ala. 710; 4 Ohio St. 576. And still more clearly for his own wanton, dishonest, and fraudulent conduct, as in breaking open letters and purloining their contents. Dunlop *v.* Munroe, 7 Cr. (U. S.) 242, 4 Ohio St. 576; 8 Watts (Penn.), 453; 110 Mass. 474. All this conforms to the general rule of agency; and so, too, where the postmaster transcends or goes outside of his public employment, the law of agency will not shield him. 106 Mass. 446 (an extreme case). Regis-

tered letters require stricter care, considering the circumstances, than unregistered letters, and sealed matter than unsealed matter. 27 Neb. 38. See further, 12 Fed. (U. S.) 675 (no injunction lies for refusing to deliver, but *semble* replevin or a suit for damages). As "to mail" see 6 Daly (N. Y.), 558.

THE TELEGRAPH AND TELEPHONE BUSINESS is monopolized by government in Great Britain, but not in the United States. Nor does such business, in strictness, involve a bailment (*i. e.*, delivering over an identical chattel), though analogous in some respects. Private telegraph and telephone companies are often treated as exercising a public vocation, in being bound to serve the public alike (128 Ill. 248, *ante*, 223); but there appears no exceptional liability, but rather the liability which is analogous to that of ordinary bailees for hire. § 272, note.

If a common carrier becomes liable at all to the sender or addressee of mail matter, which he carries under contract with the government, the standard of liability is that of ordinary bailee for hire only. 113 Fed. (U. S.) 414; 117 Fed. (U. S.) 434; Boston Ins. Co. *v.* Chicago R., Iowa (1902).

CHAPTER II.

INNKEEPERS.

228. The vocation of innkeeper falls well under the head of bailment in respect of caring for animals, baggage, and other personal property, committed by a guest to his host's keeping; which topic, inclusive of the innkeeper's lien thereon for his charges, affords almost the only point of view from which our civil courts have steadily regarded the rights and duties of this interesting class of persons; though one's treatment of his guest has sometimes been discussed, while the enforcement of liquor and license laws occasionally commends the innkeeper to the inspection of other tribunals.[1]

229. Four preliminary points are to be considered, before dwelling at length upon the exceptional measure of responsibility which the common law has affixed to innkeepers for the advantage of the public. (1) who are innkeepers; (2) who are guests; (3) to what property of the guest does the exceptional liability relate; (4) limits of the relation. And here let us bear in mind that, as in our other instances of exceptional bailment, the exception is found in one's rewarded exercise of a public vocation to which public policy assigns a rule.[2]

230. Who are innkeepers must depend upon all the circumstances presented in a particular case; and a jury may properly decide, under judicial instructions, whether one is an innkeeper or not, upon all the proof submitted.[3] The

[1] § 273. As to the nature and origin of this exceptional liability (which applies both at the common and the civil law), see § 274. In early times when the traveller journeyed by slow conveyance, public policy took heed, in England at least, that at an inn one should rest as securely from thieves or robbers as though in his own home.

[2] § 275.

[3] § 276; Clary *v.* Willey, 45 Vt. 55.

innkeeper may be either an individual or a partnership, or a corporation.[1]

231. Between tavern, hotel or restaurant, there are shades of difference affecting the present issue. A mere restaurant keeper is not an innkeeper;[2] nor is a strict apartment-house an inn;[3] yet apartment-houses which regularly entertain transients besides, or hotels on the "European plan" so called, where one engages his lodging and pays at the restaurant only for such meals as he may choose to order, are rightfully deemed inns at the law, in such respects.[4]

232. Boarding-house keepers should also be distinguished from innkeepers, since their lodging and entertainment is commonly furnished with a certain privacy and without a public title.[5] A boarding-house or lodging-house keeper, pursuing that means of livelihood, is again to be distinguished from a private householder who only casually or upon special consideration receives a boarder or lodger into the family.[6]

233. On the whole, therefore, the vocation of innkeeper must depend upon many circumstances combined: such as the

[1] § **279**; Dixon *v.* Birch, L. R. 84, 135.

[2] § **277**. Both "taverns" and "inns" are words of humble extraction; though the latter word, now falling into popular disuse, may serve all the better for legal use in this discussion. The modern "hotel," "house," etc., signifies simply a genteel inn. Publicity, in the name of the house, in a sign, in advertisements or cards, in the use of a register, a public office, a baggage room or a public parlor, all bear upon issues like the present. See Cromwell *v.* Stephens, 2 Daly (N. Y.), 15.

As to merely furnishing food or drink to the public, see Walling *v.* Potter, 35 Conn. 183; Queen *v.* Rymer, 2 Q. B. D. 136. A sleeping-car company, or a steamship company, cannot be deemed "an innkeeper," towards the passengers who patronize it. Pullman Palace Car Co. *v.* Smith, 73 Ill. 360; Clark *v.* Burns, 118 Mass. 275.

[3] § **279**; Pinkerton *v.* Woodward, 33 Cal. 557; 2 Daly (N. Y.), 15.

[4] See Johnson *v.* Chadbourn Co., 89 Minn. 310.

[5] The keeper of a boarding-house generally reserves the choice of comers and the terms of accommodation, contracting specially with each customer and most commonly arranging for long periods and a definite abode. See § **278**; 2 Daly (N. Y.). 15; Pinkerton *v.* Woodward, 33 Cal. 557; 8 C. B. N. S. 254; Dansey *v.* Richardson, 3 El. & Bl. 144.

[6] § **278**; Cady *v.* McDonald, 1 Lans. (N. Y.) 484.

regularity of one's occupation; publicity; one's method of receiving compensation; and his means of accommodating all who may choose to come and go. In short, an innkeeper, one who exercises the public vocation we are now describing, may well be defined as one who regularly keeps open a public house for lodging and entertaining transient comers, on the general expectation of his suitable recompense.[1]

234. Who are guests depends also upon all the circumstances, and the strict bailment relation arises only with reference to such parties as the law denominates guests, and, of course, to guests taken in for recompense.[2] Many make more or less personal use of a public house, or are on the hotel premises at one time or another, who yet do not put themselves on the legal footing of a guest.[3]

235. Transients and boarders are to be distinguished; and one who boards, whether at a boarding-house or by special arrangement at an inn, cannot demand of his bailee the exceptional responsibility of innkeeper for the property he brings with him.[4]

236. Upon the whole, in determining the status of guest, all

[1] § **279**; cases *ante*. There may be an inn for summer or for winter resort only, or only during some exposition, etc.

[2] § **280**. One who keeps a public house may, not inconsistently, carry on a restaurant, cater for a select company, serve liquors at a bar, keep a shaving saloon, or permit outside parties to get up a ball on his premises; and, as to strangers who avail themselves of such extraneous service, or mere callers or loungers, he is no innkeeper at all. 12 Mich. 52; 55 Barb. (N. Y.) 188; Queen *v.* Rymer, 2 Q. B. D. 136. And one's horse may be stabled, without his stopping at the inn, so as to exclude the liability of strict innkeeper for the animal; while on the other hand one may be personally a guest without confiding his horse in such relation. 68 Me. 489; 66 N. J. L. 654; Mowers *v.* Fethers, 61 N. Y. 34; 3 Q. B. D. 484.

[3] One may come upon the inn premises, as though intending to be a guest, but failing to register and avoiding inn charges, while tipping the porter for a privilege. Strauss *v.* County Hotel Co., 12 Q. B. D. 27; 5 T. R. 273. Cf. Medawar *v.* Grand Hotel Co. [1891], 2 Q. B. 11 (a guest in temporary quarters); 10 Daly (N. Y.), 265.

[4] § **281**; Beale *v.* Posey, 72 Ala. 323; 5 Bush (Ky.), 41; Johnson *v.* Reynolds, 3 Kans. 257; 36 Iowa, 651; Hall *v.* Pike, 100 Mass. 495; Wiser

the facts and circumstances of the relation must be considered. Commonly the guest is a temporary sojourner who puts up at the inn to receive its customary lodging and entertainment; and so long as one keeps this transient character.[1] One who is only an innkeeper is presumed to entertain and lodge guests alone; but where he keeps, besides, a general bar or restaurant, or where he provides for both guests and boarders, or where he lets apartments and entertains transients besides, the status of guest must be carefully considered.[2]

237. The property of a guest which the innkeeper's liability covers, at the common law, includes, not baggage alone, but whatever else the guest may have brought within the inn precincts.[3] Modern legislation tends to mitigate the ancient rigor in this respect.[4]

238. There are just limits of the relation, and limits of inn precincts. One may be a bailee on the usual footing, before or after the innkeeping relation itself, with its exceptionally large responsibility.[5] So, too, it is for property of the guests

v. Chesley, 53 Mo. 547; 43 N. H. 332; Lusk *v.* Belote, 22 Minn. 468; 26 Vt. 316, 334; 35 Wis. 118. The decisions sometimes run closely. See Hancock *v.* Rand, 94 N. Y. 1.

[1] § **282.** And yet the decisions show us that neither the length of one's stay, nor his place of permanent abode, nor the distance he may have travelled, nor his final destination, nor any special modification of the inn rates, nor the method of payment, can alone conclude the question; though all such circumstances enter as material into the proof, as likewise would the amount of accommodation supplied, and the comer's means of knowing what distinction his host observes between house boarders or lodgers and guests.

For the case of a guest coming for immoral purposes, cf. Curtis *v.* Murphy, 63 Wis. 4; 66 N. Y. S. 1136.

[2] § **282.**

[3] § **283**; 33 Cal. 557; 36 Minn. 334; 7 Cush. (Mass.) 417; 8 Co. 33; 17 Q. B. 261; Kellogg *v.* Sweeney, 46 N. Y. 291. In the days of slow travelling on the king's highway, amid great dangers of robbers, there was more policy for such a rule than at the present time. One's horse and carriage may, of course, be included, or cattle brought to a drover's inn. Hilton *v.* Adams, 71 Me. 19.

[4] § **284.** See *post* as to legislation; 14 La. An. 324; 13 Md. 126 ("baggage"). The guest's own carelessness may be set up.

[5] § **285**; 12 Q. B. D. 27 (property lost before one has become a guest);

within the inn precincts, so called, to which the strict relation applies; though the vital point is whether the innkeeper holds possession in that capacity.[1]

239. The standard of an innkeeper's responsibility, under the limitations we have intimated, is something extraordinary and exceptional; approximating, in fact, to that of a common carrier.[2] And yet it differs from that of common carrier, as we shall presently show; involving, in fact, the quiescent duty of honest watchful custody, with ceaseless vigilance, rather than the active service of transporting from one place to another.[3]

240. The cases are contradictory in dicta, yet the decisions are fairly consistent. A presumption of liability arises against the innkeeper, in case of loss, which presumption he must at least repel.[4] And, most of all, it is observable, that for the acts of his domestics and servants about the inn, which occasion the loss or injury of a guest's goods and chattels upon the inn precincts, he is responsible, as for his own negligence or misconduct;[5] and furthermore, that this responsibility extends to the wrongful, meddlesome or careless acts, affecting such property, which fellow-guests, or the innkeeper's family or substitutes, or others who are about the premises, with or without permission, not of the guest's own choosing, may have committed.[6] To this extent, at least, our law is insistent, far transcending all the usual distinctions of the law of agency.

52 Ark. 627; Miller *v.* Peeples, 60 Miss. 819 (trunk kept to accommodate, after guest has paid his bill and left).

[1] § **285**. Cf. Hilton *v.* Adams, 71 Me. 19 (inn stables, kept as such, or sheds and outhouses); Minor *v.* Staples, 71 Me. 316 (a distinct bathing house, or bowling alley, or tennis court, not to be deemed part of the "inn"); 66 N. J. L. 654.

[2] § **286**; 18 Ohio St. 343, 350.

[3] § **287**, Roman law compared. §§ **287**, **289**.

[4] § **288**, and cases cited; 5 T. R. 273; Morgan *v.* Ravey, 6 H. & N. 277; 14 Johns. (N. Y.) 175; McDaniels *v.* Robinson, 26 Vt. 337; Carhart *v.* Wainman, 114 Ga. 632 (guest's baggage check).

[5] § **290**; 33 Cal. 557; 26 Ala. 371; 39 Ga. 105.

[6] § **290**; 37 Ga. 252; 27 Miss. 652; 22 Minn. 468; 39 Iowa, 232; 6 Har. & J. 47; Sibley *v.* Aldrich, 33 N. H. 553.

241. But beyond this point, the decided cases afford none of that firm support for a standard of exceptional liability which they supply in regard to common carriers. For a burglarious entry into the inn, unaccompanied by force and violence, the host would appear liable, as in case of thefts within ;[1] but whether he is equally liable for a loss by forcible robbery from without (supposing him able to repel all presumption of fault or complicity), has not been decided ; and still less has he been held liable for injury, loss or destruction, plainly due to the irruption of mobs or rioters.[2] For loss occasioned, without his fault, by accidental fire, the better opinion is that the innkeeper is excusable.[3]

242. As in case of the carrier, an innkeeper is excused for losses occasioned by act of God, act of public enemy, act of customer (or guest), and act of public authority.[4] But, in all cases of loss or injury the direct and proximate cause must be regarded in either vocation.[5]

243. An innkeeper's liability for animals is sometimes contrasted with that for things inanimate, as to presumptions.[6]

[1] § 291 ; Clute *v.* Wiggins, 14 Johns. (N. Y.) 175; 26 Vt. 317, 338. Cf. 18 La. An. 156.

[2] § 292. See Pinkerton *v.* Woodward, 33 Cal. 557 (innkeeper's carelessness in a robbery) ; 30 Mich. 259, 261. Yet here a common carrier is plainly liable. See Part VI, c. 4.

[3] § 293 ; cf. Hulett *v.* Swift, 33 N. Y. 571 (harsh rule changed by statute) ; 33 N. Y. 577 ; 61 N. Y. 377 ; 72 Me. 273 (statute) ; 98 Cal. 678 (statute); Cutler *v.* Bonney, 30 Mich. 259; Johnson *v.* Chadbourn Co., 89 Minn. 310; Merritt *v.* Claghorn, 23 Vt. 177. Yet here a common carrier is plainly liable. See Part VI, c. 4.

[4] § 294; *post*, Part VI, c. 4. As in case of the natural death of a horse or natural spoliation of goods. Metcalf *v.* Hess, 14 Ill. 129 ; 8 Blackf. (Ind.) 535; Howe Machine Co. *v.* Pease, 49 Vt. 477.

[5] § 295. Where the circumstances of loss or injury impute bad faith or the want of ordinary care as the proximate cause, all the more clearly will the innkeeper be deemed liable. 49 Vt. 55 ; 33 N. H. 553 (improper care or exposure of horse) ; 55 Barb. (N. Y.) 188; 2 Daly (N. Y.), 102 (baggage check carelessly shifted) ; Pinkerton *v.* Woodward, 33 Cal. 557 (insecure fastenings) ; 14 Johns. (N. Y.) 175; Shoecraft *v.* Bailey, 25 Iowa, 553 ; Olson *v.* Crossman, 31 Minn. 222 (bedding strangers together needlessly).

[6] § 296 ; *ante*, 237. As to money, baggage or other " dead property "

244. The limitations of this relation apply, as already considered.[1]

245. A prima facie case is made out against the innkeeper on proof that one brought, as guest, certain property *infra hospitium,* which, on proper demand, was not restored to him; and the onus of exonerating himself devolves then upon the innkeeper.[2] And the guest's action may be grounded in contract, or at his option, in tort.[3]

246. The innkeeper's exoneration at the common law arises under any showing, such as we have seen should justly excuse him. And, most of all, is regarded his excuse, "act of customer," as in the case of a carrier.[4]

brought to an inn, from which the innkeeper derives no profit, the rule of liability may be more strict than where one's animal is lodged at the inn stable; for in this latter case a special charge is usually made. Hence, though not clearly a guest, the patron may sometimes regard the exceptional liability as applying to his animal. 9 Pick. (Mass.) 280; 28 Vt. 316, 332, 387 (innkeeper's lien where no lien as agistor); Hilton *v.* Adams, 71 Me. 19.

[1] § **297**; *ante*, 238. It appears to be the bringing one's personal property as a guest into the host's lawful possession and control, or that of his proper servants, that sets the liability of innkeeper in operation, rather than an active delivery into the host's personal custody, or even getting the things into the local confines of the inn. See Norcross *v.* Norcross, 53 Me. 163; Rockwell *v.* Proctor, 39 Ga. 105. Cf. [1891] 2 Q. B. 11. And see 37 Ga. 242; 83 Ga. 696 (inn carriage or porter sent to depot to solicit custom). And as to a departing guest, see § **298**; 12 C. B. N. S. 638; 5 Barb. (N. Y.) 560 (guest's occasional absence with intent to return); 53 Barb. (N. Y.) 451; 46 N. Y. 266; 4 Cush. (Mass.) 114 (sending guest with baggage to the station). After the relation once ceases, the innkeeper appears, properly speaking, liable only as an ordinary bailee, gratuitous or otherwise, as circumstances indicate, for the inanimate goods his departing guest may have left in his care, unless strict proof be furnished of a different understanding. See 2 Lea (Tenn.), 312.

[2] §§ **299**, **300**; 53 Mo. 547; 8 Wend. (N. Y.) 547; 27 Miss. 657. A father may sue on behalf of his minor child, a principal or true owner, because of bailment by his servant or bailee; at the same time that the bailor to the innkeeper might sue, on general principle instead, as actual guest.

[3] § **300**; Rockwell *v.* Proctor, 39 Ga. 105.

[4] § **301**; *ante*, 229, etc. For the exceptional liability arises only upon the strict relation of innkeeper and guest upon recompense, as to personal

247. **Act of customer** may be set up, as showing that the guest himself proximately and directly caused the loss; and, since a mixed custody quite commonly exists in such cases, it is material to ascertain whether the guest himself was at fault, by his negligence or otherwise.[1] But exoneration may consist in showing that the guest took upon himself the exclusive custody of the property, or, at least, did not confide it to his host, or did not deliver it in the capacity of guest.[2]

248. **Special qualification of an innkeeper's liability** may be made, as in other bailments, by special contract, usage (or custom) and legislation; and, of course, such qualifications may apply in other respects.[3]

249. **As to qualification by special contract**, this may be based upon mutual intendment, provided that public policy

property brought by the latter within the inn precincts. In other cases of bailment the usual standards apply. And see *post*, Part VI, c. 4.

[1] §§ **304**, **305**. Such carelessness or misconduct must, of course, in order to exculpate the innkeeper, be clearly shown to have induced or occasioned the loss in question. 6 E. & B. 891; Burrows *v.* Trieber, 21 Md. 320; Oppenheim *v.* White Lion Hotel Co., L. R. 6 C. P. 515; Medawar *v.* Grand Hotel Co. [1891], 2 Q. B. 11; Elcox *v.* Hill, 98 U. S. 218; Shultz *v.* Wall, 134 Penn. St. 262. The guest's failure to use his key or fasten the room, or his intoxication, is a circumstance to be considered against him, but not a conclusive one. L. R. 6 C. P. 515, 520; 73 Ala. 587; 60 Ga. 185; 145 Mass. 186. And see 60 Ga. 185 (an open window). The guest should be suitably careful about jewels or money of great value. 21 N. Y. 111. His needless display of valuables in a box which he leaves exposed or in the public room is a circumstance against him. 17 Q. B. 261; L. R. 6 C. P. 515. And see Chamberlain *v.* Masterson, 26 Ala. 371; Healey *v.* Gray, 68 Me. 489 (animals with vicious tricks not notified).

[2] §§ **302**, **303**. See 8 N. H. 408 (team put elsewhere); Houser *v.* Tully, 62 Penn. St. 92 (reposing confidence in strangers or unauthorized persons, and not in the host or the host's suitable agents); 12 Q. B. D. 27; Stewart *v.* Head, 70 Ga. 449 (leaving valise at hotel office, without calling attention to it or giving name). One who comes to the hotel with merchandise to be shown and sold there in some special room does not deal with the innkeeper as guest in that respect. 5 Biss. (U. S.) 465; Mowers *v.* Fethers, 61 N. Y. 34.

[3] § **308**. So, too, as to common carriers, Part VI, c. 5.

be not transcended.[1] The reasonable rules of the inn, when brought to a guest's knowledge, and not waived, qualify upon a like principle.[2]

250. The effect of local custom and usage may also have the effect of qualifying or regulating liability, if the custom or usage be reasonable and fairly within the presumed purview of both parties.[3]

251. But statute qualifications of an innkeeper's liability prevail almost universally at this day, in England and America; showing that public opinion tends far towards exempting this vocation from extraordinary risks, as travel and the innkeeping business is now carried on.[4]

252. The innkeeper is an ordinary bailee where the vocation is not exercised towards the particular person and his personal property upon the strict innkeeping relation.[5] And thus is it,

[1] § 309. Misconduct or the want of ordinary care may not be thus excused; and for all acts of his servants (and probably of fellow-lodgers and those about the inn), directly occasioning loss or injury, the innkeeper must still respond, on the principle of public policy, in America at least. See Yorks Co. *v.* Central R., 3 Wall. (U. S.) 107. But other risks may probably be guarded against, or a special valuation set, if reasonable, upon a closed receptacle.

[2] § 310. Such as requiring the deposit of valuables, or of hats, overcoats, etc., in a particular place, or that keys be left at the office, etc. 6 H. & N. 265, 271; 33 Cal. 557; 18 Ohio St. 343; 21 N. Y. 111; 41 Vt. 15. But the rule must have met with an express or implied knowledge or assent. It is not enough to print a rule in the register or post a notice, if the guest did not read it. 33 Cal. 557; 29 Iowa, 232; 33 N. Y. Super. 271. "Owner's risk," in an absolute sense, would seem unreasonable. See 85 Ill. App. 677.

[3] § 311; 37 Ga. 242; 65 Barb. (N. Y.) 274; 7 Cush. (Mass.) 417; L. R. 6 C. P. 515.

[4] § 312. See modern local statutes, limiting liability, where the innkeeper provides a safe for valuables, to be placed in his close custody, notices being posted, etc. And see such statutes construed. 98 U. S. 218; 73 Ala. 587; 46 N. Y. 266, 291; 43 N. Y. 539; 25 Md. 310; 77 Me. 359; 140 Mass. 123; 31 Minn. 222. Responsibility is thus limited to the culpable acts of the innkeeper or his servants, causing a loss. But see 169 N. Y. 574 (waiver); 112 Ga. 837.

[5] § 313. See Queen *v.* Rymer, 2 Q. B. D. 136 (non-paying guest); Stewart *v.* Head, 70 Ga. 449; Carter *v.* Hobbs, 12 Mich. 52; Mowers *v.*

also, in the usual business of boarding-houses and lodging-houses, by the better opinion, or with mere boarders and lodgers generally.[1]

253. As to his general rights and duties, the innkeeper is bound, as one who exercises a public vocation, to lodge and entertain, to the extent of his accommodations, all suitable persons who may apply.[2] Besides excusing himself, however, where one was obviously unsuitable, he need not trust any guest for his recompense, but may require the pay in advance.[3] But the keepers of boarding-houses, lodging-houses, and restaurants may, as a rule, select their own customers, and deal with mankind on the mutual footing, for theirs is no public employment.[4]

254. Towards third persons who come upon the inn premises, either by permission or intrusion, and who have no status as

Fethers, 61 N. Y. 34 (goods brought for show and sale). Any vocation, resembling that of innkeeper, but not such, nor a public vocation at all, leaves the ordinary rules of bailment to apply. 73 Ill. 360.

[1] §§ **314, 315**; Dansey *v.* Richardson, 3 E. & B. 144; 8 C. B. N. S. 254. Cf. for American rule, § **316**; 6 Daly (N. Y.), 33; 1 Utah, 143; Taylor *v.* Downey, 104 Mich. 537. But see 53 Mo. 547; 3 Kans. 257.

[2] §§ **317–319.** The innkeeper is liable in damages (or perhaps may be criminally indicted), if he refuses, on tender of his reasonable recompense, to receive one as a guest without just excuse. 7 C. & P. 213; 8 M. & W. 269, 276; Watson *v.* Cross, 2 Duv. (Ky.) 14 (married woman or minor cannot, on that ground, be refused); Atwater *v.* Sawyer, 76 Me. 539 (nor one of a class because others of that class had misconducted); 1 Hughes (U. S.), 541; 10 Fed. (U. S.) 4. The same rule applies as to sheltering one's horse in the inn stable, if there be one. § **318.**

But reasonable excuse may be alleged for such refusal. That the house was full. Browne *v.* Brandt, [1902] 1 K. B. 696 (*i. e.*, as to bedrooms, even though the traveller demanded lodging in the coffee room). That the traveller came drunk, or behaved in an indecent or disorderly manner, or was utterly disreputable, or sought to use the house for a criminal purpose. Queen *v.* Rymer, 2 Q. B. D. 136. Because of some infectious disease, so that health and safety required it. § **322**; Gilbert *v.* Hoffman, 66 Iowa, 205.

[3] § **318.** And see *ante*, 223.

[4] § **321.** It is sometimes suggested, by way of exception to the general rule of inns, that an innkeeper may hold himself out as doing business only for certain seasons or for a particular class of persons. 4 Ex. 367, 371 (*e.g.*, for drovers, or for invalids).

guests, lodgers or boarders, the innkeeper stands as would any one towards persons who seek to enter his private house or place of business; with, however, the due regulation of his peculiar vocation always in view.[1]

255. Inns should be built and kept in repair with due regard to the safety and convenience of the general public who may resort thither.[2] And in carrying on the business, a certain duty rests upon the innkeeper to keep good order on his premises and to restrain the assaults of others upon his patrons.[3]

256. As to his right of recompense and lien, the innkeeper may, like the carrier, waive the requirement of pay in advance, and trust his guest for due recompense, with the security, besides, which the law recognizes, of a lien upon the personal property brought under his control on the inn precincts.[4] But,

[1] § **320.** As to parties coming to solicit rival custom, etc., see State *v.* Steele, 106 N. C. 766; 2 Sumn. (U. S.) 221. A certain due regulation of his premises for the general good and security of his patrons is always expected, as in case of a carrier of passengers. To this end the innkeeper may keep drunkards, thieves, vagabonds, or even suspicious persons off his premises; and he may eject such persons, or even one whom he has admitted as a guest, for outrageous, indecent or disorderly behavior, or for gross and wanton defiance of his wholesome rules. §§ **319, 320;** 106 N. C. 766; 6 C. & P. 723; 8 M. & W. 269. And see 2 Q. B. D. 136 (bringing dogs into a common room). But cf. 120 Penn. St. 579; 159 Penn. St. 480. As to inn rules (which should be reasonable), see § **325.**

[2] § **323.** But for a patent defect or inconvenience, where no local statute is violated, the guest takes his own risk to a just extent. Cf. 47 Fed. (U. S.) 690; 97 Ala. 622.

[3] § **323**; Curran *v.* Olson, 88 Minn. 307; Rommel *v.* Schambacher, 120 Penn. St. 579 (though the guest be intoxicated). The usual principle of master and servant applies where assault is by an inn servant. See 88 Mo. App. 72; 40 Cal. 578.

[4] §§ **326, 327.** The innkeeper's lien applies, not strictly to what the guest owned, but to all personal property received on the faith of the innkeeping relation, for which the innkeeper becomes responsible. See 50 Ga. 573; 7 Cush. (Mass.) 417; 61 N. Y. 34; Robins *v.* Gray, [1895] 2 Q. B. 501; 3 Q. B. D. 484. Animals taken at the inn stable are included. And see further, 25 Q. B. D. 491; 10 Rich. (S. C.) 300. It does not follow that, because a third person's property is held by the lien, such

neither with nor without such lien security, can the innkeeper make extortionate or unjust charges, nor supply his guests with unwholesome victuals and drink or their animals with bad provender.[1]

third party is liable for the bill. 99 N. C. 523. Lien does not extend to detaining the person of the guest or his wearing apparel, but criminal statutes are sometimes found for punishing persons who impose on guests. 3 M. & W. 248; 28 Minn. 424.

As for loss, waiver, or displacement of the lien, the usual rules apply. See § **327**; 12 C. B. N. S. 638; 27 Wis. 202; 14 Gray (Mass.), 481, 483; 23 Ch. D. 330. Enforcement of lien is imperfect at the common law, but local legislation sometimes enables the innkeeper to sell. § **327**; 46 Mo. 44; 11 Barb. (N. Y.) 41; 3 Gray (Mass.), 382. His exceptional liability for such property has ended, when he holds for mere security. 23 Ch. D. 330. And irrespective of a lien, the innkeeper may, of course, sue for his recompense like any other creditor. 2 Sweeny (N. Y.), 705.

Boarding-house keepers have at law no such lien, but local legislation supplies it to a greater or less extent. § **329**.

[1] § **324**; 6 Watts (Penn.), 65. As to license see *ib.*

PART VI.

EXCEPTIONAL BAILMENTS FOR MUTUAL BENEFIT.

COMMON CARRIERS.

CHAPTER I.

CARRIERS IN GENERAL.

257. **The full flower of the bailment principle** which we have repeatedly set forth in these pages appears in a final topic which, in practical consequence to modern society and modern jurisprudence, overshadows all the others grouped together. And unless we determine to take no precedent for more than it is worth, to keep fast hold of fundamental bailment principles, and bear constantly in mind that this transportation of movable property to and fro, which involves immense mercantile and commercial interests such as the ancient world never dreamed of, is but a bailment, whose essence consists in the delivery of a chattel for the accomplishment of a certain purpose, to be succeeded by delivering it back or over when that purpose is accomplished, and that the present idiosyncrasy mostly consists in an extraordinary degree of responsibility to which public policy chooses to subject the class of bailees known as Common Carriers, we shall lose our most needful clue.[1]

258. **By carrier we are to understand** one who undertakes to transport personal property from one place to another. Our common law deals with two general classes of carriers: (1) Private Carriers; (2) Public or Common Carriers. Pri-

[1] § 330.

vate Carriers — a class which (if it be a class at all) comprehends, as will hereafter appear, only isolated cases of transportation, performed by those whose usual vocation is different, save where a recognized Public Carrier undertakes specially to act without reward — rank as simple bailees, incurring the usual responsibilities, and entitled to the usual rights and immunities, either of bailees with recompense, or of bailees without recompense, according to the circumstances actually present. But a Public or Common Carrier is one whose regular calling it is to carry chattels for all who may choose to employ and remunerate him. "Carrier," as a technical term of our law, is often employed in this latter sense alone.[1]

259. Carriers by land or water are usually distinguished; but the transportation business of modern times tends so constantly to forming continuous lines, bridging broad rivers, running cars upon ferry-boats, and, in fine, bringing land and water transit under the same control and management, that the line of demarcation between the two classes, once so boldly traced, has perceptibly faded.[2]

260. The English theory of an exceptional responsibility, as applied to common carriers of goods and chattels, is drawn, in all probability, with its reasons, from Roman sources, and from a prætorian edict which applies likewise to Innkeepers.[3]

[1] § 331. In the foregoing definitions we follow the established precedents. See Bouv. Dict. "Carrier," "Common Carrier;" Story Bailm. § 495; 2 Kent Com. 598. But were the question an open one, it might be argued that the word "carrier" should include the undertaking to transport persons, instead of being confined, as above, to the transportation of chattels; and hence, that one might speak of private carriers of goods (or rather of personal property) and private carriers of persons; and so, correspondingly, of public or common carriers. But the words "carrier" and "common carrier" came to be exclusively applied to chattel transportation, before rules affecting the transportation of passengers attracted judicial attention.

[2] § 332.

[3] § 333. "*Nautæ, caupones, stabularii, quod cujusque salvum fore receperint, nisi restituant, in eos judicium dabo.*" Dig. 4, 9, 1; Colquhoun Rom. Civ. Law, § 1969. And see as to Innkeepers, *ante*. By *nautæ* we are to under-

In a word, both civil and common systems claim to hold common carriers to an accountability unusually strict; but as to the limits of that accountability, they are not in accord. The Anglo-Saxon has apparently laid hold of the Roman idea, but worked it out according to the genius of Anglo-Saxon institutions.[1]

261. Hence the importance, at the outset, not only of keeping our excepted cases of innkeeper and common carrier quite apart, but likewise of preventing the common and the civil schemes of carrier law from intermingling. For the English sages made their judicial precedents stepping-stones to a theory of bailment accountability far more rigorous than that of the Romans, certainly as regards common carriers, however it may have been with the innkeeper. Lord Holt, in that famous opinion pronounced in Queen Anne's reign, which constitutes the groundwork of our modern law of bailments, observed: "The law charges this person thus intrusted to carry goods, against all events but acts of God and of the enemies of the king. For though the force be never so great, as if an irresponsible multitude of people should rob him,

stand, not strictly sailors, but *exercitores navis*, so that the word may be rendered by "such carriers by water as are shipowners." Further, the word *navis* includes all sorts of watercraft, whether for the sea or inland transportation. Colquhoun, *ib.* § 1970; Pand. 14, 1, 1, 6. See also as to the law of modern Europe, 1 Dom. Civ. Law, Pt. I., b. 1, tit. 4, § 8, 5; *ib.* b. 1, tit. 16, § 2; Story Bailm §§ 458, 488.

[1] We should add, however, that an English authority of our day, as eminent as Cockburn, C. J., repudiated the notion (which, to those who acknowledge the foreign source of such early works of English law as that of Bracton, seems reasonable enough) that the English law of carriers was derived from Roman law. His reasons are: (1) That our law was first applied to land carriers, upon whom the Roman law inflicted no extraordinary liability; (2) That the Roman law made no distinction as to "act of God," etc., but afforded immunity from *casus fortuitus* as well as *vis major*. Nugent *v.* Smith, 1 C. P. D. 428. But it may be said, in reply, that law borrows foreign ideas and adapts them, with change, to local and existing wants of society; a remark which holds strikingly true of legislative enactments. And again, if the Roman law could not, by construction, extend its provisions to land carriage, whence is it that the modern civilians derive their own rule for such cases? In other words,

nevertheless he is chargeable."[1] This exposition of the carrier's common-law responsibility has sturdily kept ground in England ever since; and transplanted to America, in the colonial period, the doctrine took equally strong root there. Of all this, however, with other exceptions, and the possible modifications of a carrier's responsibility, which legislation and special contract in this later day appear to justify, more in place hereafter.

262. The foundation here of exceptional responsibility is the public employment which the carrier (as well as innkeeper) exercises. "This is a politic establishment," says Lord Holt, "contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point."[2] This very clear statement is so conclusive of the matter that later judges have constantly announced the same reason, with only verbal variation; and it accords with Ulpian's comment upon the Roman edict, centuries earlier.[3] Public policy, then, not private contract, is the foundation of the common carrier's exceptional responsibility.

if, when occasion first arose, England by inference went from land carriage to water carriage, why might not the Roman law have gone, on a similar exigency, from water carriage to land carriage? It appears, to say the least, a strange coincidence that Innkeepers and Common Carriers should have been subjected to special rules of liability under the Roman and Anglo-Saxon systems, so nearly allied, and yet so that the earlier system could not have influenced the later. See § 333.

[1] § 334; Coggs *v.* Bernard, 2 Ld. Raym. 909, 918. See also 3 Co. Litt. 89 *a*; 1 Co. Inst. 89 *a*; Moore, 462. Cf. Doct. & Stud. Dial. 2, c. 38.

[2] § 335; Lord Holt, in Coggs *v.* Bernard, 2 Ld. Raym. 909, 918. And see 12 Mod. 487. But cf. 3 Co. Litt. 89 *a*; Moore, 462.

[3] *Maxima utilitas est hujus edicti: quia necesse est plerumque eorum fidem sequi, et res custodiæ eorum committere.* Dig. Lib. 4, 9, 1. And see Story Bailm. § 458.

263. But the influence of compensation in this connection is observable. The carrier, to be charged as a public bailee, must be exercising the public vocation on a business footing. For where one carries personal property for another without reward, he is reckoned chargeable, like any other bailee for a bailor's sole benefit, with slight diligence only; a rule which operates not only where one casually conveys something as a favoring friend, but also upon public professional carriers, whenever they take the goods of a particular party free, and for his exclusive benefit. A departure, however, from one's usual course of conduct in this particular is not readily assumed; nor will a bailment service be necessarily a service without reward for want of an expected recompense in money.[1]

264. Private carriers for hire cannot, as a class, be said to exist at this day, either in England or the United States; for, whenever one plies the vocation of a transporter of chattels from one place to another, and so holds himself out to the public, expecting to be paid for his services, our law affixes to the pursuit of his business, when exercised for reward, the responsibilities of a public employment. But the relation of private carrier for hire may exist when one, not holding himself out to do such business regularly, undertakes, for reward, on a special occasion, to transport property for some particular person, or perhaps persons.[2] Furthermore there are pursuits, analogous at least to carrying, which are nevertheless pronounced exempt usually from the rule of Common Carrier; these can hardly be logically classed among Private Carriers, but at all events they involve this same ordinary bailment standard; the vocation being in effect a private, not a public, one in respect of goods and chattels.[3]

[1] § **336**; Coggs *v.* Bernard, 2 Ld. Raym. 909; Jones Bailm. 62, 63; Beauchamp *v.* Powley, 1 Moo. & R. 38; Fay *v.* Steamer New World, 1 Cal. 348; Michigan Central R. *v.* Carrow, 73 Ill. 348; Gray *v.* Missouri River Packet Co., 64 Mo. 47.

[2] § **337**. See *ante*, 74.

[3] See *e. g.* street railways, sleeping-cars, forwarding merchants, towboats, etc., in next chapter.

265. A common carrier is further bound, according to his facilities, to receive and carry all goods and chattels which are offered him for transportation in the line of his vocation, provided his reasonable compensation be likewise tendered him. This is another consequence resulting from the public employment which such carriers are declared to exercise, since private carriers, and all who exercise a private vocation, are free to select those with whom they shall deal, unless stipulating to the contrary.[1]

266. Common carriers by land or water follow the same essential rule of responsibility. Yet it appears that the peculiar perils incident to navigation, and the peculiar methods of averting them, give rise to details of application in the respective classes which do not quite coincide; modern legislation and policy favoring carriers by water who seek to reduce their legal responsibility more than carriers by land.[2]

267. The earliest picture afforded us of the English common carrier by land is that of a horseman toiling along the highway between two market-towns, laden with money, light parcels, and letters, whose chief peril is that of being set upon by thieves in some lonely place, or having his overloaded horse slip down in the mire.[3] When the reign of Elizabeth began, inland transportation on its most extensive scale was by strings of pack-horses; then came the rude wagon without springs, which, improved, gradually became a fairly convenient vehicle, both for goods and the humbler sort of passengers. The lumbering York wagon, drawn by Flemish cattle, which was used in the early part of the eighteenth century, is preserved to us by Hogarth's pencil.[4] And this was the land carriage of Coke

[1] § 337; Varble *v.* Bigley, 14 Bush (Ky.), 698. And see *ante*, 253, as to innkeepers.

[2] Cro. Jac. 330; "the first case of this kind," said Lord Holt, "to be found in our books." 12 Mod. 480. And see 3 Story (U. S.), 349; Elliott *v.* Rossell, 10 Johns. (N. Y.) 1; § 338.

[3] See § 339; Doct. & Stud. Dial. 2, c. 38; observe too in Henry IV., Act II, Scene I, the humble state of Shakespeare's Rochester carriers.

[4] See Hogarth's "Harlot's Progress," Plate I. Under Stat. 12 Car. II., the liberty of forwarding letters was taken away, and then the land carrier had to confine his business mostly to the heavier teaming. See 12 Mod. 482.

and Lord Holt, — a legal theme which inspired neither of these nor the later Blackstone.[1] Yet, long before this, water transportation had attained high renown. Already had the Mediterranean powers, the Dutch Republic, Great Britain, in turn, come to ascribe the most copious source of material prosperity to grasping the carrying trade of the ocean; and to the wars which have been fostered for the sake of gaining and keeping such a prize, the United States, in later times, have been no strangers.

268. But, meantime, our land carrier has made progress. During the eighteenth century, and the earlier part of the nineteenth, the stage-coach, which had been known in and about London since 1650, greatly extended its facilities; post-roads were multiplied; and the local and inland business, for conveying both passengers and goods, became, in England and America, organized on a much more liberal scale than before, so as to meet the increasing demand for extensive transit. But, until horse-power began to be superseded for long distances, about 1840, by steam, the capacity of the carrier car was trifling as compared with vessels; and the promoters of inland traffic devoted their enterprise to canals and a connected water highway. If expanded vapor has wrought wonders in navigation since this century opened, the revolution it has accomplished during a much shorter period, in method and the bulk of land carriage, has been overwhelming. Capacious cars are yoked together in a long line, and whole cargoes of grain and produce are now rapidly drawn to the seaboard from some far inland point. Hence, if the past should serve as a criterion of the future, those now living may yet see some new and more convenient means of transit introduced, while it is certain that the interchange of the world's commodities will grow, rather than diminish, as civilization advances its steps.[2]

[1] Land carriers are but lightly touched upon in 3 Co. Litt. 89 *a*; 1 Co. Inst. 89 *a*; and that in language showing a misapprehension. Blackstone, too, treats the pursuit slightingly, as though, in his day, something inferior. 2 Bl. Com. 453; 3 *ib.* 165.

[2] § 340.

CHAPTER II.

NATURE OF THE COMMON CARRIER RELATION.

269. Our preliminary inquiry is whether the bailee undertook to transport as a common carrier; and if so, then his transportation undertaking must have been (1) for reward, and (2) in pursuance of some carriage vocation which he exercises. For, though any hired bailee might expressly contract to be unduly bounden, the common carrier is one who, by virtue of his calling, undertakes, on recompense, to transport personal property from one place to another for all such as may choose to employ and reward him.[1]

270. The transportation in question must have been for reward, for if it were plainly a gratuitous undertaking, though performed by one who usually charges for such service, this is nothing more than a gratuitous bailment for the bailee's sole benefit.[2] But liability as a common carrier does not necessitate the prepayment of carriage charges, provided only the carrier has a right to demand a recompense; nor is one any the less a common carrier because the stipulated reward is other than money, or because the rate was not fixed in advance, or because the undertaking may have turned out disadvantageous to him; for it suffices that the undertaking itself was expressly, or by implication, an undertaking for reward.[3]

[1] § **342**; *ante*, 258; Dwight *v.* Brewster, 1 Pick. 50, per Parker, C. J.; Sheldon *v.* Robinson, 7 N. H. 157.

[2] § **343**; Fay *v.* Steamer New World, 1 Cal. 348; 3 Barb. (N. Y.) 388; Michigan Central R. *v.* Carrow, 73 Ill. 348; Flint R. *v.* Weir, 37 Mich. 111; *ante*, 263.

[3] Indianapolis R. *v.* Herndon, 81 Ill. 143; Knox *v.* Rives, 14 Ala. 249; Hall *v.* Cheney, 36 N. H. 26. See as to returning empty bags for customers, 23 Wis. 387. The presumption favors an intent to charge in pursuance of one's business; yet this presumption may be repelled by the

271. The transportation must have been in pursuance of some carriage vocation which the carrier exercises. And here our main object is, to distinguish one sort of hired bailee from another, with a view to determining whether the bailment responsibility in a particular instance shall be pronounced ordinary or extraordinary. A pertinent statement of Judge Story is constantly cited in the books: namely, that to bring a person within the description of a common carrier, he must exercise the business "as a public employment; he must undertake to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation *pro hac vice*."[1] This holding out, then, to the public, that one is ready to carry things generally, in pursuance of some regular calling, appears the prime element that distinguishes the common carrier from a mere private carrier for hire. And circumstances must determine such an issue, as in the case of an innkeeper.[2] Hence proof that one has, in the course of his vocation, for a long period carried for such as chose to employ him will readily charge him as a common carrier, and the carrier's sign, his business cards, advertisements, and circulars, may, any or all, be material in such an issue.[3] Where an individual's acts or conduct, his methods of business, and the propositions he holds out for conducting it, lead naturally to the inference that he exercises, or offers to exercise, the vocation of common carrier, they who intrust goods and

facts shown. See 102 Ala. 409; 64 Mo. 47; 111 Mass. 45. And in such a case the carrier's liability is for gross negligence only.

If a carrier's servant, without knowledge or direction of the principal, undertakes to carry things gratuitously outside the scope of employment, he does not bind the principal as common carrier for their safe delivery. 2 Story (U. S.), 16; Hall *v.* Cheney, 36 N. H. 26.

[1] Story Bailm. § 495; 2 Story (U. S.), 32; Satterlee *v.* Groat, 1 Wend. 272; 2 Ga. 349; Samms *v.* Stewart, 20 Ohio, 71; Elkins *v.* Boston & Maine R., 3 Fost. (N. H.) 273, 280. But see our definition, *ante*, 269. And cf. 29 Ala. 263; 15 Ind. 345; 22 N. J. L. 372; 32 Penn. St. 208.

[2] *Ante*, 233.

[3] § **345**; 3 Car. & K. 61; 6 Bosw. (N. Y.) 235. Dubious expressions are not to be thus construed. Scaife *v.* Farrant, L. R. 10 Ex. 358.

chattels to him upon the confidence that he is a common carrier can hold him responsible accordingly.[1]

272. **In case the transporting party has carried but once or twice** in this manner, or for one or two particular patrons, difficulty may arise; though such difficulties are rather of proof than of principle. The exceptional or partial use of one's vehicle on some occasion may not charge him except as a private carrier or bailee of the third class.[2] But a common carrier is rightfully made responsible on his general undertaking to carry things for reward, even though the trip be his first; nay, though but one trip at all were contemplated; since it is the public carriage intention which is material to such an issue, rather than the longer or shorter fulfilment of that intention.[3] On the other hand, a party once a common carrier, who has clearly discontinued such business, is but an ordinary bailee towards a stranger for whom he casually transports property at a much later date;[4] though, like a retiring partner, one who has been lately engaged in a certain business, from which he withdraws, must take heed how he permits himself to be held out to old customers who seek him.

273. **Casual or auxiliary occupation** is here possible; so that whether the business of common carrier be principal or subordinate, leading or incidental, usual or only at periods, the law subjects it, while it is being pursued, to all the consequences of exercising a public profession.[5] But where one of a different vocation assumes towards those who may choose to employ him the business of carrier only at particular seasons of the year, it does not follow that at other seasons, and under exceptional circumstances, his casual transporta-

[1] § 345.

[2] § 346. See 36 La. An. 106; Allen *v.* Sackrider, 37 N. Y. 141.

[3] Fuller *v.* Bradley, 25 Penn. St. 120; Steele *v.* McTyer, 31 Ala. 667.

[4] 31 Ala. 667; Satterlee *v.* Groat, 1 Wend. 272; Harrison *v.* Roy, 39 Miss. 396.

[5] Harrison *v.* Roy, 39 Miss. 396; Chevallier *v.* Straham, 2 Tex. 115; Moss *v.* Bettis, 4 Heisk. (Tenn.) 661. But see 2 Ga. 349; 1 Pick. (Mass.) 50.

tion of goods would render him liable therefor, as a common carrier.[1] On the other hand, one may be a common carrier and at the same time conduct a different pursuit; nor does it follow that because he exercises a public vocation in one sense he exercises it in another and all senses.[2]

274. Carriage regularly between fixed points is not essential: though a certain area is usual in such vocations. One may even be a common carrier who has no fixed termini, but leaves the course of transportation in each case to depend upon his customer's wishes.[3] So, should one who habitually uses his wagon or barge to convey his private produce to market, and then loads up with supplies to bring home for such of his neighbors as will pay him for the service, be adjudged a common carrier, in respect of the return trips.[4]

275. Either a professed vocation or a special undertaking should appear in order to charge the person as a common carrier who conducts the transportation in question. But no written memorandum is needful to prove such a special undertaking or vocation; for the proof may be oral and evinced by one's conduct and circumstances.[5] The special agreement to transport gratuitously may place one who is usually a public carrier on the footing of private carrier and gratuitous bailee in a particular instance; and so, too, may a special undertaking (such as we seldom find) place a private carrier or ordinary bailee on the footing of public carrier, with corre-

[1] Haynie *v.* Baylor, 18 Tex. 498.

[2] Thus, a common carrier, who contracts with government to carry the mails, exercises no public vocation as postmaster or common carrier towards the sender of a letter by the mail. Central R. *v.* Lampley, 76 Ala. 357. And see § **347**.

[3] Liver Alkali Co. *v.* Johnson, L. R. 7 Ex. 267; L. R. 9 Ex. 338. And see § **348**; Pennewill *v.* Cullen, 5 Harr. 238. So as to connecting carriers see *post*, c. 9; 8 M. & W. 421.

[4] Harrison *v.* Roy, 39 Miss. 396. One may be a common carrier, whether transporting between different parts of one town, or from one town to another, or from a place in one state or national jurisdiction to a place in another. § **348**.

[5] § **349**; 2 Harr. 48; Fish *v.* Chapman, 2 Ga. 349; Harrison *v.* Roy, 39 Miss. 396; Varble *v.* Bigley, 14 Bush (Ky.), 698.

sponding risks and responsibility. But aside from such special undertaking, the main elements which determine the issue of common carrier are the two which we have described at length. And in pursuits for hire such as we are now to distinguish from that of common carrier, the standard applicable is that of ordinary care and diligence, whether under the rule of bailments or the broader one of service for hire.[1]

276. Let us inquire what pursuits by land or by water are most commonly classed with common carriers. As to occupations by land. Wagoners and teamsters, whose business it is to carry on hire goods and chattels from one locality to another, stand earliest among the recognized common carriers of our law, after the loaded horseman;[2] and to these may be added common porters, riders, draymen, truckmen, and cartmen; it mattering not whether such employment be carried on from town to town, or from one part of a town to another.[3] A city express engaged in transporting parcels or the trunks of travellers within the city limits, and local expresses, so called, whose business is carried on from one town to another in special conveyances, after the fashion of the ancient wagoner, fall alike under the denomination of common carriers.[4]

277. But our modern express, which forwards for hire over transportation routes by means of conveyances otherwise controlled, presents a somewhat novel aspect. The American pioneer in that business is said to have journeyed in person, by steamboat and rail car, between New York and Boston, with all his customers' valuables contained in a hand-satchel; but the pursuit thus humbly originating about 1839 now commands immense capital, and lays the civilized world under contribution. True is it that such a pursuit somewhat resembles the earlier one of "forwarding merchant," which it has largely superseded; and forwarding merchants were always

[1] See *ante*, 258; Allis *v.* Voight, 90 Mich. 125.

[2] § 350; 1 Salk. 249; Gordon *v.* Hutchinson, 1 W. & S. (Penn.) 285; *ante*, 267.

[3] § 350; Robertson *v.* Kennedy, 2 Dana (Ky.), 431; *ante*, 274.

[4] Verner *v.* Sweitzer, 32 Penn. St. 208; 2 Bosw. (N. Y.) 589; Parmelee *v.* Lowitz, 74 Ill. 116. Cf. Scaife *v.* Farrant, L. R. 10 Ex. 358.

adjudged not to be liable at our law as common carriers, but only for ordinary diligence.[1] Hence an early hesitation in the courts about treating the express carrier differently. But forwarders, besides participating in no wise in the control of the carriage, were only a sort of commission merchant, employed mainly in warehousing, or for buying and selling the goods they forwarded; and, indeed, one who simply sells to a distant customer becomes almost invariably a forwarder of merchandise to him in the same sense.[2] The express, on the other hand, makes a through transportation its main concern; it forwards, as a rule, on lines of its own choice, under the continuous supervision of its own agents, and in pursuance of private arrangements with the transporters, of which its own customers are not cognizant; it solicits business from the public, and its service is sought mainly because of the peculiar assurance thus afforded, that property which, because of its nature, its value, or the peculiar hazards of the journey, requires personal watchfulness throughout the transit, shall reach its destination in safety. Accordingly, in this country, it has at length become clearly settled that expresses are liable, not as forwarders, but as common carriers; nor can this doctrine yield to their use of such misleading titles as "transportation company," "forwarder," and the like, for designating what, in fact, is a responsible express business, conducted after the company's own judgment.[3]

[1] Maybin *v.* South Carolina R., 8 Rich. (S. C.) 240; Northern R. *v.* Fitchburg R., 6 Allen (Mass.), 254; Stannard *v.* Prince, 64 N. Y. 300.

[2] § **351**; 19 Barb. (N. Y.) 577. Any carrier for his own route may undertake to become the mere forwarder beyond his terminus. As to the duty of a forwarder, see Proctor *v.* Eastern R., 105 Mass. 512; Stannard *v.* Prince, 64 N. Y. 300.

[3] Bank of Kentucky *v.* Adams Express Co., 93 U. S. 174; Southern Express Co. *v.* Newby, 36 Ga. 635; Sweet *v.* Barney, 23 N. Y. 335; 28 Ohio St. 144; 15 Minn. 270; 29 Ill. 392; 97 Mass. 124; 86 Tenn. 392. And see § **351**.

Generally speaking, one who employs an express will sue the express carrier for a loss, rather than the transporting company who did the mischief as agent of the express. Boscowitz *v.* Adams Express Co., 93 Ill. 523.

278. **As to carriers of passengers and baggage,** these may or may not become likewise the common carriers of goods and chattels. Our modern railways, unlike the stage-coach lines they so widely displace, have constantly assumed, with their immense inland facilities, to carry over their route both passengers and general freight. Railways, in short, are common carriers both of goods and chattels received as freight, and of the baggage of their passengers; and they are, moreover, passenger carriers.[1] Yet railway freight trains and passenger trains are commonly run separately, and on different time-tables; freight depots and passenger depots are generally kept apart; freight and passenger rate schedules are separately drawn up; hence the inquiry may become pertinent, whether the fact of receiving mere freight on rare occasions upon passenger trains, apart from the baggage and effects of persons actually conveyed, will render the railway liable to such bailors as a common carrier. Such an issue must depend upon the particular circumstances of the case. Even a street railway, whose regular occupation is that of transporting passengers, and that too without any baggage, may be proven a common carrier of merchandise by the habitual conveyance thereof on hire to accommodate the public.[2] But stage-coaches, omnibuses, hacks, and street railways are *prima facie* passenger carriers only, and not held out as common carriers of goods for the general public, however it may be as to any baggage incidental to the passenger service.[3]

279. **As to miscellaneous land pursuits** the special business

[1] § 352; Parker *v.* Great Western R., 7 M. & G. 253; Camden & Amboy R. *v.* Burke, 13 Wend. 611; Thomas *v.* Boston & Providence R., 10 Met. (Mass.) 472; Murch *v.* Concord R., 9 Fost. (N. H.) 9; Kimball *v.* Rutland R., 26 Vt. 247; Hannibal R. *v.* Swift, 12 Wall. 262. For a passenger carrier's liability as to baggage, see *post*, Part VII.

[2] Levi *v.* Lynn, &c. Horse R., 11 Allen (Mass.), 300.

A railway may be a common carrier of goods, even though its charter does not style it thus; for the business itself sufficiently imports such an occupation. Chicago R. *v.* Thompson, 19 Ill. 578.

[3] § 352; Merwin *v.* Butler, 17 Conn. 138; Parmelee *v.* McNulty, 19 Ill. 556; 74 Ill. 116; Verner *v.* Sweitzer, 32 Penn. St. 208; Powell *v.* Mills, 30 Miss. 231.

of supplying sleeping-cars or drawing-room cars to railway trains, for travellers who may choose to pay for such extra accommodations, is held no common-carrier pursuit, in the sense of imposing an exceptional bailment responsibility for what the occupant may have about him.[1] In some aspects of his business, however, a sleeping-car proprietor must conduct himself as one who exercises a public vocation;[2] and at all events he must exercise ordinary care and diligence within the scope of his trust, like any other bailee for hire.[3] A bridge or turnpike company, which furnishes to responsible carriers a highway with switching or other like facilities, is not by virtue of such business a common carrier.[4] Nor is a stockyard company or other mere agistor or warehouseman for a carrier.[5]

280. **As to occupations by water.** A bargeman, hoyman, lighterman, or boatman, whose carriage of goods by water is near shore, has long been adjudged a common carrier.[6] To ferrymen, or ferry companies, and those plying canal boats,[7]

[1] § **353.** This seems to be, however, because the responsible transporter of passengers and baggage is the railway company. Pullman Palace Car *v.* Smith, 73 Ill. 360; 1 Flip. C. C. (U. S.) 500; 67 How. (N. Y.) Pr. 154. Cf. 1 Sheldon (N. Y. Super.), 457. Nor is an innkeeper's liability imputed. 73 Ill. 360.

[2] Thus, he cannot select his patrons at pleasure, but must treat all the public alike. Nevin *v.* Pullman Palace Car Co., 106 Ill. 222; *ante*, 265.

[3] Kinsley *v.* Lake Shore R., 125 Mass. 54; Woodruff Co. *v.* Diehl, 84 Ind. 474; 1 Flip. C. C. (U. S.) 500; 28 Neb. 39; 93 Tenn. 53; Pullman Palace Car *v* Martin, 95 Ga. 314. He should look after property casually left in the car. 95 Ga. 810. The sleeping-car company should not only furnish a berth at night, but keep a competent watch, exclude unauthorized persons from the car, and take reasonable care towards preventing thefts and loss by its own servants or otherwise. *Ib.*

That the railroad company cannot evade its own duty as responsible transporter, by placing blame upon the sleeping-car proprietor, see Pennsylvania Co. *v.* Roy, 102 U. S. 451; Part VII., *post.*

[4] Kentucky Bridge Co. *v.* Louisville R., 37 Fed. (U. S.) 567.

[5] Delaware R. *v.* Stock Yard Co., 45 N. J. Eq. 50.

[6] § **354**; Cro. Jac. 330; 1 Mod. 85; Liver Alkali Co. *v.* Johnson, L. R. 7 Ex. 267; (appeal) L. R. 9 Ex. 338; Allen *v.* Sewall, 2 Wend. 327; Moss *v.* Bettis, 4 Heisk. (Tenn.) 661.

[7] Willoughby *v.* Horridge, 12 C. B. 742; Smith *v.* Seward, 3 Penn. St.

the same doctrine should apply; the ferries of this day, however, usually taking loaded teams on board with their drivers, whose partial control much affects the issue of responsibility, while canal boats are rather employed in conveying cattle and inanimate freight placed under the carrier's sole charge. One who has a raft or flat-boat suitably employed may be a common carrier, even though intending to go down the river but once, and then break up his transport and sell it for lumber.[1] Steamboats, which have from their first introduction on the Hudson River, in the early part of this century, transacted a general freight and passenger business, are established, both in England and America, by a long series of decisions, to be common carriers, both for the baggage of passengers, and as to goods which are shipped by general consignors.[2]

281. But here, as elsewhere, the employment to be designated as common carriage is that held out for conveying personal property for all who may pay for the particular service. A canal company which simply allows the use of its water-highway to the boats of customers, who pay tolls, is not a common carrier.[3] For it is the control of the transporting vehicle, or, at least, participation in the transportation performance itself, which gives to one the status of carrier; and his duty must be not passive, but active, as concerns the goods. Neither is a tow-boat usually taken to be a common carrier, though in such a case the border line runs very close;[4] since

312; Pomeroy *v.* Donaldson, 5 Mo. 36; Wilson *v.* Hamilton, 4 Ohio St. 722; Powell *v.* Mills, 37 Miss. 691; Hall *v.* Renfro, 3 Met. (Ky.) 51; Lewis *v.* Smith, 107 Mass. 334; 26 Ark. 3; Self *v.* Dunn, 42 Ga. 528; 36 N. Y. 312; Wyckoff *v.* Queens County Ferry Co., 52 N. Y. 32; De Mott *v.* Laraway, 14 Wend. 225; 3 Vt. 92.

[1] Steele *v.* McTyer, 31 Ala. 667 (a mode of water-carriage formerly quite in vogue on the Mississippi and its tributaries).

[2] § **354**; Siordet *v.* Hall, 4 Bing 607; Allen *v.* Sewall, 2 Wend. 327; 2 Sumn. (U. S.) 221; 2 Watts (Penn.), 443; Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539; Bowman *v.* Hilton, 11 Ohio, 303; Bennett *v.* Filyaw, 1 Fla. 403.

[3] § **354**; Beckwith *v.* Frisbie, 32 Vt. 559; 10 Bosw. (N. Y.) 180.

[4] § **354**; Transportation Line *v.* Hope, 95 U. S. 297; 13 Wend. 387;

here the legal responsibility imposed is that of exercising ordinary care, diligence, and skill in performing a peculiar service which consists in drawing, pulling, tugging, but not carrying, certain vessels with their cargoes, of which other parties have the active control. Nor is log-driving considered a common-carriage pursuit.[1]

282. Between carriage on inland waters and ocean carriage, no fundamental distinction in this respect avails in modern times. And they who, by a ship or vessel, whether propelled by steam or wind, carry goods, chattels, and merchandise, the same being conveyed as freight under their general undertaking to perform such carriage for the public, shall be held answerable all the same, whether the transportation be on inland waters, coastwise, or by the high seas.[2]

283. In all of the pursuits by land or water we have just enumerated, the rights and responsibilities of the common-carriage relation attach to parties having possession, control, and authority in the bailment performance; that is, to the real and responsible bailee and transporter. It is not the mere wagoner or boatman, the railway conductor, engineer, or navigator, who incurs the risks of a common carrier, but rather the permanent or temporary proprietor of the vehicle, with its contents, the transporting party in charge of the goods, the principal in the business for the time being; except that any one accepting goods for transit for an undisclosed principal renders himself personally liable to customers in consequence. Our common carrier may be an individual, a partnership, or a company; and agents, officers, and employés

4 Dutch. (N. J.) 180; 6 Cal. 462; Varble *v.* Bigley, 14 Bush (Ky.), 698; Hays *v.* Miller, 77 Penn. St. 238. Cf. distinction drawn as to the method of employing the tow-boat in Bussey *v.* Miss. Valley Trans. Co., 24 La. Ann. 165.

[1] Mann *v.* White River Log. Co., 46 Mich. 38. This business consists in running, rafting, and booming logs down stream. And see, as to the business of a mud-scow, under peculiar circumstances, 5 Fed. (U. S.) 634. Cf. 26 Minn. 243.

[2] § 355; Nugent *v.* Smith, 1 C. P. D. 19, 423; Boyce *v.* Anderson, 2 Pet. (U. S.) 150; 3 Esp. 127; 6 Wend. (N. Y.) 335.

may have borne active part in the bailment performance, for which, in the eye of the law, those they represent are alone chargeable to the bailor or owner, unless they themselves transcend the actual and manifest scope of their authority.[1]

284. Agents in such performance may make themselves solely responsible by acts of which the responsible transporter, or principal, was not cognizant, and which were outside the scope of a permitted authority.[2] But, in general, no private understanding between a carrier and his own subordinate, whereby the latter is to receive the sole compensation for carrying certain things, can avail against a bailor for reward who suffers loss, unless the bailor is shown to have been aware of this arrangement, and to have bailed his property to the agent exclusively on the faith of it.[3]

284 a. The test here is actual responsible employment in the carriage, and not mere ownership. Hence the lessee of a ferry, or the charterer of a ship should respond to a customer who has trusted him with goods in that capacity.[4] A transportation company may, as to the government which employs its service in carrying the mails, incur the liabilities of a common carrier; but in such a case the responsible transporter as concerns the general public is the United States, and to the individual sender of mail matter such an agent is not liable directly for loss.[5]

285. The letting or chartering of a railway car or an entire train on a railway may give rise to similar differences of legal construction, though the law of shipping finds here no exact parallel. At all events, for an injury caused by his own bad

[1] § 356.

[2] § 357; 7 N. H. 157; Levi *v.* Lynn Horse R., 11 Allen (Mass.), 300.

[3] § 357; Allen *v.* Sewall, 2 Wend. (N. Y.) 327; s. c. 6 Wend. 335; 2 Story (U. S.), 49. Such distinctions are fundamental in the law of agency. And see Evans *v.* Atlanta R., 56 Ga. 498; O'Neill *v.* Keokuk R., 45 Iowa, 546; 44 Wis. 342; § 358.

[4] § 359; 17 Barb. (N. Y.) 191; Claypool *v.* McAllister, 20 Ill. 504. See Sandeman *v.* Scurr, L. R. 2 Q. B. 86. But owners of a vessel may be carriers on general freight. 129 U. S. 397.

[5] See Central R. *v.* Lampley, 76 Ala. 357. But here is the case of a government agency. *Supra*, 271.

loading, the consignor of freight cannot hold the railway company responsible as insurer, nor charge it with losses against which the contract provided, and which impute neither fraud nor mismanagement so far as the carrier's own participation in the bailment performance extended.[1] In shipping, however, the charterer for a voyage once finding the vessel stanch, tight, and serviceable for his purpose, the whole control of the transportation becomes his, save so far as the owner may have furnished his own officers and crew; while the charterer of a railway car, or even of a whole train, must trust largely to the company itself, to the condition of its road, the management of other trains, and, in short, to the discretion and skill of numerous agents over whom the company, and not the charterer, exercises supervision. The resemblance borne by such a land carriage to a ship put under charter-party is, perhaps, closer where the entire business of one railway company, with its tracks, rolling-stock, equipments, and goodwill become leased for a certain term to another company. Here, as a rule, for damage or loss occasioned on a railway which is run and operated by a lessee company in its own name, and not that of the lessor corporation, the former, and not the latter, should be held responsible.[2]

286. **In respect of all corporations, however,** the fundamental restraints, imposed by charter or general law, must be duly regarded. Where one railway receives for compensation into its exclusive control, and draws over its own road, the cars of another company, it becomes strictly liable for damage done to the cars during such transit. But whether this liability be founded in an implied carrier relation, and not rather deducible from the peculiar contract of employment itself, is not clearly determined by the courts.[3] Any railway com-

[1] § 360; East Tennessee R. *v.* Whittle, 27 Ga. 535; Kimball *v.* Rutland R., 26 Vt. 247.

[2] Pittsburgh R. *v.* Hannon, 60 Ind. 417; 42 N. Y. Super. 225.

[3] § 361; Vermont R. *v.* Fitchburg R., 14 Allen (Mass.), 462; New Jersey R. *v.* Pennsylvania R., 27 N. J. L. 100. In both of these cases the court inclined to regard the transporter as theoretically a common carrier. Cf. 281, that towing is not deemed a common-carriage pursuit.

pany which operates its own trains over the road of another company is responsible as common carrier.[1] But instances may arise where the arrangement for hauling another's cars by one's motive power does not involve the strict carrier relation at all, but rather a private and special one.[2]

287. **In the organization of railways,** the board of directors, headed by the president, have commonly the managing functions of the company, which are to be exercised subject to such fundamental restraints as the charter, or act of incorporation, and by-laws may have imposed upon them; their authority being, moreover, a delegated one, and derived from the consent of the stockholders.[3] But others actually operating the road might sometimes be, instead, the proper representative managers of the company's carrier business; as, for instance, receivers who operate a railroad under an appointment from a court of chancery; or the trustees of mortgage bonds in actual possession.[4] But contractors building a railroad are not presumed to intend exercising a public employment, if, indeed, they have any right to do so;[5] nor is the company, under such circumstances, liable as a common carrier.[6]

[1] § 361; Eureka Springs R. *v.* Timmons, 51 Ark. 459. See 25 Fed. (U. S.) 317.

As to yielding a partial control, through stress of government, etc., see Phelps *v.* Illinois Central R., 94 Ill. 548; Hannibal R. *v.* Swift, 12 Wall. (U. S.) 262; § 362.

[2] Coup *v.* Wabash R., 56 Mich. 111, is in point, where one's railway engine was used to draw a menagerie train of cars owned by the exhibitor. So might a teamster use his horse to help a fellow-teamster's wagon up hill. And see St. Paul R. *v.* Minneapolis R., 26 Minn. 243, as to hire; 66 Fed. (U. S.) 506.

[3] § 363.

[4] Nichols *v.* Smith, 115 Mass. 332; Newell *v.* Smith, 49 Vt. 255; Sprague *v.* Smith, 29 Vt. 421; 41 N. Y. Super. 471.

[5] Shoemaker *v.* Kingsbury, 12 Wall. (U. S.) 369.

[6] § 363. Kansas R. *v.* Fitzsimmons, 18 Kans. 34. *Aliter*, if the company receives freight and undertakes its business before the road is completed and while running construction trains. 39 Ark. 487; 23 Ohio St. 186. As to a railway owned by the government, see Peters *v.* Rylands, 20 Penn. St. 497. And see 39 Ark. 487; 23 Ohio St. 186.

288. A partnership may be created for the carrier business as well as an agency.[1] And the present discussion takes a wider range as our modern carrier companies employing steam power are brought into view and continuous transportation increases. Where two or more railways or land and water lines make connecting agreements for their mutual convenience in effecting a through transportation, the law of agency may supplement that of partnership so as to establish the power of one company to make a transportation contract which shall bind both or all.[2] An arrangement, moreover, between connecting carriers in the nature of a partnership or mutual agency may be shown so as to charge one for losses beyond his own route.[3]

289. As to the kinds of property which may be the subject of carriage, to movables or personal property is this and every bailment both logically and practically confined. But, excepting that particular carriage pursuits may limit the dealing to certain kinds of chattels, whatever is capable of being thus bailed at all may be brought here under the protection of public policy.[4] Hence, a person may be adjudged a common carrier of money, whether in specie or bills, as well as of other kinds of personal property, if such be his line of business.[5]

[1] § **365**; 11 Wend. (N. Y.) 571; Waland *v.* Elkins, 1 Stark. 272; Fairchild *v.* Slocum, 19 Wend. 329; s. c. 7 Hill, 292; Helsby *v.* Mears, 5 B. & Cr. 504; s. c. 8 Dow. & Ry. 289.

[2] § **365**; Gill *v.* Manchester, &c. R., L. R. 8 Q. B. 186.

[3] Railroad Co. *v.* Pratt, 22 Wall. 123. See c. 9, *post*.

[4] § **366**. When the books speak of "common carriers of goods," it is not meant that what are technically "goods" alone are included.

[5] §§ **367–370**; 11 Johns. (N. Y.) 107; 2 Wend. (N. Y.) 327; 6 Wend. (N. Y.) 335; 1 Pick. (Mass.) 50.

But here we must consider (1) the true nature and scope of the carrier business as held out to the public; (2) the fundamental restraints which charter or legislation may have imposed upon that business. As to steamboats, in such a pursuit, see Citizens' Bank *v.* Nantucket Steamboat Co., 2 Story (U. S.), 16 (specie taken rather than bank bills except for a passenger's baggage); Sewall *v.* Allen, 6 Wend. (N. Y.) 335; 23 Vt. 186; Garey *v.* Meagher, 33 Ala. 630. As to stage-coaches, railways, etc., and other land carriers, see § **369**; Bean *v.* Sturtevant, 8 N. H. 146; 7 N. H. 157. Money and valuables, apart from what may properly be considered as baggage, are usually conveyed on our steam highways, at the present

Animals, too, are "chattels" or "personal property," and, as such, may be bailed for transportation as well as custody; though the peculiar habits and propensities of living creatures give rise to novel methods of transportation, and introduce perplexing qualifications of the common carrier's liability, in respect of their conveyance, which we shall consider hereafter.[1]

290. Dangerous articles, etc., may be the subject of carriage. It might be worth inquiring whether, in view of the variety and vastness of our modern inland and external carrying trade, and the constant tendency of all labor to subdivision, a carrier should not be able to make still closer limitations of the scope of his employment, in order that his vehicles may not be put to uses for which they are plainly unsuitable, nor freight be thrust upon him of a sort which he neither offers to take, nor

day, under the especial safeguard of an express carrier; and so is it, to some extent, with transportation by water.

In collecting and remitting money, or in selling freight and returning the proceeds obtained, the extent of the particular carrier's business as held out to the public may be considered, in the particular era or locality. See § 368; *post*, c. 6 ("C. O. D.").

[1] § 370; Nugent *v.* Smith, 1 C. P. D. 19, 423; Smith *v.* New Haven, &c. R., 12 Allen (Mass.), 531; Clark *v.* Rochester R., 14 N. Y. 570; Kansas Pacific R. *v.* Nichols, 9 Kans. 235; Bamberg *v.* South Carolina R., 9 S. C. (N. S.) 61.

In some of our late cases it is asserted that, as the early precedents contain nothing about animals, the common law may be assumed to have taken no cognizance of such property, and did not mean to include it; hence, they argue, a common carrier is not an insurer of live-stock. 9 Bush (Ky.), 645; 21 Mich. 165; see also 10 Lea (Tenn.), 304. This reasoning appears fallacious, besides being opposed to all the analogies of the law of bailment; which ought here to have expressly excepted animals, had not their carriage, so far as the nature of the case permitted, been intended to follow the usual rule of chattels or personal property. The ancient carrier's wagon did not, it is true, transport live-stock to anything like the extent of modern railway cars; but a bird in a cage, a dog fastened by a cord, or a young lamb must occasionally have been thus transported for hire; and this at a day when, for obvious reasons, coupon-bonds could not have been thus taken, nor spinning-jennies, nor could the common-law jurists have actually had these species of personal property in contemplation. And yet as carriers may, by the method of hold-

desires, nor has the facilities for handling.[1] But, doubtless, the general obligation of a common carrier is and always has been to receive and carry and to provide the means for carrying, whatever may be offered him for reward within the scope of his calling as professed to the public. Be the subject never so dangerous or difficult, some one must be prepared to carry it for the public, and his charge may be commensurate with the pains and danger involved.[2]

ing themselves out to the public, specialize their business considerably, so even a railroad company, or a vessel, may thus exclude the business of carrying live-stock. See 123 U. S. 727. But usually a railroad makes no such disavowal in holding itself out for business. Ayres *v.* Chicago R., 71 Wis. 372.

[1] See Brass *v.* Maitland, 6 E. & B. 470; Boston & Albany R. *v.* Shanly, 107 Mass. 568; Nitro-Glycerine Case, 15 Wall. (U. S.) 524 (instances of transportation of petroleum, nitro-glycerine, &c., where cars of peculiar construction must be used and the hazard is very great).

[2] § 371.

CHAPTER III.

WHAT CONSTITUTES BAILMENT TO THE COMMON CARRIER.

291. I. **General Duty of Receiving. By the common law every common carrier is bound to receive,** without respect of persons, whatever may be offered him for transportation on reasonable hire, so far as comports with his means and the nature of his calling.[1] This statement embodies, it will be perceived, three marked qualifications of one's duty to receive and convey: (1) that the party offering the chattels should offer for reasonable hire; (2) that the common carrier's means of safe conveyance should be adequate; (3) that such carriage should be in the line of his vocation.

292. (1) **The party offering should offer for hire,** since it is clear that a common carrier is under no obligation to take things, except upon compensation for his service. And, as no mean offset to the great risks he must encounter, a common carrier has the most ample means of making that recompense sure; for, to say nothing of the customer's credit as a source of reliance, such a party may demand pay in advance as the condition of carrying, or, as is commonly preferred, retain by way of lien whatever he conveys for any customer, for the security of the transportation costs and charges.[2] But if his reasonable compensation be tendered him, the carrier who refuses, without assigning good reason, to carry the goods so offered, is put in default, and may be sued as for breach of a public duty;[3] nor need even such a tender be made, provided the party wronged by the carrier's refusal can aver and prove that he was ready and willing to pay in advance for the carriage, or that the carrier's misconduct made such tender useless.[4]

[1] § 372. [2] See *post*, c. 7. [3] § 373.

[4] Pickford *v.* Grand Junction R., 12 M. & W. 766; Galena R. *v.* Rae, 18 Ill. 488; Texas R. *v.* Nicholson, 61 Tex. 491. As to remedies, see

293. It is not what the carrier may arbitrarily exact, that furnishes here the criterion of compensation, but he is suable if he refuse to carry for what is a reasonable reward; for, were the rule otherwise, a carrier might easily evade his duty by asking of his customer an exorbitant sum.[1] But the common law never went so far as to compel a common carrier to treat all customers equally. He might show special favor to individuals by taking their freight at an unreasonably low rate, or even free of charge, without being compelled to do the same by others. The fact that others were charged less was available to a particular customer only so far as it tended to show that this customer himself was charged unjustly high; and if the carrier had demanded of him only a reasonable reward for the service, this duty was well discharged.[2] Hence the origin of "equality statutes" or anti-discriminating legislation in modern times.[3]

294. Discrimination in charges between local freight and through freight is, to a certain extent, neither unjust, illegal, nor unconstitutional.[4] Nor would it be unfair discrimination for a common carrier to charge higher rates than usual where the risk becomes, from some pressing cause, excessive, or to exact a premium for taking property which is extra-hazardous, and requires special pains in the handling; or, in general, to fix a tariff of rates, variable on reasonable considerations, to

further, c. 8. A complete tender of specific property to be transported, as well as of recompense, seems proper. 61 Ark. 560; 66 Vt. 636.

[1] § 374.

[2] Great Western R. *v.* Sutton, L. R. 4 H. L. 226, 237; Johnson *v.* Pensacola R., 16 Fla. 623; Lough *v.* Outerbridge, 143 N. Y. 271. See this subject discussed in McDuffee *v.* Portland, &c. R., 52 N. H. 430; Messenger *v.* Penn. R., 37 N. J. L. 531; 12 Fed. R. 309.

[3] § 374; local statutes (as to railways in particular); L. R. 4 H. L. 226; 149 U. S. 680 (rebates); 49 Ohio St. 649; 132 Ind. 517; 143 N. Y. 271; (1891) 1 Q. B. 120; (1892) 2 Q. B. 229. See 299, *post.*

[4] § 375; 47 Penn. St. 338.

As to injunction to prevent discrimination, see 27 Fed. (U. S.) 529; c. 8 *post;* 123 Fed. (U. S.) 789. The legislature has power to regulate charges. 199 Ill. 484.

which all of his customers are expected to conform.[1] Common carriers, again, may guard themselves against undue competition.[2] But no common carrier has a right to impose conditions of shipment tending to secure to himself exorbitant or unlawful compensation or other unreasonable advantage, even by indirection; nor can he refuse freight because the customer does not give him a monopoly of his business.[3]

295. (2) **The carrier's duty is also qualified by his accommodations.** He may excuse transportation, in a particular case, on the ground that his means of conveyance are inadequate for taking safely and suitably what is offered him. Like the innkeeper, he may stop receiving when his quarters are full; for he is under no obligation to provide extra carriages to satisfy an unusual demand; and some carriers employ a large capital, others a small one.[4] So, if his conveyance be utterly unfit for goods of the description offered, and he has not held himself out for taking such, the carrier can make this his excuse for not receiving them; and furthermore, he may decline immediate acceptance if the property will, at the particular time, be exposed on his route, from special cause, to extraordinary danger or popular rage,[5] or

[1] See Pickford *v.* Grand Junction R., 10 M. & W. 399, 422.

[2] See 1 Duv. (Ky.) 143; People *v.* Boston, &c. R., 70 N. Y. 569; Munn *v.* Illinois, 94 U. S. 113. Rates are presumed to continue as previously, and a carrier must respect his continuous offer. Harvey *v.* Conn. R., 124 Mass. 421; 10 Fed. (U. S.) 774.

[3] Chicago R. *v.* Suffern, 129 Ill. 274; 14 Blatchf. (U. S.) 453.

[4] § 377; Thayer *v.* Burchard, 99 Mass. 508. For such special emergency, the company should provide with reasonable diligence. 2 Kern. (N. Y.) 245; Galena R. *v.* Rae, 18 Ill. 488; 10 Biss. 170.

[5] § 377; An insurrection or strike or riot which attains such proportions that it has to be finally put down by the military power of the State will excuse a railroad company from receiving and carrying live-stock. Pittsburg R. *v.* Hollowell, 65 Ind. 88. And this, notwithstanding the insurrection arose from the violence of men who had been employed by the railway, but struck for higher wages and severed their relation with the company. *Ib.*; Geismer *v.* Lake Shore R., 102 N. Y. 563. *Aliter*, where the company's employés simply refused to work without increased wages, no acts of violence, riot, or intimidation having occurred. 28 Hun (N. Y.), 543; Blackstock *v.* N. Y. R., 20 N. Y. 48. And see Haas

if he is under coercion so as not to be in the free exercise of his vocation.[1]

296. **There should be no unreasonable delay** either in receiving or transporting; but for delays that under the peculiar circumstances are reasonable, a carrier is fairly excusable.[2]

297. (3) **The scope of one's vocation,** as held out, also limits one's duty to receive. Not every common carrier is a universal carrier. Passenger carriers do not, as a matter of course, hold themselves out for general freight, nor do freight carriers always undertake to carry passengers also. And much closer may one's public business be restricted, if he so wills, so offers himself, and acts consistently. "At common law," says Parke, B., "a carrier is not bound to carry for every person tendering goods of any description, but his obligation is to carry according to his public profession."[3] In accordance with such public profession, then, one might hold himself out to carry a particular description of property only, or, at all events, so as to reasonably exclude the carriage of certain kinds of chattels; in which case his limitations, if openly shown and reasonable, ought to be respected by the public.[4]

v. Kansas City R., 81 Ga. 792; Louisville R. *v.* Queen Coal Co., Ky. (1896). So is it even though the journey be already begun. Gulf R. *v.* Levi, 76 Tex. 337; Lake Shore R. *v.* Bennett, 89 Ind. 457.

[1] Phelps *v.* Illinois Central R., 94 Ill. 548.

[2] § **377**; Geismer *v.* Lake Shore R., 102 N. Y. 563. And see *post*, c. 4.

[3] Johnson *v.* Midland R., 4 Ex. 367, 372; 12 Mod. 484; Oxlade *v.* North-Eastern R., 15 C. B. N. S. 680; Citizens' Bank *v.* Nantucket Steamboat Co., 2 Story (U. S.), 49. There are baggage (or trunk) carriers, piano carriers, etc. As to carrying live-stock, in any wholesale sense, it would appear that a railway may expressly hold out its business as exclusive of such freight. It certainly may as to money and valuables, such as express companies make their own special business. See *ante*, 289, 290. And see 118 Fed. (U. S.) 162.

[4] With like effect one may and commonly does limit his course of transit to a certain route or area and as between certain places, or establish it from one fixed point to another, so as to exclude freight for any or all intermediate places.

§ **378**; Pittsburgh R. *v.* Morton, 61 Ind. 539; 55 Ill. 95; Chicago R. *v.* People, 56 Ill. 365; Bullard *v.* Am. Express Co., Mich. (1896).

298. The carrier may promulgate reasonable rules concerning the time and methods of receiving freight, as incidental to putting bounds to the scope of his vocation. He may require delivery to be at seasonable times, and close his doors upon all customers after certain hours, or when the car or vessel ought to be ready to start. Nor can a carrier be held bound to receive goods so long before the time of departure as to add unfairly to his risks; nor to receive at unreasonable places.[1] Reasonable rules, too, as to the mode of packing articles offered for transportation may be made and enforced; though not to the extent of putting the consignor to hardship.[2] In general, while unreasonable rules are forbidden, the carrier's fair and reasonable regulations must be respected by the consignor who is made duly aware of them.[3]

299. Under the influence of the equality statutes, already noticed, not only discriminating and unfair rates of transportation are checked and discouraged, but the undue preference of customers in other respects.[4] Discrimination and partiality in the exercise of a public vocation our common law certainly abhors; and yet the common law, independently of such salutary legislation, fails positively to forbid some practices whose mischievous tendency must undoubtedly be to favor special patrons to the detriment of others and the general public.[5] By the better modern opinion a railroad is not bound at common law to furnish equal express facilities to all companies undertaking this peculiar business as now conducted in special passenger cars; though in receiving for transportation the express matter of small jobbing expressmen the rule may still be otherwise.[6]

[1] § 379; 12 M. & W. 766; Frazier *v.* Kansas City R., 48 Iowa, 571.

[2] See Munster *v.* South-Eastern R., 4 C. B. N. S. 676.

[3] Gleason *v.* Goodrich Trans. Co., 32 Wis. 85.

[4] § 380; Palmer *re*, L. R. 6 C. P. 194 (in time of delivery); Evershed *v.* London R., 2 Q. B. D. 254 (favors in loading or unloading or filling orders). See *ante*, 293.

[5] § 380; see c. 9.

[6] It has been held in some States that for a railway to confer a monopoly of its carriage facilities upon one express to the exclusion of all others,

300. Suitable facilities for receiving and discharging freight should be furnished, and the customer should not be burdened with special charges for furnishing such facilities.[1]

301. The carrier may waive his right to refuse goods in a particular case, and thereby limit his own rights and remedies.[2]

302. Goods from wrongful parties may be refused by the carrier; for he must not knowingly connive at wrong, but on the contrary is put upon inquiry where suspicion arises.[3]

303. II. **When the Carrier's Responsibility commences. At what time, we now inquire,** does the common carrier's responsibility commence? This is often a delicate matter of fact to

or even better and extra facilities simply, is a grievance such as entitles an express whose packages are refused transportation to sue for damages. 24 Penn. St. 378; New England Express Co. *v.* Maine Central R., 57 Me. 188; McDuffee *v.* Portland R., 52 N. H. 430; Andenried *v.* Phil. R., 68 Penn. St. 370. On the other hand, a Massachusetts case ruled that the common carrier was not bound to continue to any expressman greater facilities than it afforded the general public, even though the practical effect were to cut off privileges long enjoyed by a party and to transfer his business to the railway's own control. Sargent *v.* Boston & Lowell R., 115 Mass. 416. And the Supreme Court of the United States in 1886 confirmed this view of the question by a decree which reversed a number of decisions made previously in the various southwestern circuits and districts, and favoring facilities to all express companies alike. Express Cases, 117 U. S. 1, reversing 3 McC. 147; 8 Sawyer, 600; 2 Flip. 672; 18 Fed. R. 17, etc. The practical convenience of such carriers in their peculiar relations to express business justifies, perhaps, such a decision.

For local legislation forbidding discrimination among express companies, see 165 Mass. 398; 81 Me. 92; 24 Penn. St. 378. Such statutes can have no force as to interstate or foreign transportation. See c. 10, *post*.

[1] § **380a**; Covington Co. *v.* Keith, 139 U. S. 128 (as to live-stock). See further, Chicago R. *v.* Wolcott, 141 Ind. 267; 47 Ohio St. 130; Lough *v.* Outerbridge, 143 N. Y. 271 (reduced rates to continuous patrons offered).

[2] § **381**; 12 M. & W. 766; 14 Rich (S. C.) 181; 18 Ill. 488; 61 Tex. 491. And see c. 7, *post*.

One who agrees expressly to furnish facilities at a given date becomes liable on his contract accordingly. § **383**. But the contract must have mutually closed. 99 Va. 394.

[3] § **382**; Fitch *v.* Newberry, 1 Dougl. (Mich.) 1; Hayes *v.* Campbell, 63 Cal. 143

determine, for it may depend upon a variety of circumstances to which custom gives the coloring. But the main principle is the same as in other bailments: namely, that, when chattels are delivered to one as common carrier, and in that character and no other accepted by him, the incident responsibilities at once attach; and further, there may be a contract for the bailment before the bailment itself takes place. In other words one is chargeable as carrier when he receives the particular goods as for present and immediate transportation and not earlier.[1]

304. Such delivery and acceptance may be individual, or through the medium of agents. Railways and other chartered companies must needs deal with the public through officers, managers, and subordinates; vessels are manned and officered; and, for all carriage on an extensive scale, intermediate parties must be employed for various purposes. There are agents for freight, and agents whose sole concern is the locomotion; agents with directing authority, and subordinates; agents to make and receive payments, and agents to load, unload, and store things, as may be needful. Now, to constitute a delivery of property to a carrier's agent in the proper sense, the thing offered for transportation should come into the hands of the carrier's agent for receiving freight, not of any person whom the carrier may employ for other purposes.[2]

305. The proper place and manner of delivery to the carrier may be of much consequence; and, as a rule, delivery should be at the carrier's habitual place of receiving his customer's goods.[3] A railway is not to be pronounced the common car-

[1] § 384.

[2] § 386. See 23 Conn. 595; 21 Ind. 54 (delivery to deck-hand of a steamer insufficient); Cronkite *v.* Wells, 32 N. Y. 247 (mere clerk not freight agent); 1 Woods (U. S.), 96. The scope of the agent's authority to receive and accept, as brought home to a consignor's notice, cannot be safely disregarded. And see 3 Camp. 414; 3 E. D. Smith (N. Y.), 571 (delivery to unknown person at a wharf). Agents differ in scope of authority; *e. g.* a railway station agent is a general factotum, while duties are much subdivided at the great terminal points. See further, 109 Iowa, 551.

[3] § 386; Cronkite *v.* Wells, 32 N. Y. 247. But see 307, as to the bearing of usage on such matters.

rier of goods which are carelessly left at the side of the track, to be picked up by the next freight train, there being neither station nor freight-agent at hand.[1] For freight should, as a rule, be delivered at such a spot on the carrier's premises that the carrier or his servant charged with such affairs can at once take control and know that he is expected to assume the liability.[2] One's delivery of the property on the carrier's premises should be accompanied by some notice, express or implied, to the carrier or his proper agent, that the consignor intends committing it for a specific transportation. Merely placing goods where the carrier could easily have taken them is not sufficient; and a customer may well bear his own loss when he silently deposits the thing where it must needs be exposed to harm.[3]

306. **Actual or constructive acceptance by the carrier** is, then, an indispensable element in every complete delivery. And business usage will not unfrequently call for the booking or entry of the goods by the carrier, followed by his handing over a receipt, way-bill, bill of lading, or other like token of the responsibility he has thus assumed towards the property. Yet the assumption of the common carrier's responsibility turns not upon the interchange of documents, but upon the carrier's acceptance; upon the completion of that bailment delivery in fact, actual or constructive, of which documents afford only a more convincing proof.[4] Whenever property

[1] Wells *v.* Wilmington R., 6 Jones (N. C.), 47. And the more so as to a mere switch where there is not even a platform. Kansas City *v.* Lilley, Miss. (1891). But cf. 307 *post*, as to usage.

[2] See Grosvenor *v.* New York Central R., 39 N. Y. 34.

[3] 1 Ld. Raym. 46; 6 Cow. (N. Y.) 757; Grosvenor *v.* New York Central R., 39 N. Y. 34; Gleason *v.* Goodrich Trans. Co., 32 Wis. 85; O'Bannon *v.* Southern Express Co., 51 Ala. 481. Not even placing upon the carrier's vehicle will suffice without his due knowledge and sanction. 1 C. & P. 640; 38 Ill. 354.

[4] § **387**; The Keokuk, 9 Wall. (U. S.) 517; Illinois Central R. *v.* Smyser, 83 Ill. 354; Judson *v.* Western R., 4 Allen (Mass.), 520; 5 Bosw. (N. Y.) 625; Hickox *v.* Naugatuck R., 31 Conn. 281. The mere date of a bill of lading does not conclude the date of actual receipt as a fact. 56 Ark. 271. And see 93 Tenn. 314.

is received for purposes of present transportation, knowingly and willingly, by the party who professes the public employment, and the consignor relinquishes control accordingly, one's duty as common carrier on that instant arises. It is enough that such assent be given by one the scope of whose employment authorizes him to make the delegated acceptance; and, under circumstances like these, delivery of the property to the person and at the place where such things are habitually left for the carrier, will charge him sufficiently, whether the freight money was paid or not, and notwithstanding the circumstance that a writing or other token of acceptance follows at a later stage.[1] And the fact of delivery having been plainly brought home to the carrier, no actual acceptance on his part need be shown by the customer; for negative conduct and even silence may be construed into the assumption of that duty which the public servant has no right to renounce at discretion.[2]

307. **Usage or special contract** may extend the presumptive effect of a due delivery and acceptance, in the particular case.[3] Business methods go far towards determining the point of time at which the thing passes into the carrier's control with his assent for present transit purposes. And, provided the circumstances of a case warrant the inference that a certain carrier has accepted for present transportation in his public capacity, the place of acceptance becomes immaterial; for it may be in or out of his office, store, depot, or warehouse, and either with or without being accompanied by formalities.[4]

[1] 2 C. & K. 680.

[2] § **387**. See, as to due and presumptive acceptance by the proper agent held out for the particular occasion, Grosvenor *v.* New York Central R., 39 N. Y. 34, 37.

[3] § **388**; Merriam *v.* Hartford R., 20 Conn. 354 (delivery to some person unidentified, who called out, "All right"). And see an extreme railway case, as to the customary delivery of cotton at a remote station by leaving it where there was no actual agent to receive. Montgomery R. *v.* Kolb, 73 Ala. 396; 41 La. An. 639. But precedents like these enfeeble the main principle we are discussing, and ought not to be far extended by construction. See Tate *v.* Yazoo R., 78 Miss. 242; *ante* 305.

[4] See 38 Ill. 354; 89 Ill. 241. A nod or other oral assent to the delivery may be enough in numerous instances.

308. Expressmen and other carriers who send their servants habitually to the customer's dwelling or store to receive goods, shift, by so doing, their place of carriage acceptance, and become there as fully bound as though delivery had been made on their own business premises.[1] In some special instances the carrier's duty of acceptance requires him to come and select; in which case he must perform according to the mutual understanding, and neither beyond nor short of it.[2]

309. But a carrier may be a mere bailee in his preliminary or subsequent capacity, while holding the property placed in his charge for transportation. Railway freight depots, or wharves, where much property is necessarily held, from one cause or another, on long storage, furnish instances where the distinction of warehousemen is applicable. For while every public carrier may doubtless refuse to receive property when tendered him for transit unreasonably early, such carrier may accept, if he choose, on the just understanding, express or implied, that, until he is prepared to load aboard for the journey, his own liability shall be simply that of warehouseman or hired custodian, or, if the case were freed utterly from the consideration of recompense, as a gratuitous bailee.[3] As a rule, the carrier who accepts is taken to accept for present transportation at his own convenience, and accordingly as a party at once liable as common carrier.[4] Yet wherever the bailment relation which follows the transfer of possession imports, upon all the evidence, no duty or intent of immediate or present transportation on his part, but rather that he shall await his consignor's further acts or instructions before putting the goods on their course, or accommodate him by a storage, the position of the bailee, though he be a public carrier by profession, will con-

[1] § 389; 8 C. & P. 361; 8 Pick. (Mass.) 182.

[2] Cooper *v.* Berry, 21 Ga. 556. And see L. R. 6 C. P. 194.

[3] § 390.

[4] § 390; 2 B. & P. 416, 419; 6 Gray (Mass.), 539; Blossom *v.* Griffin, 3 Kern. (N. Y.) 569; Clarke *v.* Needles, 25 Penn. St. 338; Michigan Southern R. *v.* Shurtz, 7 Mich. 515.

tinue meantime that of warehouseman or simple bailee, and not of carrier.[1]

310. **But the presumption arises,** where goods are delivered and accepted by a common carrier in the ordinary course, and nothing remains for the consignor to do to them, that no intermediate storage is requisite unless it be for the carrier's convenience; that the acceptance is, in fact, to forward forthwith, or solely as common carrier.[2] How the common carrier may be changed into a custodian or warehouseman, at the journey's end, because of some delay in delivery over to the proper consignee, we shall consider hereafter.[3]

311. **The carrier usually loads and stows** and determines the place for the goods to occupy in his vehicle.[4] If he permits the loading to be done by the consignor or his servants, the law treats them, for this purpose, as agents of his own, and subject to his direction, save so far as it might appear that the transfer of the consignor's control was still kept in abeyance.[5] But shippers sometimes have a private car or quarters and are held liable for loading and stowing accordingly.[6]

[1] Barron *v.* Eldredge, 100 Mass. 457; 102 Mass. 284; St. Louis R. *v.* Montgomery, 39 Ill. 335; Watts *v.* Boston & Lowell R., 106 Mass. 466 (part of a lot received); Schmidt *v.* Chicago R., 90 Wis. 504; 112 Mo. 622; 100 Fed. (U. S.) 359 (live-stock waiting); 154 U. S. 155 (cotton to be compressed). Cf. 110 Ga. 173.

[2] 4 Fost. (N. H.) 71; Nichols *v.* Smith, 115 Mass. 332; Hickox *v.* Naugatuck R., 31 Conn. 281; Grand Tower Co. *v.* Ullman, 89 Ill. 244; § **392.**

[3] *Post*, c. 6; and see *post*, c. 9 (connecting carriers). The pertinence of our present distinction is strongly shown where goods are accidentally destroyed while in the carrier's possession, but before transit; fire being a casualty against which one insures as a common carrier, but not as a hired custodian or warehouseman. See Nichols *v.* Smith, 115 Mass. 332 (ordinary care and diligence the rule as to compensated warehousemen); Maybin *v.* South Carolina R., 8 Rich. (S. C.) 240. Cf. 7 Mich. 515; 30 N. Y. 564.

[4] § **393**; Hannibal R. *v.* Swift, 12 Wall. (U. S.) 262; May *v.* Hanson, 5 Cal. 360; Illinois Central R. *v.* Smyser, 38 Ill. 354. Cf. 9 Wall. 517.

[5] Merritt *v.* Old Colony R., 11 Allen (Mass.), 80; Kinnick *v.* Chicago R., 69 Iowa, 665.

[6] Fordyce *v.* McFlynn, 56 Ark. 424; 111 N. C. 592.

As to delivery by apparatus, tackling, pipe, etc., see 5 Blatchf. (U. S.) 518; 4 Biss. (U. S.) 13; § **396.**

312. **The carriage of freight by water** affords an illustration of our rule of delivery and acceptance. Whenever property comes into control of the water carrier's servants for present transportation, the carrier risk attaches; and this does not wait for the thing to be actually put on board where, as constantly happens, freight is received by the carrier on a wharf for loading up the vessel; or so as to be taken out in lighters while she lies in the stream at anchor; or even at the shipper's warehouse; provided the loading and stowing be under the carrier's direction.[1] Still more clearly is the vessel's liability fixed if the carrier has receipted for the goods.[2] Bills of lading or way-bills are used to a considerable extent in railway or other land traffic as also in water transportation.[3] Notwithstanding their use, the question as between shipper and carrier is one of actual delivery of the goods as for immediate transportation.[4]

313. **A carrier by ferry** is usually liable as common carrier, from the time he admits teams upon one slip until they are off the other.[5] He is bound to keep the ferry slips in good order, as well as the boat itself; and may direct what position

[1] § **394**; British Columbia Co. *v.* Nettleship, L. R. 3 C. P. 499; The Barque Edwin, 24 How. 386; 28 Fed. R. (U. S.) 202. Under such circumstances, if goods are delivered and accepted in a lighter which the carrier hires to bring goods out to his vessel, and the lighter explodes before it reaches the ship, the carrier must respond for the loss of goods thereby, whatever his own remedy against the lighter. 24 How. 386.

[2] *Ib.*; Greenwood *v.* Cooper, 10 La. An. 796; 9 Wall. (U. S.) 517; 64 Tex. 615. As to bills of lading used in water carriage, see § **394**; and a question much considered is whether pretended bills of lading shall conclude the carrier where his servant connives with a fraudulent consignor as regards an innocent purchaser or holder for value. See Grant *v.* Norway, 10 C. B. 665; Pollard *v.* Vinton, 105 U. S. 7. And see c. 5, *post*.

[3] See Baltimore & Ohio R. *v.* Wilkens, 44 Md. 11; Armour *v.* Michigan Central R., 65 N. Y. 111; 44 Minn. 224 (error rather than fraud); Friedlander *v.* Texas R., 130 U. S. 416; 154 U. S. 155.

[4] 93 Tenn. 314.

[5] § **395**; Willoughby *v.* Horridge, 12 C. B. 742; 1 M'Cord, 157; 5 Cal. 360.

persons and their carriages shall take on the boat.[1] Yet the driver who has not actually parted control of his team to the ferryman is not without a considerable share of responsibility for its safety, as in the corresponding instance, where one travels upon a cattle-car, in charge of his property; nor, indeed, would the animal's own nature and disposition be immaterial in such an issue of responsibility.[2]

314. The consignor of goods and chattels has correspondent duties to those we have considered which rest upon the carrier himself. What the consignor wishes transported should be offered for that purpose to the right carrier at a reasonable time. If offered as freight, he should be ready to make compensation in advance upon the carrier's request.[3] The consignor should see that what he sends is plainly and legibly marked in some way, so that the place of destination may be readily known, and the party identified who should receive the goods; though an identification by marks, and description in bills of lading or way-bills, or by check or other token, will often suffice for practical purposes, as transportation business is now conducted; and certainly he should not misdirect what he sends.[4] Again, he should offer his goods properly packed according to their nature and condition; for he is liable for losses directly due to his own bad packing as well as to his own misdirection or misdelivery.[5] So, too, he should make no false pretensions of ownership, nor practise deception as to the contents of the package he delivers.[6] Fraud is not the

[1] Claypool *v.* McAllister, 20 Ill. 504; 5 Cal. 360.

[2] White *v.* Winnisimmet Co., 7 Cush. (Mass.) 155. And see next c.

[3] § 397; *ante*, 292.

[4] Southern Express Co. *v.* Kaufman, 12 Heisk. (Tenn.) 161; Finn *v.* Western R., 102 Mass. 283, 290; 1 Hilton (N. Y.), 223. See 25 Ga. 228; Forsythe *v.* Walker, 9 Penn. St. 148; Stimson *v.* Jackson, 58 N. H. 138. Where the carrier has no means of knowing the destination or perceives that there is a misdirection, he may wait to be properly informed. 44 Iowa, 526; Erie R. *v.* Wilcox, 84 Ill. 239; 24 Wis. 157.

[5] Baldwin *v.* London R., 9 Q. B. D. 582; Shriver *v.* Sioux City R., 24 Minn. 506.

[6] American Express Co. *v.* Perkins, 42 Ill. 458; § 397. Money and valuables should not be put up as though they were cheap merchan-

needful basis of liability if damage ensues from such packing; but the shipper's negligence often proves sufficient to charge him. The carrier must, however, on his behalf, have exercised, in all these cases, such care as befitted the apparent nature and worth of the article committed to him.[1]

315. Indeed, the carrier's duty is limited to transporting things according in character to what he may have reasonably supposed them to be.[2] The limitations of this doctrine will be discussed hereafter;[3] but we here add that it is held that, when the appearance of the package is such as to arouse the carrier's suspicion that it is extra-hazardous, he may require a knowledge of its contents, as a prerequisite of carrying it; since only latent matters could justify him in setting up the shipper's negligence or deception, by way of an excuse for loss or injury.[4] So the carrier may ask shippers the value of packages tendered, with a view to determining whether extra rates should be charged, and he may rely upon the answer given, by way of limiting his risk, unless disproof were patent; while, on the other hand, the shipper who has practised no deception or improper concealment is under no obligation to volunteer a statement of contents or value.[5]

316. The consignor should make a full delivery, whether personally, or through his agents, or, in other words, should yield possession and immediate control of the property to the carrier. What falls short of this, so as to import rather a

dise, nor glass and explosives delivered as articles which bear rough handling.

[1] § **397**; Brass *v.* Maitland, 6 E. & B. 470; 11 C. B. N. S. 553; Boston & Albany R *v.* Shanly, 107 Mass. 568; Nitro-Glycerine Case, 15 Wall. (U. S.) 524.

[2] Crouch *v.* London R., 14 C. B. 255; Nitro-Glycerine Case, 15 Wall. (U. S.) 524. And see § **315**; 3 W. & S. (Penn.) 21; Phillips *v.* Earle, 8 Pick. (Mass.) 182.

[3] See next chapter.

[4] Field, J., in Nitro-Glycerine Case, 15 Wall. 524; New Jersey R. *v.* Pennsylvania R., 27 N. J. L. 100; Wiggin *v.* Boston & Albany R., 120 Mass. 201.

[5] Little *v.* Boston & Maine R., 66 Me. 239; Merchants Desp. Trans. Co. *v.* Bolles, 80 Ill. 475; 1 Pick. (Mass.) 50.

retention of custody on his part, or the trust of his own agents, instead of the carrier, leaves a hiatus in the bailment delivery; for the carrier must have been trusted, in order to become fully liable.[1]

317. A mixed responsibility, however, is found in various instances, where freight or baggage is conveyed, and the consignor or his agent accompanies it, exercising a certain control. For one who seeks to recover from another for a loss or injury inflicted upon him in person or property must not, by his own want of ordinary care or his misconduct, appear to have contributed to that loss or injury. As in packing, marking, and bringing his goods into the possession of the public carrier for a particular undertaking towards them, so, too, in partaking of their care on the journey, if he does so, the customer is bound to be honest, and to bestow ordinary diligence within whatever happens to be the sphere of his chosen opportunity.[2]

[1] § 399; 6 Bing. 743; Dunlap *v.* Steamboat Co., 98 Mass. 371.

[2] § 400; Talley *v.* Great Western R., L. R. 6 C. P. 44; Le Conteur *v.* London R., L. R. 1 Q. B. 547; 111 Mass. 142; 1 Q. B. D. 42. A drover goes to take care of animals transported; a ferryman has charge of his horse and team driven on board; a passenger looks after his hand baggage, etc. See next chapter.

CHAPTER IV.

BAILMENT RESPONSIBILITY OF THE COMMON CARRIER.

318. **Upon the instant a thing is delivered on hire** to a common carrier as for present or immediate transportation, and accepted by himself or his agents in conformity with such an undertaking, the duties and rights of a public relation will attach thereto at the common law. Whether it remains in quiet custody until he can perform the journey, or is ready to be sent at once, — whether it requires to be loaded by the carrier upon a car or vessel and stowed away, or is already on board and in place, — the carrier has now assumed towards the chattel thus consigned to him a perilous and exceptional responsibility, which must in general continue until the thing safely reaches its destination, and his carriage undertaking, under the bailment and bailment contract, becomes fully performed, so far as may be. But the responsibility or risk incurred at the common law is one thing, and the duty another. To separate these two ideas will be found convenient, as our investigation proceeds. As to his duty, the common carrier is a bailee for hire, bound to the ordinary or average standard of performance. The legal responsibility, however, transcends all considerations of care and diligence, on his part, as we shall presently see; making him an insurer, virtually, in many instances, aside from the qualifying elements to be noted in our next chapter.[1]

319. **First, then, as to his duty,** the common carrier is bound to have his customer's property fitly loaded and stowed, and to carry it in vehicles which are reasonably strong, tight, and serviceable for the purpose intended; this, however, only with reference to the nature and value of the chattel as dis-

[1] § 401.

closed to the carrier by its appearance or otherwise, and applying the ordinary or average standard of care and diligence in the particular calling. He must keep things properly packed and stowed and not carelessly shift them about. The propelling force must be fit and adequate for the common emergencies of the particular transit; and the carrier must man, equip, and provide the propelling faculties with reasonable prudence and foresight. In manning and equipping, the carrier need not provide against unusual exigencies, but only those which ordinary prudence forecasts; for, in these and all other respects, his obligation is presumably commensurate with the exercise of a reasonable care and discretion, such as those ordinarily careful in the vocation would bestow.[1] As a rule, the mode of carriage is taken to be limited and defined, as to the power and kind of vehicle, by the carrier's public undertaking.[2]

320. **In carrying the goods to their destination,** the common carrier and his servants are bound to transport, with reasonable despatch, and by the prescribed or his customary route.[3] He must take care that the goods be kept, after their kind, well stowed, secured, and sheltered throughout the transit, so as not to suffer undue waste, decay, or diminution; that the vehicle and motive power fail not from want of the usual skill or fair precaution; that the transit be made over clear tracks or an unobstructed course, so far as ordinary discretion on his part can make it such; and, at the last, that the property be delivered over rightfully, with reasonable despatch, and according to the just sense of his particular bailment under-

[1] § 402; Kopitoff *v.* Wilson, 1 Q. B. D. 377; Schmidt *v.* Chicago R., 83 Ill. 405; Propeller Niagara *v.* Cordes, 21 How. (U. S.) 8; Branch *v.* Wilmington R., 77 N. C. 347; Alabama R. *v.* Searles, 71 Miss. 744.

[2] Fraser *v.* Tel. Construction Co., L. R. 7 Q. B. 566; Merrick *v.* Webster, 3 Mich. 268. As to the implied warranty of fitness of the vessel or other vehicle (whose standard is "ordinary"), see L. R. 2 Q. B. D. 412; The Northern Belle, 9 Wall. (U. S.) 526; Kopitoff *v.* Wilson, 1 Q. B. D. 377; Gibson *v.* Small, 4 H. L. C. 353.

[3] § 403; Hales *v.* London R., 4 B. & S. 66; 7 Blackf. (Ind.) 497; Harris *v.* Northern Indiana R., 20 N. Y. 232; 37 La. Ann. 468.

taking.[1] While deviations from the agreed or customary route, if made without good excuse, must place the carrier in the predicament of having to answer for all the ill consequences which may ensue from his breach of contract, a deviation from necessity, especially in a sea voyage, ought to be and is more lightly visited.[2]

321. Should disaster overtake him during the transit, the common carrier is bound to lessen its injurious effects by pursuing a reasonable course of conduct towards the property placed under his charge for carriage.[3] He ought, if the goods be still worth transporting, to repair the vehicle and then proceed on his way, or else to transship them; if delayed long, he should temporarily store and shelter them; and he should neither needlessly abandon the goods nor expose them carelessly to damage; all this according to his opportunity and in the exercise of ordinary discretion and prudence under the peculiar exigency. And, after the same measure of sound good sense, should he apply the proper means of preserving from destruction whatever may remain; as in drying, repacking, repairing, and separating the spoiled from the unspoiled.[4] But he would not be justified in sending forward, merely for the sake of earning his hire, that which plainly is too far damaged to be worth to its owner the cost of further transportation; but should rather send for instructions, or else sell it on the spot for what it will bring; for he is bound to

[1] § **403**; 5 East, 428; Hastings *v.* Pepper, 11 Pick. (Mass.) 428. But a carrier is not obliged to carry goods strictly in the order he receives them; nor, on the other hand, to favor unduly one kind of property to the detriment of another. Dixon *v.* Chicago R., 64 Iowa, 531; 76 N. Y. 305; Peet *v.* Chicago R., 20 Wis. 594 (perishable goods).

[2] § **403**; The Maggie Hammond, 9 Wall. (U. S.) 435; 11 Fed. (U. S.) 179; 12 Conn. 410; 4 Whart. (Penn.) 204; (1891) 1 Q. B. 605.

[3] Hales *v.* London R., 4 B. & S. 66; Phillips *v.* Brigham, 26 Ga. 617; 2 Sprague (U. S.), 31; The Jason, 28 Fed. R. 323. And see Kinnick *v.* Chicago R., 69 Iowa, 665.

[4] § **404**; Propeller Niagara *v.* Cordes, 21 How. (U. S.) 7; 12 La. Ann. 410; Houston R. *v.* Harn, 44 Tex. 628; The Maggie Hammond, 9 Wall. 435; Chouteaux *v.* Leech, 18 Penn. St. 224; 1 Mo. 81; 13 Mo. App. 415; 72 Miss. 891.

regard his customer's interests as well as his own in such a calamity.[1]

322. A carrier delayed with his goods from some cause for which the law will excuse him should, when that cause ceases to operate, proceed onward and complete the transit, if the interests of the owners of the goods so require.[2] And his inexcusable failure to put the goods in transit at all, or his want of ordinary foresight in receiving goods which were not likely to go through safely unspoiled and uninjured, will charge a carrier with all the damaging consequences.[3] For mere delay, reasonable in the course of events, courts are not disposed to visit the carrier harshly nor to pronounce a delay unreasonable without reference to the circumstances.[4] In absence of a special undertaking on his part the carrier is to transport presumably within a reasonable time after the goods are delivered him, and with reasonable expedition, all circumstances considered; but a special undertaking exacts special fulfilment.[5]

323. An unreasonably premature shipment as well as unreasonable delay will render the carrier liable for resulting ill consequences.[6]

324. But the carrier's legal liability is distinguishable from the measure of his duty, though the latter becomes in many

[1] Notara *v.* Henderson, L. R. 5 Q. B. 346; s. c. L. R. 7 Q. B. 225.

The wisdom of a transshipment depends on circumstances; and the relation to his customers should be considered. Lemont *v.* Lord, 52 Me. 365; Steamboat Lynx *v.* King, 12 Mo. 272 (general welfare of shippers); 33 Ala. 713.

[2] Lowe *v.* Moss, 12 Ill. 477.

[3] § **404**; 1 Bush (Ky.), 32; Clarke *v.* Needles, 52 Penn. St. 338; Tierney *v.* N. Y. Central R., 76 N. Y. 305; 63 Iowa, 611; Dixon *v.* Chicago R., 64 Iowa, 531; Collier *v.* Swinney, 16 Mo. 484; Sumner *v.* Charlotte R., 78 N. C. 289; 107 N. C. 76.

[4] *Ante*, 296.

[5] As in undertaking to forward by a specified date or train. Corbett *v.* Chicago R., 86 Wis. 82; Cantwell *v.* Pacific Express Co., 58 Ark. 487. An absolute contract to transport is, at the utmost, only suspended by superhuman necessity. Collier *v.* Swiney, 16 Mo. 484.

[6] Campion *v.* Canadian R., 43 Fed. (U. S.) 775.

instances an important ingredient, as we shall see. Our present bailment is not an exceptional one in the sense of requiring the exercise of an exceptional degree of diligence. Public policy under the common law takes a higher plane; and, without asking whether a certain loss or injury occasioned to property which was consigned for carriage to one who exercised a public vocation in conveying it imputes to him actual diligence or negligence, actual blame or blamelessness, pronounces him legally answerable therefor, unless he can clear himself by bringing the loss or injury within certain stated exceptions. It makes the common carrier, in other words, a virtual insurer against all risks of loss or injury save those (1) of loss or injury by act of God, and (2) of loss or injury by a public enemy; to which modern precedent justifies us in adding, (3) of loss or injury by act of the owner or consignor of the goods, since common justice demands that the carrier's customer shall suffer for his own faults. One more exception this writer ventures to add, in advance of judicial announcement, viz., (4) of loss or injury by the public authority.[1]

325. As regards the two former exceptions, our law has fastened upon these not simply for the reason that the cause of loss is irresistible, — for so, too, might be the scattering of the carrier's goods by a mob, or their destruction by an accidental fire, — but because calamities like these are matter of public notoriety, open to investigation, and such as no carrier would be likely to draw upon himself by corrupt collusion with individuals or fraud upon his customer. Here we may perceive, as in the case of innkeepers, the operation of a principle whereby the public bailee is invested with a responsibility which no degree of prudence or forethought on his own part can wholly confine.[2]

[1] § 405.

[2] § 405.

"And this is a politic establishment, contrived by the policy of the law for the safety of all persons the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all per-

326. Usage, special contract and legislation mitigates, as we shall see later, the ancient rigor of the carrier law, especially as regards our modern railways, steamships, and sailing vessels.[1]

sons that had any dealings with them by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point." Lord Holt, C. J., in Coggs *v.* Bernard, 2 Ld. Raym. 909, 918. And see Best, C. J., later in Riley *v.* Horne, 5 Bing. 217, 220; Nelson, J., in 6 How. (U. S.) 344; Hubbard, J., in Thomas *v.* Boston R., 10 Met. (Mass.) 472, 476; Bronson, J., in 19 Wend. (N. Y.) 234; Sergeant, J., in 2 Watts (Penn.), 443; 21 Wis. 21; 22 N. J. L. 372.

Under this ensign the courts of England and America have rallied for centuries; yet there is reason to believe that a conservative regard for ancient precedent, and a disposition to rest on the popular side of the controversy, have kept the carrier's responsibility wound to this pitch, more than an unshaken conviction of the justice and necessity of the rule, whatever changes in society or in the modes of transportation time might bring. Consistency drove our courts to declaring ships at sea public carriers in this sense of public insurers; but how slight the chance here of plunder by fraud or collusion when compared with that "poor carrier" who travelled by himself over lonely roads infested by marauders, and whose hard lot, should he, an honest fellow, happen to be robbed without any default whatever on his part, Lord Holt could not, out of his humanity, help pitying. Modern business methods, modern inventions, modern customs, have all reduced the carrier's opportunities for clandestine plunder of his customers quite as low, it may be thought, as those of depositaries, commission merchants, and a host of others who were never put in this pillory of public policy. The carriage of property is now organized on an immense scale, engaging numerous servants, conducted with much publicity, choosing often for managers men whose names ought to inspire confidence among their fellow-citizens, and who, at all events, would not be suspected of plundering the merchandise they conveyed. With the introduction of steam, and of traffic by railway more especially, we find the Anglo-Saxon rule put to a harder strain in the last fifty or seventy-five years than during all the preceding centuries of inland carriage put together. The distrustful feeling towards common carriers which modern experience engenders among consignors is not so much that of petty pilfering on their part, as of overbearing and extortionate conduct, and negligent and reckless transportation. Except for some need of an advantage to the pigmy who contends against a giant, and a certain dread, among the people, lest our ministers become our masters, it is likely that the old maxims would, ere this, have spent considerable of their pristine force.

[1] § 408. See c. 5, *post*.

The influence of modern insurance as a special pursuit is also felt.[1]

327. Loss or injury by act of God constitutes the first legal exception to a carrier's risk of transportation. A loss by "act of God" signifies such irresistible disaster as results immediately from natural causes, and is in no sense attributable to human agency.[2] The current of the decisions serves to confirm the strict, if not precisely literal, construction put upon this term by our earlier jurists; a term which indicates that which man neither produces nor can contend against, a natural necessity, as the carrier's sole ground of justification under the present head, and not merely some calamity which human intervention so brought about that the carrier was unable to escape it, and which human instrumentality might have altogether prevented. Accidents attributable, while the carrier pursues his line of duty, to lightning, tempest, earthquake, flood, and sudden death, afford the usual instances of disaster which the common law recognizes as the "act of God."[3] Damage caused by rain, stress of bad weather, snow, freezing, thawing, rough winds, and the like, are also referable to this head.[4] But, since the less sudden and violent action of the elements may better be foreseen by prudent men, and guarded against, or, at all events, kept from doing their worst, the carrier is here less readily excused than before.[5]

[1] § **409**; 10 Rich. (S. C.) 113; 81 Tex. 605. A carrier must run his usual risk, notwithstanding insurance. Willock *v.* Railroad, 166 Penn. St. 184.

[2] § **410**. The civil law employs a corresponding term, *vis major*. But "inevitable accident" is by no means synonymous with "act of God," since this might be human in its origin. 1 T. R. 27, 33; 4 Doug. 280, per Lord Mansfield. And see Wright J., in Merritt *v.* Earle, 29 N. Y. 115.

[3] § **410**; 1 T. R. 27; Nugent *v.* Smith, 1 C. P. D. 19, 423; Railroad Co. *v.* Reeves, 10 Wall. (U. S.) 176; Michaels *v.* New York R., 30 N. Y. 564; 4 Harring. (Del.) 448, 449; 21 Wend. (N. Y.) 190; Denny *v.* New York Central R., 13 Gray (Mass.), 481; Morrison *v.* Davis, 20 Penn. St. 171; Powell *v.* Mills, 30 Miss. 231; 6 Heisk. (Tenn.) 261; Slater *v.* South Carolina R., 29 S. C. 96 (earthquake).

[4] Empire Trans. Co. *v.* Wallace, 68 Penn. St. 302; 30 Neb. 197.

[5] 40 Mo. 491; Vail *v.* Pacific R., 63 Mo. 230 (snowstorm, blocking the

328. **But losses by fire** are, generally speaking, not to be excused as the "act of God." To have to insure against this risk is, perhaps, the harshest infliction which our common carrier must bear; yet to their rule in this respect the courts have firmly adhered. The ground taken appears to be that a fire, whatever may have caused its spread, and however far it may have outrun the control of those who started the first spark, originates in human agency, and not independently of it.[1] Hence the common carrier, by land or water, though free from all complicity in the disaster, energetic in repelling the flames, vigilant and prompt in the moment of danger, must answer for his customer's goods so injured or destroyed. For, as against fires, accidental or otherwise, he is pronounced an insurer.[2] As in the case of fire, loss from the explosion of a steam boiler is also inexcusable; for this originates in human and not divine agency, so that the carrier is here afforded no claim of exemption from the risk of insurer.[3]

329. **The causation of a disaster** is in other cases scrutinized, so as to distinguish between what is the immediate result of human and what of divine or natural agency.[4] And on all

track); 14 Wend. (N. Y.) 215 (freezing of river or canal); 23 Wend. (N. Y.) 306; 4 N. H. 259; Swetland *v.* Boston & Albany R., 102 Mass. 276, 283; Colt *v.* M'Mechen, 6 Johns. (N. Y.) 160 (sudden failure of wind).

[1] § 411; 1 T. R. 27; 5 T. R. 389; 4 Bing. N. C. 314; Morewood *v.* Pollok, 1 El. & Bl. 743; Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539; Parker *v.* Flagg, 26 Me. 181; Moore *v.* Michigan R., 3 Mich. 23; Cox *v.* Peterson, 30 Ala. 608; Graff *v.* Bloomer, 9 Penn. St. 114; 1 Sm. & Marsh. (Miss.) 279; Chevallier *v.* Straham, 2 Tex. 115; 15 Col. 333.

[2] § 411. Cf. Miller *v.* Steam Nav Co., 6 Seld. (N. Y.) 431; Penn. R. *v.* Fries, 87 Penn. St. 234. Where the immediate cause of the loss by fire was a tornado or lightning stroke, this would properly be "an act of God." *Ib.* So too, as it appears, when the case is purely one of spontaneous combustion.

[3] The Barque Edwin, 21 How. (U. S.) 386; 1 Cliff. 322; 1 Sprague, 477; 5 Strobh. (S. C.) 119; The Mohawk, 8 Wall. (U. S.) 153.

[4] § 413. Striking upon some hidden and unknown rock, snag, shallow, or bar, or even some recent formation under water, has thus been excused. Williams *v.* Grant, 1 Conn. 487; Steele *v.* McTyer, 31 Ala. 607. But cf. Friend *v.* Woods, 6 Gratt. (Va.) 189. But a disaster which is due to the

occasions the exercise of ordinary care and diligence on the carrier's part is imperative, as we shall perceive presently.[1]

330. **Accidents in navigation,** which one may attribute to a display of false lights, the drifting of a buoy, or the removal of a beacon, are not devoid of human agency, though the navigator and carrier himself were blameless. Nor, to lay down a broad principle, is any loss on which a carrier might found his own action for damages, because of another party's wrong, fitly pronounced to be an "act of God." A collision of vessels, therefore, not brought on immediately by tempest or other natural accident, ought, upon good reasoning, to be taken as insufficient reason of exemption for a carrier to allege under the present head, notwithstanding his own vessel was blameless.[2] And the same may be affirmed of trains which collide on a railway track, or stages which run into one another, if they belong to different carriers.

331. **Whether the action of animate nature** to the injury of goods may ever excuse a carrier is not clearly stated by authority. Such agency may not be human, but to attribute it to natural necessity and bring it within our exception is another matter.[3]

sinking of an anchor, a mast, a boa , a cable, a cargo, or the like, is due presumptively to human and not divine intervention, and this does not excuse. 21 Wend. (N. Y.) 190; Merritt *v.* Earle, 29 N. Y. 115; New Brunswick Steamboat Co. *v.* Tiers, 24 N. J. L. 697.

The effect of a sudden strike may be such as to excuse a reasonable delay to supply the places of the skilled employés; but this does not excuse as an "act of God." Blackstock *v.* New York & Erie R., 1 Bosw. (N. Y.) 77; 20 N. Y. 48; § **412.**

[1] § **413.** Where a hidden rock, bar, shoal, or snag was generally known and prudent navigators knew how to avoid, this does not excuse as a natural cause. Friend *v.* Woods, 6 Gratt. (Va.) 189; Collier *v.* Valentine, 11 Mo. 299; 5 Harring. (Del.) 238. And whenever the formation is reduced to chart, one is not readily relieved of his legal liability.

[2] § **414**; McArthur *v.* Sears, 21 Wend. 190; Reaves *v.* Waterman, 2 Speer (S. C.), 197; Plaisted *v.* Boston Steam Nav. Co., 26 Me. 132; Mershon *v.* Hobensack, 2 Zab. (N. J.) 372.

But whether collisions may not come within such special contract exceptions as "perils of the sea," or "dangers of navigation," see *post.*

[3] § **415**; Laveroni *v.* Drury, 8 Ex. 166 (destruction by common vermin):

332. But losses due to the natural decay, deterioration, and waste of the things carried are excusable; and such spoliation, also, as may be fairly attributed to the ordinary wear and tear of the journey; all this, however, with reference to the nature and inherent qualities of the articles in question, their unavoidable exposure at the time and place and under the general circumstances, while in charge of a carrier of ordinary prudence, and the condition in which the shipper may have chosen to intrust them to the carrier for the particular transportation.[1] The broad ground of all such exemption is "act of God;" or, in other words, that natural causes must be allowed their natural and inevitable operation during the accomplishment of the bailment purpose, provided the bailee pursue his course with ordinary care and diligence. This doctrine may often be found reinforced by that other reason of exoneration to be later discussed, the fault of the owner or customer himself. For the common-sense of carriage undertakings forbids that the carrier should warrant, by implication, the quality of what he simply conveys for the true owner, be things better or worse, and more or less capable of bearing the exposure of the journey.[2]

333. Whether jettison by a carrier will render him liable for the loss so occasioned depends upon circumstances. Under

Kay *v.* Wheeler, L. R. 2 C. P. 302; 59 Fed. (U. S.) 617; 1 T. R. 27 (destruction by worms); The Northern Belle, 9 Wall. (U. S.) 526; Kopitoff *v.* Wilson, 1 Q. B. D. 377. If the carrier were careless, the more surely is he inexcusable.

[1] § 416. As where liquids evaporate, effervesce, sour, or burst the bottles, or leak out of the casks (see 338, *post*), the carrier is not answerable if not remiss in his duty. 2 H. & N. 575; 6 Watts (Penn.), 424; Powell *v.* Mills, 37 Miss. 492. Or where meats taint, lard melts, fruits decay, or eggs grow stale. 12 How. (U. S.) 272; 12 Ga. 566; Swetland *v.* Boston & Albany R., 102 Mass. 276; 1 Black. (U. S.) 156, 170.

[2] § 416. Observe *post* the same principle applying to the death, sickness, or self-inflicted injury of animals which are carried. The carrier is no insurer against loss or injury such as results from natural and inherent qualities.

justifying conditions jettison may be ascribed to act of God.[1] But where the jettison springs out of no such divine or natural necessity, but is resorted to under circumstances of human compulsion, or because of some strait into which the carrier's imprudence has brought him, or carelessly or wantonly, the carrier should be made to suffer for it.[2]

334. Loss or injury by public enemies constitutes the second exception to the carrier's liability for loss or injury. "Public enemies," in this connection, are those with whom the government which prescribes these conditions of carriage contract is at open war.[3] This is what the expression, more familiar in the mother country, of "king's enemies," or "queen's enemies," properly signifies. Under our American system, the constitution plainly gives the supremacy as to declaring and dealing with public enemies to the United States, or the Federal head. With abundant reason, the Confederate insurgents of 1861, with whom the Union waged open war, have been styled "public enemies," thus affording to our carriers a rule of practical immunity in certain cases which simple justice demanded.[4] Hostile tribes of Indians, too, on our borders, may well be regarded as "public enemies," though their status with reference to the government is a peculiar one.[5]

335. But the violence of mobs, rioters, and insurgents within a sovereign jurisdiction does not constitute a cause of exemption within the meaning of the term "public enemies."[6] This

[1] See 2 Bulst. 280; Gillett *v.* Ellis, 11 Ill. 579; Price *v.* Hartshorn, 44 N. Y. 94.

[2] The Portsmouth, 9 Wall. (U. S.) 682; 17 How. (U. S.) 100; The Delaware, 14 Wall. (U. S.) 579; § 417.

[3] § 418; Russell *v.* Niemann, 17 C. B. N. S. 162; 2 Ld. Raym. 909.

[4] McCranie *v.* Wood, 24 La. Ann. 406; Bland *v.* Adams Express Co., 1 Duv. (Ky.) 232; Philadelphia R. *v.* Harper, 29 Md. 330; Holladay *v.* Kennard, 12 Wall. (U. S.) 254; Nashville R. *v.* Estes, 10 Lea, 749.

[5] Holladay *v.* Kennard, 12 Wall. (U. S.) 254.

[6] Barclay *v.* Cuculla y Gana, 3 Doug. 389. "For though the force be never so great," says Lord Holt, "as if an irresistible multitude should rob him, nevertheless he is chargeable." Coggs *v.* Bernard, 2 Ld. Raym. 909. 918. See also Missouri R. *v.* Nevill, 60 Ark. 375; § 41

is a great hardship imposed by our law upon the carrier, and second only to that of his liability for a loss by accidental fire. And it is well understood that the common carrier can claim no legal immunity from the depredation of thieves and robbers, but is held as an insurer against all losses of this character, even though he were personally free from the reproach of complicity or cowardice.[1]

336. **Acts of pirates fall within** our present exception apparently; inasmuch as pirates are now pursued by civilized nations, and scourged as the common enemies of mankind.[2] So, with equal or better reason, should acts of privateers furnish the carrier with a cause of exemption; for if privateers differ at all from pirates, it is only because the broad seal of a belligerent power sanctions their depredations, so as to exalt those by whom the carrier is thus overpowered all the more nearly to the plane of "public enemies."[3]

337. **Loss or injury by act or fault of the consignor** of the goods, or the customer himself, makes a third cause of exemption. This cause appears not to have been specially stated in the earlier books; but the influence of the consignor's or customer's conduct in diminishing or excluding his right of recovery under the contract, has always been conceded; and in some of the later decisions, this class of exceptions will be found expressly recognized. Whenever the consignor or customer has, under contract of carriage, by himself or his servants, wilfully, fraudulently, or in negligent disregard of his duty as bailor, occasioned the loss complained of, the carrier may set this up for his own especial justification.[4]

338. **Thus, insecure or imperfect packing** which causes damage to the goods imputes fault to the customer rather than to the carrier.[5] Or, if the goods are improperly marked or

[1] See *ante*, 328; § 419.

[2] § 420; The Magellan Pirates, 25 E. L. & Eq. 595.

[3] 1 Kent Com. 96.

[4] § 337; Choate *v.* Crowninshield, 3 Cliff. (U. S.) 184.

[5] § 422; Baldwin *v.* London R., 9 Q. B. D. 582 (damp rags badly packed); 22 Oreg. 14; Klauber *v.* American Express Co., 21 Wis. 21; 9 C. & P. 380. And see *ante*, 314, as to consignor's duty in packing, etc.

directed, the carrier cannot be blamed for their being missent accordingly, in fair pursuance of direction.[1] And as to packing, loading, and securing the property on the vehicle generally, it may often be material to inquire how far the performance, instead of being intrusted to the carrier and his own servants, or where at all events the carrier had the responsible supervision, was kept under the exclusive management and control of the consignor or customer himself; since presumptions of duty may be controlled by the actual circumstances of a case.[2]

339. Bad faith, too, wherever exhibited, dulls the sympathy of the law towards the victim who has practised it to his own injury. And since a carrier may not break packages, and learn for himself what they contain or how much they are worth, nor ply the consignor with searching interrogatories, the latter party should take heed that appearances and his own voluntary statements be not calculated to deceive and impose upon the carrier.[3] And, apart from open statements, should the consignor do up his package artfully, so as to make it appear less valuable or less liable to receive or inflict injury than is really the fact; or, by false marks or other trick, impose upon his bailee; all evil consequences which such misconduct may have invited must be borne by himself. For a carrier is to be charged with no responsibility beyond what the thing appears, on its face and the proof at command, to deserve;

[1] Congar *v.* Chicago R., 24 Wis. 157; Stimson *v.* Jackson, 58 N. H. 138.

[2] § **422**. While the duty of loading on board and stowing belongs properly to the carrier, yet in exceptional cases the shipper sometimes attends to this for special reasons. Ross *v.* Troy & Boston R., 49 Vt. 364; 56 Ark. 424. Where, contrary to usage, the customer selects his own vehicle or part of vehicle, he may be held to have assumed certain obvious risks. Harris *v.* Northern R., 20 N. Y. 232. Cf. Railroad Co. *v.* Pratt, 22 Wall. (U. S.) 123; 102 Mass. 557.

[3] § **423**; *ante*, 314–316. As to the carrier's right to ask the value of a closed package, etc., see Walker *v.* Jackson, 10 M. & W. 168; 14 C. B. 255; 9 Wend. (N. Y.) 115; 8 Pick (Mass.) 182; Merchants' Despatch Co. *v.* Bolles, 80 Ill. 472; Little *v.* Boston & Maine R., 66 Me. 239; Nitro-Glycerine Case, 15 Wall. (U. S.) 521; 42 Ill. 458.

and the sender whose conduct induces him to relax his guard, or goes to deprive him of his just compensation, puts himself without the pale of justice.[1]

340. By his negligent omission of duty, apart from any wilful misconduct, the consignor may exonerate the carrier. Thus, where he fails to warn the carrier of the dangerous, fragile, or perishable nature of articles he delivers, whose peculiar character does not appear on inspection, he puts in jeopardy his right to recover for a loss which his ordinary prudence in this respect might have prevented.[2] Where, too, things break, spoil, or run out, because of inherent defects or properties against whose mischievous operation unusual pains should be taken, the carrier may set up, in extension of the defence of natural wear and deterioration usually allowed him, that the damage was occasioned by the shipper in delivering the property without affording him the means of knowing its real nature or condition. For, if the carrier takes such reasonable pains against wasting, breaking, or spoiling, as the thing, when accepted, appears to require, in accordance with its evident nature and condition, this is pains enough; though as to matters open, and not latent, he is bound to be alert and discriminating.[3]

341. A mixed custody in the transit occasions a mixed responsibility. In all such cases liability for loss may actually rest upon carrier or customer, according to the circumstances.[4]

[1] § **423**; 4 Burr. 2298; 2 Bosw. (N. Y.) 589; Southern Express Co. *v.* Everett, 46 Ga. 303; 10 Otto (U. S.), 24; Hutchinson *v.* Guion, 5 C. B. N. S. 149; Coxe *v.* Heisley, 19 Penn. St. 243; Chicago R. *v.* Thompson, 19 Ill. 578; Hayes *v.* Wells, 23 Cal. 185.

[2] § **424**; 6 E. & B. 470; Farrant *v.* Barnes, 11 C. B. N. S. 553; Nitro-Glycerine Case, 15 Wall. (U. S.) 524; Boston & Albany R. *v.* Shanly, 107 Mass. 568. See also 2 Sprague (U. S.), 35.

Such default on the consignor's part, especially in highly dangerous articles, will render him personally liable for damages thereby occasioned to the carrier or others in person or property. *Ib.*

[3] § **424.** See *ante*, 314, 333.

[4] § **425.** Such is the case, *e. g.*, with the driver of a loaded team upon a ferry boat, with the drover who accompanies a cattle train, or with a passenger who takes hand-baggage.

342. But the carrier's own vigilance should not relax, in order that the consignor's or customer's act or conduct may avail the carrier to excuse a loss.[1] Courts and juries hesitate to transfer the risks of transportation from the carrier to his customer, on any suggestion that the latter has concealed or misrepresented to the former's prejudice, where such concealment or misrepresentation was through inadvertence, or because of a silence neither unnatural nor inexcusable, and where, too, it does not reach fundamentals; but their presumption is rather against the party pursuing his public vocation, who is not intended to enter at pleasure into contracts as one on equal terms, and who, under no circumstances, should be allowed, on trivial grounds, to shift to his patron's shoulders the extraordinary risks which the law compels him to bear by himself.[2]

343. Loss or injury by the public authority affords our fourth and final exception. Since loss by "public enemies" affords the instance of carriage exemption because of human intervention, as contrasted with that occasioned by Divine or natural intervention, such as we denominate "act of God," according to the old statement of the rule (to which we have just added the act of the customer himself), we may here inquire what would be the effect of a seizure of the goods and dispossession by the domestic public authority, or the strong arm of the law; a further exception, by human intervention, if an exception at all.[3] Interference with the transit by process of the courts affords here our clearest illustration. In case of a seizure or legal compulsion because of the carrier's own fault, or under some false or pretended process

[1] §§ 426. 427; 5 Blatchf. (U. S.) 266; 26 Ohio St. 595; 2 Sumn. (U. S.) 567; Lebeau *v.* Steam Nav. Co., L. R. 8 C. P. 88.

While delay might be excused from a misdirection, loss of the goods would not; nor can loss or injury be excused, to which the consignor's remissness did not contribute. 17 La. An. 29; Union Express Co. *v.* Graham, 26 Ohio St. 595; Shriver *v.* Sioux City R., 24 Minn. 506; 102 Mass. 201.

[2] *Ib.* Cf. 12 How. (U. S.) 272; 28 Barb. (N. Y.) 323.

[3] § 428.

the carrier can claim no exemption from full responsibility to the party who employed him.[1] But otherwise, wherever he encounters without fault the service of genuine legal process against the goods, he is properly absolved from further liability if he notifies his customer promptly and leaves the latter to defend, otherwise using due diligence and care.[2] Our conclusion, from these cases and the light of reason, is, that a fourth legal exception should be stated to the carrier's common-law liability: namely, where loss or injury is directly caused by the public authority. And hence, should the carrier's own government, by a direct act of sovereignty, such as embargo, seizure, or impressment, hinder or interrupt his transit or intercept the goods, this overpowering act would serve him as an excuse, whether the government acted by its civil or military officers, through the courts or the executive department; supposing the carrier himself to have acted in good faith and with ordinary prudence and discretion under all the circumstances.[3]

[1] 104 Mass. 159; Kiff *v.* Old Colony R., 117 Mass. 591; Faust *v.* South Carolina R., 8 S. C. 118; Bennett *v.* Express Co., 83 Me. 236; 1 Camp. 451.

[2] Stiles *v.* Davis, 1 Black. (U. S.) 101; Ohio R. *v.* Yohe, 51 Ind. 181 126 Ind. 322; Hett *v.* Boston & Maine R., 69 N. H. 139; Bliven *v.* Hudson River R., 36 N. Y. 403; Spencer *v.* Chodwick, 10 Q. B. 516; 18 Oreg. 419; Furman *v.* Chicago R., 81 Iowa, 510. But the process should be valid and the customer duly notified. 86 Minn. 33.

A public seizure under police regulations of a State excuses the carrier; but he should not connive at or procure it, nor withhold notice from his customer. Railroad Co. *v.* O'Donnell, 49 Ohio St. 489.

That the rightful owner obtained possession by or without legal process would of course justify an honorable carrier.

[3] That under such constraint a carrier need not accept private business, see Phelps *v.* Illinois Central R., 94 Ill. 548. And see 4 Cliff. (U. S.) 228, where the carrier was exonerated from the loss of liquors in his custody, which were seized and destroyed under the Maine liquor act of 1871; having given due notice of the seizure to the owner. So, too, the carrier's exemption during our civil war, which one State court excuses as the act of a "public enemy," appears in another regarded as an act of public (or "Confederate") authority. Nashville R. *v.* Estes, 10 Lea (U. S.), 749.

344. The carrier is liable for his servants as for himself, whether their misconduct be wilful or simply careless. All such liability for neglect or default of servants transcends the rules of agency so as to render the carrier liable absolutely for the felony or wilful wrong of his servants.[1] The fraud and misconduct of the carrier or his servants, which occasions a loss, forbids, therefore, his exemption on any plea, whether it be "act of God" or other pretended excuse; as if his ship be wilfully scuttled, or run aground, or deserted, or set on fire, whereby the cargo sustains injury.[2]

345. Proximate and remote cause are always regarded in applying any and all of the four excuses we have enumerated. We must consider whether, in a case of loss or injury, the direct and proximate cause of that loss or injury was the carrier's own remissness of duty rather than the legal excuse which he sets up. Thus, to take the most familiar exception, "act of God." Manifestly all issues of the present character, discussed under this head, pivot upon proximate or immediate cause of the disaster as distinguished from what is remote. Hence, the carrier's own conduct, as inducing or enhancing the loss, or otherwise, becomes an affair of great moment. If a ferryman, for instance, ventures out in a blinding storm, or the master of a ship crowds sail to meet a tempest, or an express or railway carrier undertakes to transport animals notwithstanding a flood, the disaster invited by thus daring the elements should not be ascribed to the elements themselves,

[1] § 429; 1 Bosw. (N. Y.) 77; Winter *v.* Pacific R., 41 Mo 503; Bulkley *v.* Cotton Co., 24 How. (U. S.) 386 (towboat as agent); 11 Wend. (N. Y.) 571; Mayall *v.* Boston & Maine R., 19 N. H. 122 (partner as servant). As to those loading, see 84 Tex. 318; *ante*, 311. The transporting company employed by an express is the express company's servant. *pro hac vice*. Bank of Kentucky *v.* Adams Express Co., 93 U. S. 174. And see Boscowitz *v.* Adams Express Co., 93 Ill 523. See also connecting carriers, c. 9, *post*. Strikers who sever their relation with a company cease to be servants in a binding sense. Geismer *v.* Lake Shore R., 102 N. Y. 563; 65 Ind. 188. Cf. Central R. *v.* Georgia Exchange, 91 Ga. 389.

[2] Waters *v.* Merchants' Ins. Co., 11 Pet. (U. S.) 213; Stephens *v.* London R., 18 Q. B. D. 121.

but to the carrier's foolhardiness.[1] Wherever, in short, by overloading, deviating, furnishing unsuitable vehicles, servants, or equipments, journeying at improper seasons or in unsafe places, carelessly directing his vehicle, or imprudently exposing the property contained therein, the carrier substantially occasions the loss or injury under discussion, the proximate cause of loss, no matter what tempest or other natural calamity may come upon him, is of man's intervention, and that man the carrier himself. The law refuses to accept his excuse in such cases, because the essential cause of loss was his remissness in duty.[2]

346. **And, as with exposure to the unforeseen action of natural elements,** so in general as to permitting their normal operation and the wear and tear of the transit, no carrier can escape liability for loss and damage, who, from a failure to exercise such care and skill as is usually bestowed by prudent persons of his calling, becomes in any instance the efficient cause or occasion thereof.[3] Likewise is the carrier denied the privilege of alleging natural spoliation or "act of God" in his defence, where he placed things in close contact, which prudent carriers know should be kept far apart, and so caused mischief; where, for instance, what he perceives to be a bale of silk is

[1] § 431; 2 Nott & McCord (S. C.), 19; Adams Express Co. *v.* Jackson, 92 Tenn. 326.

[2] § 431; The Schooner Sarah, 2 Sprague (U. S.), 31; West *v.* Steamboat Berlin, 3 Iowa, 532. A needless deviation renders the carrier liable. Phillips *v.* Brigham, 26 Ga. 617; 7 Blackf. (Ind.) 497; 4 B. & S. 66; 4 Harr. & J. 291. And see Tierney *v.* N. Y. Central R., 76 N. Y. 305; Hewett *v.* Chicago R., 63 Iowa, 611 (freezing or melting); 79 Iowa, 518 (neglect of cold storage for long journey); 21 Wis. 21 (wetting); Philleo *v.* Sanford, 17 Tex. 227; 11 Pick. (Mass.) 41 (neglect of directions); Packard *v.* Taylor, 35 Ark. 402 (unseaworthy vessel); Kinnick *v.* Chicago R., 69 Iowa, 665 (failure to prudently preserve and diminish loss, where calamity overtakes).

[3] Thus, for bad stowage which directly causes loss or injury, the carrier is liable. The Star of Hope, 17 Wall. (U. S.) 651; 16 Fed. (U. S.) 148; 29 Fed. 373. And see §§ 432, 433. So for causing a leakage. Leech *v.* Baldwin, 5 Watts (Penn.), 446. Or for badly ventilating or regulating light. 3 Sawyer (U. S.), 176; 8 Ben. (U. S.) 491. Or for careless handling. § 432.

set against sulphuric acid or molasses, or breadstuffs are deliberately packed among volatile oils of penetrating flavor.[1] Stowage should be suitable according to all the circumstances: such as the character and bulk of the particular goods, their liability to spoil, and whether other goods or the proper appliances of the vehicle will be incommoded.[2] No jettison, of course, is excusable which is immediately traceable to the fault of the carrier.[3]

347. To loss or injury from "public enemies" the rule of proximate and remote cause is further applied. Here, as under our former exception, the overpowering calamity must have been the proximate and immediate cause of the loss; so that the carrier's want of ordinary care and diligence, as well as his fraud and wilful misconduct, (or the remissness of his servants) entering as a contributing element into the disaster, would commonly leave him responsible as before.[4] For the experience of many confirms the remark that the seizure, destruction, or confiscation of personal property on transit, even by public enemies, is by no means so irresistible or beyond the power of a carrier's prevention, that common prudence and energy may not, in many instances, preserve them: while, on the other hand, opportunity and the prospect of private gain may tempt such a party to collude with his country's foes, or run dangerous risks, at the sacrifice of those who were compelled to trust him. That proximate and remote cause must be considered where "act of the customer" is set up in defence clearly enough appears from our former statements on that point. This default or misconduct

[1] Alston *v.* Herring, 11 Ex. 822; 6 E. & B. 478 *n.*; 1 Sprague (U. S.), 530.

[2] Stowage under deck is presumed under a vessel's bill of lading. The Delaware, 14 Wall. (U. S.) 579; 3 Conn. 9. But usage, as implying a short distance, etc., may modify. See 8 Ben. (U. S.) 216; § **433**; 17 How. (U. S.) 114; 11 Ill. 579; 13 Me. 229.

[3] The Portsmouth, 9 Wall. (U. S.) 682. And see 94 N. C. 451; Mackill *v.* Wright, 14 App. Cas. 106 (stowage of coal among machinery not proper).

[4] § **434**; Holladay *v.* Kennard, 12 Wall. (U. S.) 254; Porcher *v.* Northeastern R., 14 Rich. (S. C.) 181.

of the carrier's consignor or consignee — in other words, of his customer — must have been the primary and essential cause of the mischief in order to avail the carrier.[1] The same holds true of loss or injury "by the public authority;" an excuse which no carrier is competent to set up where he yields heedlessly to legal process such as any claimant might set in motion under the color of a right, without either notifying his customer to defend the suit or testing the justice of the claim for himself.[2] Proximate and remote cause is also regarded in deciding as between an excusable and non-excusable calamity; as, for instance, where a fire (which is not legally excusable) occurs, which, it is claimed, would not have destroyed the goods had not a tempest driven the flames suddenly forward.[3]

348. In general, for the ordinary and proximate consequences of their own culpable carelessness, common carriers are answerable, though not for such consequences as are remote and exceptional; and this liability includes all those consequences which may have arisen from the want of ordinary prevision to anticipate or ordinary care to reduce the damage by what occurs, so far as, under all the circumstances, a due exercise of diligence would have prevented loss.[4] And in this connection we may revert to the measure of a carrier's duty already set forth. For, by far the better opinion, it is simply the measure of ordinary care and good faith which the law properly exacts of him, wherever questions of contributory negligence arise. Some courts seem to have wrongly supposed that with his legal risk as insurer, went a requirement of extraordinary care on his part where causes primary and secondary, proximate and remote, had to be considered.[5]

[1] § **434**; *ante*, 311, 312.

[2] *Ante*, 313.

[3] Pennsylvania R. *v.* Fries, 87 Penn. St. 234.

We shall see the principle of proximate and remote cause extended to such other exceptions from liability as special contract introduces into the carriage undertaking. See c. 5, *post*.

[4] See Scott *v.* Allegheny R., 172 Penn. St. 646.

[5] §§ **435–437**. The conflict, in England, arose in the case of an animal whose death was evidently caused by fright and struggling on a rough

349. Where the disaster was inevitable notwithstanding the carrier's default, the question arises whether such an excuse is ever available to him. Thus, supposing the master of a ship to have deviated so slightly, or for so short a period, that the same tempest which actually wrecked his vessel must in-

voyage, where the creature had been reasonably well secured and regarded while the general safety of the vessel required special attention during the bad weather. On the principle that with the utmost foresight and skill the animal's life might have been preserved, the lower court held the sea-carrier liable. But on appeal the decision was reversed; and this exposition was condemned as demanding too much of the carrier, as against the direct operation of "act of God." In other words, the exertion of reasonable or ordinary skill and prudence to avert or overcome the natural disaster is all that the law holds requisite. Nugent *v.* Smith, 1 C. P. D. 19, 34; s c. on appeal, 1 C. P. D. 423, 435.

"It is somewhat remarkable," observed Cockburn, C. J., on appeal, "that, previously to the present case, no judicial exposition has occurred of the meaning of the term, 'act of God,' as regards the degree of care to be applied by the carrier, in order to entitle himself to the benefit of its protection." 1 C. P. D. 423, 435.

In America, the same general inquiry has arisen with reference to land carriers, and with the same preponderance of authority. Thus, in New York State, a strict rule was applied for contributory negligence, where "act of God" had directly occasioned the loss. Goods were left in the freight depot at the Hudson River, and a sudden flood arose so as to wet and injure them. The carrier, having delayed (though not unreasonably) to forward the goods before the flood came, was here held liable. Michaels *v.* N. Y. Central R., 30 N. Y. 564; 30 N. Y. 630. But, since reasonable delays in transportation are always excused, and merely ordinary care would not have averted such a disaster, the railway carrier was in Massachusetts relieved, upon the same showing of facts. Denny *v.* N. Y. Central R., 13 Gray (Mass.), 481. And in a Pennsylvania case the standard of simply ordinary care was applied where "act of God" was shown. Morrison *v.* Davis, 20 Penn. St. 171. The rule of Pennsylvania and Massachusetts, rather than that of New York, received, several years later, the approval of the Supreme Court of the United States; a sanction which, under all the circumstances, ought to preponderate in American tribunals. Railroad Co. *v.* Reeve, 10 Wall. (U. S.) 176. And see, as confirming such a conclusion, the later cases: 115 Mass. 304; 68 Penn. St. 302; Vail *v.* Pacific R., 63 Mo. 230; 12 Wall. (U. S.) 254; 9 Heisk. (Tenn.) 58; 15 Col. 333; Black *v.* Chicago R., 30 Neb. 197; Smith *v.* Western R., 91 Ala 455; Baltimore R. *v.* Keedy, 75 Md. 320; Johnson *v.* Tennessee R., 90 Ga. 810; 101 Cal. 187.

fallibly have overtaken it, even if he had steadily pursued the true course, will he be held liable for the loss of the goods on board? Or must he strictly respond, supposing goods were left on deck, in violation of his duty, and yet the storm that washed them away destroyed likewise all that were stowed in the hold? The Roman law would, under such circumstances, have exonerated the carrier. Pothier is an eminent authority in favor of such a doctrine.[1] Our common law appears to incline in the same direction; permitting the carrier to show in defence, that although he may have been in default, yet that the loss was independent of such default, and must have happened regardless of it.[2] As for delay or deviation, whereby goods are brought into immediate contact with the excepted peril, we may well conceive of circumstances rendering such delay or deviation not only reasonable, but highly expedient.[3] All this goes, however, towards justifying, not so much the admission of contributory wrong or default on the carrier's part, despite which the excepted calamity, it is shown, must have happened, as to strike away the link of contribution altogether, and leave the excepted cause in sole operation as the motive of the disaster. Or, it may be said, the bailment of itself mutually implies that in a peculiar and pressing emergency, the carrier may delay or even deviate, observing the bounds of prudence and good faith.[4]

350. The carrier's legal excuse should be set up by him in defence when charged with a loss or injury. For, to discourage litigation, the common law strongly presumes against every public transporter to whom, in the regular course of business, property has been consigned for carriage, which fails in due time to reach its destination reasonably safe and sound. Proof, to this extent, of an owner's or customer's

[1] § 438; Story Bailm. § 413 *a–d*.

[2] Tindal, C. J., in Davis *v.* Garrett, 6 Bing. 716 (unseaworthy vessel captured by public enemy). And see, as to stowage on deck not producing the loss, Ware (U. S.), 188; Gardner *v.* Smallwood, 2 Hayw. (S. C.) 349.

[3] The Schooner Sarah, 2 Sprague (U. S.), 31.

[4] For this suggestion as applied to bailments for hire, see *supra*, 115, 116. And see 13 Mo. 352; 28 Mo. 323; 2 Watts (Penn.), 114; 26 Ga. 617.

loss or injury establishes, *prima facie*, the liability of the common carrier to make that loss or injury good, and puts upon him the onus of controverting such proof, or of relieving himself by showing that the occasion of loss or injury was such as ought, by law, to excuse him.[1] But while the consignor or owner of goods is not commonly bound to prove how or where the mischief actually happened, — matters whose knowledge, except in special cases, must be within the carrier's peculiar province, if proof be attainable at all, — it is yet incumbent upon such party, as the foundation of his rightful claim, to show a complete delivery of the property to the party exercising the public vocation, and further, that the goods in question were delivered over, at the end of the transit, in the damaged or wasted condition complained of, or not delivered over at all. His showing must be such as leaves it improbable that the loss or injury could have occurred from any other cause than such as leaves a carrier liable.[2] And whenever the carrier has, in response, brought the loss or injury fairly within one of the foregoing legal exceptions, act of God, act of public enemy, or act of the consignor or customer, or act of public authority, by ample evidence to that effect, such as imputes no blame to himself, he is not bound to show further, affirmatively, that there was, in fact, no contributory negligence or misconduct on his part, but may here rest his case, and leave the other to show such negligence or misconduct, as proximate cause of the mischief, by way of rebutting testimony if he can.[3] In general, and as the final result of all the evidence adduced, the burden

[1] § 439; Nugent *v.* Smith, 1 C. P. D. 19, 423; 1 T. R. 27; 2 Ohio St. 131; Michaels *v.* New York Central R., 30 N. Y. 564; Montgomery R. *v.* Moore, 51 Ala. 394; Hall *v.* Cheney, 36 N. H. 26; Alden *v.* Pearson, 3 Gray (Mass.), 342; Van Winkle *v.* South Carolina R., 38 Ga. 32; Little *v.* Boston R., 66 Me. 239; 89 Mo. 340.

[2] Midland R. *v.* Bromley, 17 C. B. 376; 2 Blatchf. (U. S.) 64; Ringgold *v.* Haven, 1 Cal. 108.

[3] Nugent *v.* Smith, 1 C. P. D. 423; Vail *v.* Pacific R., 63 Mo. 230; 3 Woods (U. S.), 380; Railroad Co. *v.* Reeve, 10 Wall. (U. S.) 176.

As to the burden of proof under special contract modifications of liability, see next chapter.

of a *prima facie* case against the carrier rests upon the customer.[1]

351. Where the carrier is styled an "insurer," this is not meant in any technical sense.[2]

352. As to the transportation of live animals peculiar considerations arise, especially where they are transported by the wholesale. Litigation over the liability for such transportation involves usually two elements of especial difficulty: one, the animal's own nature and disposition; the other, the behavior of the owner, or his drover or servant, who may have accompanied the creature on the transit. A public carrier incurs all the usual risks of his profession at the common law, with reference to brute creatures that he undertakes to transport; for these are chattels.[3] He must fasten up and secure the animal well, to prevent its escape;[4] and must put

[1] Where goods are found damaged at the end of the transit, and it is left, on the whole, in doubt, upon the owner's suit, what the real cause of injury was, so that the loss or damage may as well be attributed to the carrier's excepted cause as to the carrier's negligence, the plaintiff, it is held, cannot recover. Muddle *v.* Stride, 9 C. & P. 380; Clark *v.* Barnwell, 12 How. (U. S.) 272. Damage which appears to be the result of the inherent nature or inherent defect of the thing of course relieves the carrier. 3 Woods (U. S.), 380; 12 Fed. (U. S.) 876 (decay of perishable articles or horse's sickly condition). But where the evidence imputes actual carelessness or misconduct to the carrier, on the owner's showing, all the more surely is his case established against the carrier. See Little *v.* Boston R., 66 Me. 239. A case being made out of delivery in good order to the carrier and non-delivery over, the burden shifts to the carrier in conformity with the rule already stated. 79 Tex. 26; Browning *v.* Trans. Co., 78 Wis. 391; cases *supra*. But some evidence of non-delivery, according to the carrier's obligation, ought to be shown. Roberts *v.* Chittenden, 88 N. Y. 33.

Care and diligence is according to circumstances. See Wolf *v.* American Express Co., 43 Mo. 421; 67 Fed. (U. S.) 426; § **441**.

[2] § **440**; Nettles *v.* Railroad Co., 7 Rich. (S. C.) 190; 13 Ind. 263; 12 La. An. 352 (abandonment rule). And see as to subrogation of insurance company, Mobile R. *v.* Jarey, 111 U. S. 584.

[3] § **442**; Nugent *v.* Smith, 1 C. P. D. 19, 423; McCoy *v.* K. & D. M. R., 44 Iowa, 124.

[4] 68 Ark. 218; 2 Stark. 323; 8 Humph. (Tenn.) 497. Cf. Blower *v.* Great Western R., L. R. 7 C. P. 655.

it in some suitable place which may afford reasonable shelter and protection. He must not endanger the creature's life and health by neglecting to provide food, water, and the means of repose or needful exercise on the journey.[1] In case of delay or accident, from whatever cause, he must reasonably regard the comfort and safety of the creatures intrusted to his care, whether in keeping them on board or unloading and re-loading them.[2] Where cattle are transported by rail in large numbers, cars of a peculiar construction are commonly used; but whatever the vehicle, or part of a vehicle, assigned to animals, this must be of strength reasonably sufficient to keep them from breaking through, escaping, or doing themselves serious damage, and in all respects well adapted for the peculiar transportation purpose.[3] Unreasonable delay or unreasonable exposure might be at the beginning or end of the transit or at some intermediate point.[4] In short, the carrier of animals is responsible for any loss or injury which the pursuance of ordinary diligence and skill in his vocation might have obviated; and he will be charged as their insurer, save so far as he can bring himself within some one or more of the recognized exceptions of the law.[5] But the common carrier of animals does not necessarily make himself an insurer against a loss or injury which is really attributable to the nature, habits, disposition, and propensities of the animals, and such as ordinary diligence on his part would not

[1] Illinois Central R. v. Adams, 42 Ill. 474; 71 Ill. 434; Harris v. Northern Indiana R., 20 N. Y. 232; Dunn v. Hannibal R., 68 Mo. 268.

[2] Kinnick v. Chicago R., 69 Iowa, 665.

[3] Cf. Harris v. Northern Indiana R., 20 N. Y. 232; Welsh v. Pittsburg R., 10 Ohio St. 65; Indianapolis R. v. Strain, 81 Ill. 504; 184 Ill. 57; Pratt v. Ogdensburg R., 102 Mass. 557; Railroad Co. v. Pratt, 22 Wall. (U. S.) 123; Hawkins v. Great Western R., 17 Mich. 57; 29 Fed. R. 373. If cars are built suitably and strongly enough for animals ordinarily vicious and unruly, the carrier has done his duty sufficiently. Selby v. Wilmington R., 113 N. C. 588.

[4] Where live-stock are delayed by stress of bad weather, they should be suitably sheltered according to their natural requirements. Feinberg v. Delaware R., 52 N. J. 451. And see 71 Miss. 757.

[5] § 442. See Evans v. Dunbar, 117 Mass. 546.

probably have prevented. Should the animal sicken, pine away, and die a natural death; or, because of fright, restlessness, or viciousness, inflict injury on itself or other animals of the same owner; or even should it escape, — it is the owner who must bear the loss, so long as the carrier appears to have faithfully performed his own duty as the undertaking bound him.[1] The principle of this exception is analogous to that already noticed, where goods spoil and deteriorate from inherent defects, and other natural causes; no blame attaching to the party transporting them.[2]

353. If the consignor, or his drover or servant, travels with his own live-stock, as in a cattle-train of our modern times, he relieves the carrier from the active care of the creatures, in so far as he assumes such care for himself. Within his understood sphere of action, as for feeding and watering, or the treatment of bruises and disease, a person thus travelling in charge of one's stock as care-taker is more immediately answerable than the carrier; and for negligence or misconduct on his part, productive of injury, or, indeed, for damage occasioned by him, whether culpably or not,[3] the carrier may set up that it was the consignor's or customer's act.[4] This assumes, however, that the carrier was not himself at apparent fault; for, whether in intermeddling, or while attending to

[1] Blower *v.* Great Western R., L. R. 7 C. P. 655; Kendall *v.* London R., L. R. 7 Ex. 373; Smith *v.* New Haven R., 12 Allen (Mass.), 531; 3 Met. (Ky.) 51; Mynard *v.* Syracuse R., 71 N. Y. 180; Central R. *v.* Smitha, 85 Ala. 47; Louisville R. *v.* Bigger, 66 Miss. 319; Coupland *v.* Housatonic R., 61 Conn. 531; 81 Mo. App. 109; 110 Ga. 659. Still clearer is the excuse where such mischief develops in the course of some irresistible, natural, and hence excusable calamity. Nugent *v.* Smith, 1 C. P. D. 19, 423.

[2] *Ante*, 332.

[3] Hart *v.* Chicago R., 69 Iowa, 485 (fodder set on fire by the drover in charge, though not carelessly); 87 Ga. 463.

[4] Wilson *v.* Hamilton, 4 Ohio St. 722; Evans *v.* Fitchburg R., 111 Mass. 142; Heller *v.* Chicago R., Mich. (1896) (no care-taker sent as promised); Hengstler *v.* Flint R., 125 Mich. 430. Consignor at fault who does not send a drover when he agreed to do so. 117 Ga. 832. But in absence of agreement or undertaking to send a drover, the carrier must bear his full risks. 61 Neb. 618.

running the train or other transit duties of his own or supervising the carriage of the creatures, the carrier continues responsible for all such damage as his misconduct or want of ordinary diligence may have inflicted; and as a public carrier, he continues in a considerable measure the insurer of such freight.[1] He must at least give any such care-taker on the shipper's behalf full opportunity to take care.[2]

354. Ferry transportation furnishes another instance of mixed custody in transportation, as concerns the liability for horses and teams on board. As this business is usually conducted at the crowded centres of trade, the ferry seldom takes entire charge of such property, but leaves the driver to cross in charge of his team. A ferryman is bound to keep his slips in good order, and to provide suitable means of ingress and egress; to have a boat stanch, strong, and seaworthy, well constructed and fitted up for its peculiar service, and properly manned, equipped, and managed; and to maintain reasonable safeguards, and enforce such customary rules as may keep the boat well trimmed on its passage and promote the general security and comfort in person and property of all concerned. He must not overload, nor venture out imprudently in bad weather, without the means of averting possible dangers. Should damage result from his violation of such plain duties,

[1] Sneesby *v.* Lancashire R., L. R. 9 Q. B. 263; s. c. 1 Q. B. D. 42; Powell *v.* Pennsylvania R., 32 Penn. St. 414; Illinois Central R. *v.* Adams, 42 Ill. 474; Cragin *v.* N. Y. Central R., 51 N. Y. 61. See Coupland *v.* Housatonic R., 61 Conn. 531.

[2] § **443**; Smith *v.* Michigan R., 100 Mich. 148.

In general it may be added that the customer sometimes participates or takes the entire charge, in loading his animals on board a cattle car. East Tennessee R. *v.* Whittle, 27 Ga. 535; Harris *v.* Northern Indiana R., 20 N. Y. 232 (selection of a car). And so, too, as to the method of fastening the animal he offers, any consignor may be held responsible, on the general principle of proper "packing," etc. See curious distinction made in Richardson *v.* North Eastern R., L. R. 7 C. P. 75 (dog slipping a noose or collar). A consignor may be presumed better acquainted with his animal's propensities than the carrier, and hence should take due precautions. And see 54 Mo. 385; Evans *v.* Fitchburg R., 111 Mass. 142; Rixford *v.* Smith, 52 N. H. 355.

the carrier must respond to his patron who suffers in consequence.[1] But if the ferryman discharge his duty in the premises with ordinary diligence and discretion, and the loss be occasioned by the animal's restiveness, viciousness, or other inherent fault, the owner must suffer for it; and so, too, where the owner or his servant, instead of surrendering the animal to the ferryman's entire custody, drives on board, selects his place, and, undertaking, in fact, to look after his creature, occasions the damage by neglecting to do so.[2]

355. Expressions common in our modern bills of lading and similar documents of common carriage illustrate further the common-law doctrines of liability already discussed. Phrases of corresponding tenor might be cited, too, from marine insurance policies.[3] But any and all terms of exception, such

[1] § 445; 2 Nott & McC. (S. C.) 19; 5 Mo. 36; Ferris *v.* Union Ferry Co., 36 N. Y. 312; Miller *v.* Pendleton, 8 Gray (Mass.), 547; Willoughby *v.* Horridge, 12 C. B. 742; 20 Ill. 504.

[2] 3 Met. (Ky.) 51; Lewis *v.* Smith, 107 Mass. 334; 7 Cush. (Mass.) 155. Cf. 5 Cal. 360.

[3] § 446. The stated exceptions under a bill of lading or stated risks in a policy of insurance vary, of course, with time and circumstances and the changing methods of transportation. But the following are the phrases most commonly employed in carriage by water, to which special allusion is made in the text:

1. *Exception of "perils of the sea,"* or "*perils of navigation.*" The former expression, which for a long time was the only one used by English carriers in merchant vessels under bills of lading, covers, doubtless, natural accidents peculiar to that element. But the phrase is by no means synonymous with "act of God"; for, excluding on the one hand altogether the idea of land calamities, it has on the other hand been judicially interpreted so as to protect various losses by sea which are not referable, on the principles already discussed, to the intervention of Providence. "Perils of navigation" is a phrase of much the same import, which is now sometimes preferred to "perils of the sea," as less technical. Loss by fire or explosion, however, is not thus included. Morewood *v.* Pollok, 1 E. & B. 743; Propeller Mohawk, 8 Wall. (U. S.) 153; 1 Sprague (U. S.), 477. See further, § 446; Southgate, The, (1893) Prob. 329; McKinlay *v.* Morrish, 21 How. (U. S.) 243 (sweating); L. C. 3 C. P. 476 (collision).

2. *Exception of "dangers," "accidents," etc.* "Accident" excludes human design; while "danger" may be considered a generic term, of

as express contract creates in favor of the carrier, must be distinguished from those three sanctioned and firmly estab-

which "peril" is the specific, as importing some imminent danger. But whether an exception of "dangers and accidents of the seas and navigation" is to be construed as essentially different from "perils of the seas," may well be doubted. See 15 M. & W. 746. After much dispute it is settled in England that damage done by water entering through holes made by rats is within the exception of "dangers and accidents," etc. Pandorf *v.* Hamilton, 12 App. Cas. 518.

3. *Exception of "dangers" or "perils" of the "river," of "lake navigation," etc.* Clauses of this description are often found in modern bills of lading, but less in Great Britain than America, where inland navigation is of so vast consequence. By such expressions, ordinary dangers or perils, corresponding to those of the sea, which attend the inland navigation referred to, are mainly intended. Transportation Co. *v.* Downer, 11 Wall. (U. S.) 129. But the peculiarities which distinguish transit by inland waters from that by sea are not to be forgotten. See further, § **446**; Hays *v.* Kennedy, 41 Penn. St. 378; Garrison *v.* Memphis, 19 How. (U. S.) 312; 30 Ala. 608; Hibler *v.* McCartney, 31 Ala. 501; Kay *v.* Wheeler, L. R. 2 C. P. 302; 8 W. & S. (Penn.) 44; 7 Yerg. (Tenn.) 340; 28 Mo. 323; 55 Ala. 387 (collision). It is peculiarly incumbent upon a carrier who navigates inland waters to avoid running ashore, to keep clear of other craft, and to look out for bridges. The Lady Pike, 21 Wall. (U. S.) 1; The Mohler, 21 Wall. (U. S.) 230.

4. *Exception of "restraint of princes," "losses by the king's enemies," etc.* As to siege or blockade, see Rodocanachi *v.* Elliott, L. R. 8 C. P. 649; 9 Allen (Mass.), 299.

5. *Miscellaneous phrases of exception.* The present tendency of common carriers and insurers is to multiply words and expressions, so as more clearly to except particular perils, dangers, and accidents, which are not embraced in general phrases like the foregoing. How eagerly, in fact, railways and ship-owners run to cover behind special contract provisions of their own framing will better appear in our next chapter. Among the more striking of these miscellaneous exceptions, are these: "Stranding." 8 Bing. 458; 7 T. R. 210; 33 W. R. 342 ("jettison and stranding"). Loss by "fire," or "accidental fire," "explosion," etc. 5 Wis. 454; Bank of Kentucky *v.* Adams Express Co., 93 U. S. 174; 3 Iowa, 532; 66 Vt. 290. Loss by "thieves" or "robbers." Taylor *v.* Liverpool Steam Co., L. R. 9 Q. B. 546; De Rothschild *v.* Steam Packet Co., 7 Ex. 734. "Damage to goods which can be insured against"; a phrase referring to damage by the loss or destruction of the goods, but not to loss by their abstraction. Taylor *v.* Liverpool Steam Co., L. R. 9 Q. B. 546. "Dangers of the roads," which commonly means, as employed in water carriage, dangers of marine roads; or, if in land carriage, then such dangers

lished by our Anglo-Saxon public policy, and which this chapter has aimed to set forth; viz., act of God, act of public enemies, act of consignor or customer; to which we have added, act of public authority. These and other contract exceptions remain for discussion in our next chapter.[1]

as the overturning of a carriage in rough and bad places. De Rothschild *v.* Royal Mail Steam Packet Co., 7 Ex. 734. Loss by "capture." Losses by vermin, by leakage, by breakage, by pilferage, by accidents of machinery, and the like, are also found expressly excepted; in short, the enumeration takes often a very wide range, making verbal mention even of the common-law instances of exemption at the same time. See 7 Ex. 734; L. R. 9 Q. B. 546; Ohrloff *v.* Briscall, L. R. 1 P. C. 231; Edwards *v.* Steamer Cahawba, 14 La. An. 224; The Pereire, 8 Ben. (U. S.) 301.

[1] § 416. The courts, in construing all such phrases as these, will very properly decline to infer a mutual intention that the loss shall excuse the carrier, regardless of his agency therein. Hence, under an exception of "fire," "theft," "capture," "leakage," "breakage," "jettison and stranding," and the like, the peril stated must have been the real cause of damage; not the dereliction of duty, culpable negligence, or bad conduct of the carrier himself, without which the disaster would not have happened; though, whether such construction be founded in a fair interpretation of what the parties meant, or a deeper public policy against which private convention is powerless, is not universally settled in England and America, as the next chapter will show.

We may here add that, in general, causes of exemption enumerated under bills of lading and insurance policies are not to be extended, by inference, for the carrier's undue advantage. For instance, a loss by theft or robbery, when committed by persons on board ship, or by persons coming to the vessel while not on the high seas, is not a "piracy," nor, of course, a peril of the seas. King *v.* Shepherd, 3 Story (U. S.), 349; De Rothschild *v.* Royal Mail Steam Packet Co., 7 Ex. 734. By "thieves" is meant, presumably, thieves external to the vessel or other vehicle, and not a thievish servant, sailor, or passenger. Taylor *v.* Liverpool, &c. Steam Co., L. R. 9 Q. B. 546. Even where "theft" or "robbery" or "barratry of master and mariners" is excepted, the carrier has the *onus* of showing by whom the crime was committed; and if he cannot so clear himself, the owner may recover. *Ib.* But cf. Spinetti *v.* Atlas S. S. Co., 80 N. Y. 71. Embezzlement is not a "peril of the seas." *Ib.*; King *v.* Shepherd, 3 Story, 349. Nor can "dangers of the roads" be said to include dangers from highwaymen or other human violators of the law. De Rothschild *v.* Royal Mail Steam Packet Co., 7 Ex. 734.

Finally, inasmuch as the special enumeration of perils or dangers of the seas has for its primary object that of enlarging the common-law ex-

emption of "act of God," it will not be readily assumed that the carrier meant thereby to exclude the privilege of setting up any of his other common-law excuses, such as act of public enemies or of the customer. Even should he give a bill of lading for delivering goods "the dangers of the seas only excepted," the inference is not conclusive that he undertook to be responsible for losses arising from all other causes, such as the act of "public enemies." Gage *v.* Tirrell, 9 Allen (Mass.), 299. And see Morrison *v.* Davis, 20 Penn. St. 171. In short, a hidden and obscure meaning will not be sought for where an obvious meaning applies Texas R. *v.* Reiss, 183 U. S. 621.

The reader should study the foregoing note in connection with our next chapter.

CHAPTER V.

USAGE, SPECIAL CONTRACT, AND LEGISLATION, AFFECTING THE COMMON CARRIER'S BAILMENT RESPONSIBILITY.

356. Modern qualifications of the carrier's liability are now to be considered at length. Were that liability dependent entirely upon the rules set forth in our preceding chapter, its breadth and compass might by this time have been grasped by the investigator with tolerable firmness; notwithstanding that quivering play of proximate and remote cause, of divine and human agency, of contributory negligence now on the bailee's and now on the bailor's part, which so eludes the effort to generalize broadly from precedents and the given facts of a particular case. But the Anglo-Saxon carrier, grown to manhood with the cords about his limbs which public policy fastened there while he was an infant, has struggled with more purpose to shuffle them off than has the law to knot them tighter; and in the course of events the force of ancient maxim has been considerably spent: the old priming is overlaid in these days with coats of diverse tints; and while the basis of our bailment responsibility continues, as already shown, non-exemption, save for act of God, act of public enemies, act of consignor or customer, and act of public authority, special variance in responsibility may be established: (I.) by usage; (II.) by special contract; or (III.) by legislation. Under, then, these three separate heads in order, which suggest qualifications possible in any bailment relation, we shall discourse in the present chapter.[1]

357. I. Effect of Usage. Usage, in its legal aspect, shapes and modifies a contract only so far as some uniform, reasonable, and continuous business method of the jurisdiction may be taken to have influenced the mutual intent of both parties concerned in a particular transaction. Custom antedates judi-

[1] § 447.

cial sanction in most instances; and not to recognize its just force as shaping the social and business intercourse of mankind would be to set the courts, whose machinery was contrived for bending individuals to the public will, into hopeless encounter with the public will itself and the irresistible forces of human society. Usage distinguishes between carriage by land and carriage by water; and in either branch of the business permits one to confine himself to special modes of locomotion, to choose specific routes with fixed termini, and, in a measure, to put definite limits to the kinds of property or the classes of customers he purposes dealing with. Usage among ordinarily prudent carriers of the same class under similar circumstances will largely determine, too, what care, skill, and diligence should be employed towards averting or lessening the injurious consequences of a disaster otherwise excusable.[1] But usage cannot be set up to absolve a carrier from the ordinary duties which public policy, his general undertaking, or an express promise may have bound him to; instead of diverting, it shapes the natural course of the current; and its controlling influence is spent, after all, within the usual narrow and well-recognized confines.[2]

358. II. Effect of Special Contract. By some special agreement or acceptance, the common carrier, it was always conceded, might, like other bailees, either limit or extend his general

[1] § **448**; 1 Blatchf. (U. S.) 526; Rich *v.* Lambert, 12 How. (U. S.) 347. Usage may thus enlarge rather than diminish the scope of a carrier's duty.

[2] § **448**; Newall *v.* Royal Shipping Co., 33 W. R. 342; 22 Fed. R. 680; 19 Penn. St. 243; Cox *v.* Peterson, 30 Ala. 608; 5 Wis. 454; McMasters *v.* Penn. R., 69 Penn. St. 374. Usage of refrigerator cars is enforced in Beard *v.* Illinois Central R., 79 Iowa, 518; 159 Ill. 53. And as to ventilated cars, see 173 Penn. St. 398. Usage of express companies to seal money packages may also bind the carrier. 7 Col. 43. See, as to usage of carrying live-stock in vessels or cars free from contagious diseases, Tattersall *v.* Steamship Co., 12 Q. B. D. 297; Illinois Cent. R. *v.* Harris, 184 Ill. 57.

A carrier cannot set up his own unsafe and unreasonable usage, though long continued. 143 Mass. 307. Nor that of requiring a shipper to accompany his live-stock. 72 Tex. 127. As to usage of carrying in open cars, see 88 Tenn. 653.

obligation in a particular transaction. But whether private agreement can thus be made to thwart and defeat the well-considered policy of our law, and if so, to what extent, is a vital issue on which the later English and American courts have asserted their authority so differently, within their respective jurisdictions, that the course of their decisions should be presented separately, in order to be intelligently comprehended and brought into comparison. At the same time, our general theory must avail that, as in all bailments, no special contract should transcend the limits defined by public policy, whatever those limits may be.[1]

359. As to the English doctrine, Lord Coke and Sir Matthew Hale early intimated that the common carrier had the right to make a qualified acceptance, so as not to be chargeable generally on his undertaking.[2] Lord Mansfield[3] and Lord Kenyon[4] emphasized this view of the law, which, by the beginning of the nineteenth century, had become so rooted in the English mind that the almost universal practice of common carriers by land and water had become to except, under a special contract, various risks of loss from which the common law itself would not have excused them. This course of business, which no English court of justice had ever denounced, and to which Parliament itself had lately given a colorable sanction, Lord Ellenborough felt compelled, in an important case coming before him in 1804, to uphold, notwithstanding the weighty argument made by opposing counsel, to the effect that this special acceptance of the carrier was in fact subversive of the time-honored policy of the law, regarding parties who exercised that vocation.[5] The old mode of declaring against carriers in

[1] § 449; *ante*, 10.

[2] See 4 Co. 84 *n.*; Morse *v.* Slue, 1 Vent. 190.

[3] Gibbon *v.* Paynton, 4 Burr. 2298.

[4] Peake Add. Cas. 185; Hide *v.* Trent & Mersey Nav. Co., 1 Esp. 36.

[5] Nicholson *v.* Willan (1804), 5 East, 507. The effect of the special acceptance here was to relieve a carrier by stage altogether from liability for parcels over a certain value, unless specially booked and paid for as freight. And see Maving *v.* Todd, 1 Stark. 72 (A. D. 1815), as to losses by fire.

common-law practice was on the custom of the realm; but it had now come to be in assumpsit for these special acceptances, as though the particular contract, and not public policy, should govern the bailment transaction. Gradually the English doctrine adapted itself to this latter theory.[1] By the middle of the nineteenth century it became clearly settled in Great Britain that a carrier could, by a special notice brought home to his customer, procure what, for organized companies engaged in transportation and acting solely by servants, must have been tantamount to an entire exemption from legal responsibility.[2]

360. Later English legislation has, since 1854, given a different direction to the doctrine, so far at least as concerns railway and canal traffic. Such decisions as the foregoing created profound dissatisfaction in the community. For steam railways now came into general use, easily supplanting other carriage rivals inland wherever they were extended. Managed with energy, endowed with capital, and retaining upon large fees the keenest legal talent of the land in their interests, these companies fought as carriers had never done before for the privilege of dealing with customers upon their own terms, and the insertion of such special conditions in freight

[1] § 450. By construction of the Carriers' Act of 1830, it was held that a carrier might exempt himself from liability for the fraud, misconduct, or gross negligence of his servants. See Hinton *v.* Dibbin, 2 Q. B. 646 (1842); Peek *v.* North Staffordshire R., 10 H. L. 473, 494; 10 C. B. 494; 7 Ex. 707; McManus *v.* Lancashire R., 2 H. & N. 693.

[2] The sudden expansion of the steam railway system, with its humble pioneer, the canal, was by that time noticeable. While, therefore, one might now, under English sanction, stipulate as common carrier for obtaining special immunity against losses which the default or misconduct of those he employed in the course of his undertaking might occasion, we may well suppose that, for his own personal gross negligence, fraud, or misconduct, the common carrier still continued, by legal inference, chargeable. See Wyld *v.* Pickford, 8 M. & W. 443, 460. But the carrier capitalist reaped the advantage of the law. It became well understood that the Carriers' Act of 1830 did not preclude the carrier and his customer from entering into a special contract which should shift the legal risks practically from the former to the latter, "however caused." § 450.

contracts as should to the utmost increase their profits by reducing the legal risks to the lowest point. They claimed the same right of special-contract exemption which the court had conceded to stage-owners; and the right was accorded.[1] The judicial decisions which were riveting their shrewd policy so firmly, Parliament at length sought to neutralize by passing, in 1854, as to these and a leading class of inland competitors of inferior consequence, the Railway and Canal Traffic Act,[2] whose provisions have since been extended by later legislation, so as to embrace steam vessels, and perhaps other classes of carriers.[3] This act, from which the modern English policy as to carriers' contracts takes its departure, made all companies of the description mentioned therein liable generally for the neglect or default of the company or its servants; but with the equivocal reservation that such conditions might be imposed by the carrier as the court or judge before whom any such question was tried should adjudge to be "just and reasonable."[4]

[1] See Walker *v.* York & North Midland R., 2 E. & B. 750; Carr *v.* Lancashire R., 7 Ex. 707.

[2] Act 17 & 18 Vict. c. 31.

[3] Act 31 & 32 Vict. c. 119; Cohen *v.* South-Eastern R., 1 Ex. D. 217; Doolan *v.* Midland R., 2 App. D. 792.

[4] Railway & Canal Traffic Act, § 7. And see § **451**. At first some of the judges undertook to thwart by construction the policy of this act; but this attempt proved abortive, for the highest tribunal, the House of Lords, sustained the rights of the public, as Parliament had intended. Cf. L. R. 8 Q. B. 57; 1 H. & N. 63; M'Manus *v.* Lancashire R., 4 H. & N. 327; Doolan *v.* Midland R., 2 App. D. 792 (1877); Peek *v.* Staffordshire R., 10 H. L. 473. Conditions against responsibility on the carrier's part are "unjust and unreasonable." 1 B. & S. 112; L. R. 2 Ex. 173; 5 Ex. D. 190; Gregory *v.* West Midland R., 2 H. & C. 944; Gill *v.* Manchester R., L. R. 8 Q. B. 186.

But special limitations upon the time for presenting claims for damage are treated as "just and reasonable." 5 H. & N. 867. Also, conditions against liability for other cause than gross negligence or fraud. 5 H. & N. 875, and 3 H. & C. 337. And see Lord *v.* Midland R., L. R. 2 C. P. 339; Lewis *v.* Great Western R., 3 Q. B. D. 195. As to alternative rates (the lower rate exempting from all liability for loss or damage) there has been some strange wavering; but the House of Lords sustained (1882–3) the practice. See Manchester R. *v.* Brown, 8 App. Cas. 703, reversing

361. In cases of carriage not embraced under the Railway and Canal Traffic Act and its amendments, as where one carries freight by stage-coach or team in pursuance of a vocation which is left to common-law rules, the effect of a special contract still appears to be, as understood by the English courts, to exclude the relation of common carrier and public policy in the particular instance, and substitute that of a carrier who conveys under his special contract; in other words, the theory prior to 1854 still operates.[1] As for ships and sailing vessels, the latest English cases appear to allow special exception under a bill of lading for the negligence or misconduct of servants, where the language is explicit.[2]

362. The American doctrine of special contract qualification is a just and reasonable one, and in this country the course of decision has been far more conservative, consistent, and uniform than in England. We find no judicial eccentricity manifested in dealing with the rights of companies organized for carriage of freight that legislatures have felt called upon to correct; but the whole treatment of this question with reference to the policy of the law appears, on the whole, prudent, sensible, and worthy of public gratitude. In view, certainly, of the local independence of so many jurisdictions, and of the conflict and diversity of State interests in our modern land and water transportation, the uniform steadiness with which American courts have continued to hold common carriers to their fundamental obligations in dealing with the individual customer, despite English example and a corporate pressure no less forcible, is quite remarkable. Here, then, we find courts adhering to the general rule of bailments that all special-contract stipulations are limited by public policy.[3]

10 Q. B. D. 250, which reversed 9 Q. B. D. 230. And see § 451. See *post* as to "written contract" required by the Act of 1854.

[1] § 452; Scaife *v.* Farrant, L. R. 3 Ex. 358; Mr. Justice Gray in Liverpool Steam Co. *v.* Phenix Co., 129 U. S. 397, 447.

[2] § 452; Missouri Co., *Re*, 42 Ch. Div. 321; Norman *v.* Binnington, 25 Q. B. D. 475; (1894) 1 Q. B. 373.

[3] § 453. See Alexander *v.* Greene, 3 Hill (N. Y.), 9, reversed 7 Hill, 533; 1 Kern. (N. Y.) 485; New Jersey Steam Nav. Co. *v.* Merchant's Bank, 6 How. (U. S.) 344 (a leading case, decided about 1849).

363. Our State and Federal courts have fairly reached without the aid of legislation these quite consistent conclusions: (1) That common carriers may, by special agreement, stipulate for a less degree of responsibility than the common law imposes; and this, apparently, to the extent of making them, in effect, no longer what public policy once declared them, extraordinary bailees, who are invested with extraordinary risks, but, what they would otherwise have been, ordinary bailees for hire, bound to the exercise of honest good faith and ordinary diligence.[1] (2) But, on the other hand, that for the culpable negligence, fraud, or misconduct of himself or his servants, subordinates, and sub-contractors, the common carrier continues answerable in law, notwithstanding any special stipulations to the contrary, which he may have procured from his customer; this meaning, as we conceive, not gross but ordinary negligence, as in the case of other hired bailees, besides fraud or misconduct. In fact, the public carrier may become a private carrier, or mutual-benefit bailee of the ordinary sort, by special contract; and here the right to transcend the safeguards of public policy ceases.[2] (3) If the carrier gives a lower rate of recompense, quicker transportation, or some other genuine consideration to the customer in return for a reduction of his legal risks, more especially should his special stipulation receive favor.[3]

[1] § 454; Kirkland *v.* Dinsmore, 62 N. Y. 171; Camp *v.* Hartford Steamboat Co., 43 Conn. 333; Sager *v.* Portsmouth R., 31 Me. 228; 97 Me. 77; Hoadley *v.* Northern Trans. Co., 115 Mass. 304; 4 Ohio St. 362; Field *v.* Chicago R., 71 Ill. 458; Powell *v.* Pennsylvania R., 32 Penn. St. 414; Michigan Central R. *v.* Hale, 6 Mich. 243; Hooper *v.* Wells, 27 Cal. 11; Rice *v.* Kansas Pacific R., 63 Mo. 314; York Co. *v.* Central R., 3 Wall. (U. S.) 107; 2 Rich. (S. C.) 286; 21 Wis. 152.

[2] Railroad Co. *v.* Lockwood, 17 Wall. (U. S.) 357, and many cases cited; 12 B. Monr. (Ky.) 63; Union Express Co. *v.* Graham, 26 Ohio St. 595; 63 Mo. 376; Mann *v.* Birchard, 40 Vt. 326; Bank of Kentucky *v.* Adams Express Co., 93 U. S. 174; Christenson *v.* American Express Co., 15 Minn. 270.

[3] Dillard *v.* Louisville R., 2 Lea (Tenn.), 288. That the carrier has two distinct liabilities at the law, one as an insurer, and the other as an ordinary bailee, see Campbell, J., in 4 Sandf. (N. Y.)

364. **The American rule as to the carrier's servants** is that the carrier must respond for their wilful or careless misconduct towards the goods as for his own; and that the usual limitations of an agency do not apply.[1]

365. **As to permitted qualifications by special contract,** our American policy permits of exemption of responsibility, on the common carrier's part, for loss of his consignor's goods by any fire happening without his own fault.[2] So, too, a special exemption may properly be secured by the carrier against losses by "breakage," "leakage," "damage by rats," and the like; but not, again, to the extent of discharging legal liability for such a loss, when produced by the negligence of the carrier and his servants, or by his or their other plain breach of

136, 145; also Mr. Justice Field in York Co. *v.* Central R., 3 Wall. (U. S.) 107.

Our American doctrine corresponds considerably with the English rule "just and reasonable," under the act of 1854 (*ante*, 360). And see Parke, B., in Wyld *v.* Pickford, 8 M. & W. 443; Doct. & Stud. 2, c. 38; Noy Maxims, 92; which are to the same effect. American courts cannot distinguish between common carriers in this respect; for to individuals, partners, and companies alike, the rule is applied. § 454.

[1] § 455; Railroad Co. *v.* Lockwood, 17 Wall. (U. S.) 357; Alabama R. *v.* Thomas, 83 Ala. 343; Missouri R. *v.* Cornwall, 70 Tex. 611; Medfield *v.* Boston, &c. R., 102 Mass. 552; Shriver *v.* Sioux City R., 24 Minn. 506. And see 97 N. Y. 87. A bill of lading by sea cannot in American jurisdiction relieve the carrier for loss or damage occasioned by the negligence of officers or crew. Liverpool Steam Co. *v.* Phenix Co., 129 U. S. 397. Contrast with this the ordinary bailee for hire, *ante*, 86.

[2] § 456; York Co. *v.* Central R., 3 Wall. (U. S.) 107; Germania Fire Ins. Co. *v.* Memphis R., 72 N. Y. 90; Pemberton Co. *v.* New York Central R., 104 Mass. 144; 100 Mass. 505; Swindler *v.* Hilliard, 2 Rich. (S. C.) 286; Wertheimer *v.* Penn. R., 17 Blatchf. 421 (burning by a mob); 59 N. H. 303.

But not where the burning was by his fault, as the proximate cause, or by that of his servants. Bank of Kentucky *v.* Adams Express Co., 93 U. S. 174; Steinweg *v.* Erie R., 43 N. Y. 123; 31 Ala. 501; 32 Penn. St. 414; Erie R. *v.* Lockwood, 28 Ohio St. 358; 6 Mich. 243; 63 Penn. St. 14; 18 Fed. R. 318; 39 Ark. 523; 14 Bush (Ky.), 590. So, too, where the exemption was against damage by "fire or water;" and cotton was carelessly carried in open cars and burned in consequence. New Orleans R. *v.* Faler, 58 Miss. 911; 60 Miss. 1003.

duty.[1] The same rule, with its reservations, will hold true of special stipulations against damage of sea or river, and losses or delays by unavoidable accident, by thieves, mobs, riots, and the like; [2] and of special acceptances to carry only to a certain point, and then forward by another conveyance.[3] On the main principle thus indicated, no general stipulation against liability for loss "from whatever cause arising" can carry the sweeping force of an absolute immunity from bailment responsibility.[4] But the carrier may provide, by special agreement, against all accountability, save for the negligence or misconduct of himself and his agents; or, in other words, cast off the capacity of insurer completely.[5]

366. **As to contracts of valuation,** the carrier may state a reasonable limit to the sum for which he shall be held accountable in case of any loss; though he cannot, where this sum is understood to be an under-valuation of the goods, thereby evade his full accountability as an ordinary bailee.[6] Upon this point State decisions have been somewhat at variance; but the better authority decidedly favors the carrier's right to protect himself against arbitrary, fanciful, and extravagant valuations even where his own negligence may have occasioned the loss, especially if he has given reduced rates in conse-

[1] Reno *v.* Hogan, 12 B. Monr. (Ky.) 63; Sager *v.* Portsmouth R., 31 Me. 228; 8 Ben. (U. S.) 139, 491.

[2] See Davidson *v.* Graham, 2 Ohio St. 131; 4 Ohio St. 362; 79 Tex. 89.

[3] See Reed *v.* U. S. Exp. Co., 48 N. Y. 462; Snider *v.* Adams Express Co., 63 Mo. 377; Field *v.* Chicago R., 71 Ill. 458; 27 Cal. 11; 15 Minn. 270.

[4] Mynard *v.* Syracuse R., 71 N. Y. 180; 6 How. (U. S.) 344; Sager *v.* Portsmouth R., 31 Me. 228.

[5] See Camp *v.* Hartford Steamboat Co., 43 Conn. 333; § **456.** See Hoadley *v.* Northern Trans. Co., 115 Mass. 304 (proximate cause considered); 70 N. Y. 410; 10 Wall. (U. S.) 176; 104 Mass. 144.

[6] § **457**; United States Express Co. *v.* Backman, 28 Ohio St. 144; 51 N. Y. 166. And see 21 Wis. 152; Squire *v.* New York Central R., 98 Mass. 239; Railroad Co. *v.* Lockwood, 17 Wall. (U. S.) 357; South Alabama R. *v.* Henlein, 52 Ala. 606; 61 N. Y. 512; Magnin *v.* Dinsmore, 62 N. Y. 35; Harvey *v.* Terre Haute R., 74 Mo. 538.

quence.[1] The business of express companies is peculiarly liable to heavy loss in parcels of money or valuables delivered in closed packages whose contents are not apparent; and late decisions favor the right of such carriers to limit liability reasonably where value is not stated at the outset.[2]

367. As to contracts concerning the time or method of presenting claims, for loss or damage against the carrier, reasonable stipulations may also be made so as to bind the customer;[3] but to utterly exclude thereby the consignee's fair opportunity of inspecting the property upon its arrival, ascertaining the extent of damage, if any, and so making his claim known to the carrier, or his proper representative, is not allowable.[4] All such stipulations ought in fact to be

[1] See Hart *v.* Pennsylvania R., 112 U. S. 331, approving the rule of Massachusetts, New York, Illinois, Pennsylvania, and Missouri, in this respect, and disapproving that of Ohio, Mississippi, Wisconsin, Kansas, and Minnesota. And see Graves *v.* Lake Shore R., 137 Mass. 33. Cf. Bermel *v.* New York R., 172 N. Y. 639 (special condition not clearly expressed); Chicago R. *v.* Calumet Farm, 194 Ill. 9 (gross negligence); 127 N. C. 293; (1899) 1 Q. B. 309 (deviation); 158 Mo. 226 (consideration not given as promised). This doctrine, thus carefully announced, must not be extended so as to conflict with 17 Wall. (U. S.) 357. And see 144 Mass. 284; 137 N. Y. 460; 61 Conn. 531; 91 Ala. 340; 66 N. H. 263. *Contra*, 55 Wis. 713; 30 Kan. 645; 60 Miss. 1017; 120 Ind. 73; 71 Ala. 611; 31 Minn. 85; 134 Penn. St. 310; 67 Miss. 609; 133 Ill. 96. So is it as to stipulations which restrain liability to the invoice value of goods carried by bill of lading. 18 Fed. (U. S.) 459.

[2] See express receipts, limiting value to $50 unless shipper states actual value when asked by the carrier. The customer, though not compellable to state value or contents, increases his own risk by his silence. Ballou *v.* Earle, 17 R. I. 441; Durgin *v.* Am. Express Co., 66 N. H. 277; Pacific Express Co. *v.* Foley, 46 Kan. 457 (1891); 96 Fed. 574; Smith *v.* Am. Express Co., 108 Mich. 272. Such limitations are to be reasonable and reasonably construed. See 36 W. Va. 524; 46 Kan. 457, 470.

[3] § **458**; Express Co. *v.* Caldwell, 21 Wall. (U. S.) 264 (ninety days after delivery to the company; the transit occupying only about a day). *Contra*, 44 Ala. 101, here commented upon. Had the transit occupied ninety days, or nearly, such limitation would not, *semble*, have been available. And see Southern Express Co. *v.* Hunnicutt, 54 Miss. 566; United States Express Co. *v.* Harris, 51 Ind. 127; Westcott *v.* Fargo, 61 N. Y. 542.

[4] Rice *v.* Kansas Pacific R., 63 Mo. 314; Adams Express Co. *v.*

reasonable and consistent with sound policy as applied to the particular case; and every such limitation should be reasonably interpreted.[1]

368. The carrier's intention to enlarge, by special contract, his legal risk as insurer, so as to make his responsibility absolute, or to indemnify against an excepted peril, will, of course, be

Reagan, 29 Ind. 21; Capehart *v.* Seaboard R., 77 N. C. 355; Porter *v.* Southern Express Co., 4 S. C. N. S. 135; Memphis R. *v.* Holloway, 9 Baxt. (Tenn.) 188. The limit must be specially pleaded. 61 N. Y. 542.

[1] Jennings *v.* Grand Trunk R., 127 N. Y. 438; 68 Mo. 268. See also 159 Ill 53; 67 Ark. 407. Claim of damage to be made under oath within five days after delivery pronounced valid in Black *v.* Wabash R., 111 Ill. 351; 153 Penn. St. 302. Limit of thirty days is reasonable. 16 Lea, 472. As to thirty days after loss occurs, see 53 Minn. 183. As to three months after loss, see 8 C. C. A. 341. Thirty-six hours might be reasonable in some cases; but the peculiar circumstances might make it unreasonable. 78 Tex. 372. That a claim must be presented before a consignee could in fact ascertain, would be unreasonable; and the question of reasonableness on the facts is sometimes left to a jury. But the carrier's exposure to fraudulent claims, if no reasonable limit is placed after he delivers over, is to be considered in his favor. 47 Kan. 753. Not applicable under inconsistent circumstances. 126 N. C. 932.

A special contract may give the carrier an option as between modes of transportation. Blitz *v.* Union S. S. Co., 51 Mich. 558. Or a right to jettison cattle shipped on deck, should the safety of the ship require it. 5 Hughes (U. S.), 275. Or the benefit, in case of loss, of any insurance taken out by the customer. 17 Fed. (U. S.) 905; British Ins. Co. *v.* Gulf R., 63 Tex. 475. See 129 U. S. 128, 397. (But not so that the customer must rely upon such insurance regardless of the carrier's fault. 166 Penn. St. 184.) Or express exemption before goods are in deliverable condition for him to receive. 90 Tenn. 306 (cotton compress). Or the right to ship "at convenience;" or "without liability for delay;" not meaning, however, with wholly unreasonable delay. Branch *v.* Wilmington R., 88 N. C. 573; Jennings *v.* Grand Trunk R., 127 N. Y. 438; Green *v.* Boston R., 128 Mass. 221; 7 Col. 43. For stipulations like these are not deemed unreasonable or obnoxious to the public interests, nor should they be so interpreted. But an absolute release by the shipper for all prospective loss or damage is void. 40 Fed. 731. And so is any stated exemption while loading or unloading, in any such sense as to excuse improper facilities or improper handling. Norfolk R. *v.* Harmon, 91 Va. 601; 92 Va. 495. And see 78 Tex. 372; 87 Tex. 322; 61 Conn. 531. For negligence is never excusable on the carrier's part. See 91 Tenn. 177 (defective car accepted by shipper); 167 Penn. St. 166; 68 Miss. 351.

respected whenever this is manifest; but a contract of this sort is so out of course and so disadvantageous to himself, that, unless some special consideration appear for such extreme indulgence to a particular customer, a binding agreement to this effect is not inferable from the carrier's bare promise to do more than the law demands.[1]

369. **We next ask how a special contract may be entered into** which seeks to qualify the carrier's common-law liability. Were it customary for modern carriers to go strictly by public policy in their charges, and at the same time to ask each shipper, as a personal favor, to sign off deliberately in advance his legal rights, special carriage contracts would be few, and litigation under this head quite infrequent. But the practice of this busy century shows the bailor's real position by no means so advantageous in such transactions as ancient wisdom designed it should be. Ship-owners, stage-coach proprietors, transporters by steam, expresses, common carriers in general, more especially those with great capital, push unceasingly for that practical immunity which the common law denied them; and, as one important means to this end, most of them seek to establish, wherever they can, a constructive assent on the part of customers to special terms which they alone have put forward; and so gain, by indirection, concessions that by open proposal, while affording free opportunity for assent or rejection, they could not hope to procure. Mutual assent, then, is the theory, but inferential assent the practice.[2]

370. **It became common in England** in the latter part of the eighteenth century for inland carriers to post and distribute notices which announced express conditions and limitations of responsibility on their part; so that whosoever might employ the transportation service without objection was chargeable, as the carrier could claim, with knowledge of these express

[1] § 459; Fenwick *v.* Schmalz, L. R. 3 C. P. 313; Railroad Co. *v.* Reeves, 10 Wall. (U. S.) 176. See also 50 Me. 339; 105 Mass. 437; 9 Wall. 161; 2 Kern. (N. Y.) 99.

As to the stipulation to carry "safely and securely," etc., see 2 Ld. Raym. 909, 911; Shaw *v.* York R., 13 Q. B. 347. And see 47 Iowa, 229.

[2] § 460.

conditions, and a tacit consent to abide by them. In Great Britain the practice of giving notice had prevailed long before the courts gave decision upon the validity of making such limitations; and by Lord Ellenborough's time, and at the opening of this century, the general right of the carrier to thus limit his risks became clearly conceded in Westminster Hall.[1] But the English courts did not stop here; for, as we have seen, they came to granting the carrier the right to procure unjust and unreasonable contract exemptions;[2] and when the right of casting off the public responsibilities was once found to depend, in actual practice, not upon the clear and indisputable permission of the customer himself, but upon the issue or publication by the carrier of some card, circular, poster, or advertisement (aside from a bill of lading), to which no more than one's tacit assent was expected in return, the situation of the public was seen to be intolerable.[3] Hence, the English Railway and Canal Traffic Act of 1854 (17 & 18 Vict. c. 31) required that the conditions "just and reasonable" should be embodied in a special contract in writing, signed by the owner or sender of the goods.[4]

[1] § 461; Nicholson *v.* Willan, 5 East, 507 (1804). And see 8 Taunt. 144; 5 Bing. 217.

[2] *Ante*, 361; § 461.

[3] 2 E. & B. 750; Peek *v.* North Staffordshire R., 10 H. L. 473, 494, and earlier cases reviewed therein by Blackburn, J., concerning carriers' notices previous to 1830.

[4] See *ante*, 361; Peek *v.* North Staffordshire R., 10 H. L. 473; Doolan *v.* Midland R., 2 App. Cas. 792. Though such common carriers had, to a large extent, sought exemption by giving bills of lading, tickets, receipts, and the like, to the sender or owner, or by means of some more general notice, and they had asked no writing or token of assent in return, the fairer method was sometimes employed of procuring the sender's signature to a memorandum or ticket stating the terms. See, *e. g.*, Austin *v.* Manchester R., 16 Q. B. 600; 21 L. J. Q. B. 319. This signed memorandum had, of course, the effect of a special contract. Walker *v.* York, &c. R., 2 E. & B. 750, was an extreme case of injustice to customers (insisting, by a notice which the fish dealers strongly protested against, that fish would be carried only upon condition of absolute exemption). See further § 462 and English reports cited.

This doctrine of notice bears largely upon the rule of mutual assent,

371. The better nerve of our American tribunals, in keeping the curb rein steady which holds the carrier to his public obligations, has rendered judicial laxity concerning methods of special contract much less injurious. Nor even in this latter respect, closely as many States have approached the English doctrine of notice, are mere public notices, as by the carrier's general advertisement or posters, favored in this country to the extent of enabling the public transporter to limit his legal responsibility by such means alone. Even a public notice brought directly to the knowledge of the owner or sender of the goods has, in several cases before the appellate courts of different States, been treated as ineffectual.[1] And our general rule is to require, at all events, some evidence, *aliunde*, of the owner's assent to the qualified liability which the carrier seeks thereby to impose upon him.[2] But in America, as in England, saving legislative restrictions on this point, the common carrier may qualify his bailment responsibility within such limits as may be lawful, by any express contract, oral or written.[3] If the owner's or sender's assent appear in writing, all the better; yet this is by no means indispensable to the validity of that stipulated exemption which bears the genuine stamp of mutual assent.[4]

where bills of lading, receipts, tickets, and other memoranda containing written or printed qualifications of liability are habitually given by the carrier to his several customers. Judge Story has set forth at much length the English doctrine of notices, as expounded in the early part of the nineteenth century. Story Bailm. §§ 553–573. His lucid statements are worthy of the student's careful perusal, though, ere this, the subject has lost its prestige.

[1] § 463; 26 Vt. 247; 10 Ohio, 145.

[2] *Ib.*; 1 Kern. (N. Y.) 485; Blossom *v.* Dodd, 43 N. Y. 264; Judson *v.* Western R., 6 Allen (Mass.), 486, 490; 6 Mich. 243; Davidson *v.* Graham, 2 Ohio St. 131; New Jersey Steam Nav. Co. *v.* Merchants Bank, 6 How. (U. S.) 344; Cantling *v.* Hannibal R., 54 Mo. 385; 49 N. H. 20; 17 R. I. 441.

[3] 6 How. (U. S.) 344; 6 Mich. 243. Written supersedes oral contract.

[4] The special contract should not be with one legally or physically disqualified, and unfair advantage should not be taken. Camden R. *v.* Baldauf, 16 Penn. St. 67. And see 2 C. B. N. S. 620. But a customer not

372. Mutual assent in bills of lading, way-bills, and the like, may be here considered. The English practice of giving public notice of the intent to transport under a qualified liability appears to have originated with land carriers, who always found better opportunities to pursue it than carriers by water. The latter class early adopted a more positive and appropriate means of curtailing their public risks, by stating the special exceptions they meant to claim in the bill of lading, a document universally recognized by commercial countries in shipments of personal property by water, and given in each individual transaction. This bill of lading, which has usually been made out in triplicate for the convenience of all parties concerned, serves as the written evidence of a contract with the particular customer for carrying his goods by sea for a certain compensation called freight; it is signed by the captain, master, or other agent of the vessel; it specifies the receipt of specified chattels; and, in effect, promises their transportation on the terms therein expressed, followed by their delivery at the place appointed to the consignee or his assigns, he or they paying freight for the same. It is assignable by indorsement, so as to afford a ready means of transferring property and possessory title to the goods represented; and, as its verbal tenor shows, this instrument partakes of two distinct characters, — that of a written contract, and that of a written receipt. Now, the insertion of special conditions of carriage in documents like these was natural enough, from the moment it became likely that a sea-carrier's special terms or special acceptance would bind his customer by indirection at all.[1] That silently receiving a bill of lading for carriage by ocean or in our inland waters imports an assent, on the shipper's part, to be bound by any and all special and permissible qualifications which may prove to be

thus disqualified is generally bound by his signature to a written contract. 77 Mo. 631; 91 Ala. 340; 39 S. C. 55. In some States, as in England, railway carriers must make express contracts. 68 Ga. 350.

[1] § **464**; The Delaware, 14 Wall. (U. S.) 579, 600; 1 H. Bl. 357; 15 Otto (U. S.), 7. And see *ante*, 355, where the usual expressions are stated, beginning with the moderate "perils of the seas."

therein contained, is not, as a rule, to be denied. And since general notices have fallen into disrepute, railways and other inland carriers are latterly drawn into the extensive use of corresponding instruments for similar purposes of carriage and carriage exemption. Conditions inserted in documents like these are more readily brought home to the knowledge of consignors and owners than those promulgated by general notice, and hence obtain the judicial sanction more readily; while, on the other hand, the carrier keeps the advantage he has so much craved, of securing the customer's assent by indirection or his mere non-objection, if only the courts will extend to inland traffic the time-honored favor accorded to bills of lading where the transportation is by water.[1]

373. Indirect mutual assent is thus the rule with carriers in modern cases. This widely prevalent use of inland bills of lading, receipts and tickets, written or printed, which the carrier alone issues, so that the consignor need sign nothing and say nothing, but find from inspection, if he cares to read the document, that the other party intends to perform the transportation upon other than the common-law terms, and take the onus of offering his inopportune objections at the last moment, lays open a field of legal controversy, originating in misunderstandings and an uncertain mutuality. Here the carrier has commonly this advantage of an altercation with his customer, that he may keep his lien alive upon the goods in dispute, if they be not utterly lost or destroyed, refer his customer to the document of receipt, refuse to surrender on other terms, and put the burden of litigation and of disproving a contract upon the party of the two who can less afford to sue, and who is kept out of possession. But the main question which engrosses the courts in such issues must be whether, under all the circumstances, the sender should be taken to have understood the carrier's notice that he means to transport under a specially qualified responsibility, and to have assented by implication accordingly. The decisions under this head appear somewhat confusing; yet seven separate

[1] § 464.

elements for consideration may help to reconcile them; and these we proceed to point out. They are briefly these: (1) the character of the document given into the sender's hands; (2) the carrier's fair effort to make his special terms plain; (3) his seasonableness in announcing these special terms; (4) whether the special terms are brought home to the proper party; (5) honesty and fair dealing on the sender's part; (6) waiver or non-waiver of the terms specially announced; (7) authority from the carrier.[1]

374. (1) **The character of the document** given into the sender's hands. Bills of lading, for carriage transit by sea or an extensive journey by inland waters, are of such solemnity, both as the means of transferring title, and as the long-established method of evincing the true terms of transportation, that one can hardly be justified in receiving such an instrument without reading its terms.[2] In a less degree the more modern railway bills of lading or way-bills for freight acquire a similar legal importance, especially for extensive distances; and these are sometimes in like manner pledged for advances or transferred outright.[3] But the mere receipts of express or other miscellaneous land carriers are of little consequence, usually, other than to evince, perhaps, an acceptance by the carrier; and, being mainly for the consignor's temporary convenience, and as a voucher which need not be presented at the terminus, and cannot be negotiated as a document of title, they are seldom read or carefully preserved. And yet, here we should add, be the inland conveyance by express or as railway freight, the importance of the consignment, and the distance and time of transit, has much to do with assimilating such documents to those which symbolize a carriage by sea; nor can a uniform local custom be disregarded in any case.[4]

[1] § **465**.

[2] § **466**; The Delaware, 14 Wall. (U. S.) 562, 579; 66 Vt. 290; *ante*, 372; 15 Otto (U. S.), 7; 3 Allen (Mass.), 103.

[3] Farmers Bank *v.* Erie R., 72 N. Y. 188; Mulligan *v.* Illinois Central R., 36 Iowa, 181; Morrison *v.* Phillips Co., 44 Wis. 405; 20 Kan. 519; 73 N. Y. 167; Louisville R. *v.* Brownlee, 14 Bush (Ky.), 590; O'Bryan *v.* Kinney, 71 Mo. 125.

[4] 16 Wall. (U. S.) 318, 329, per Mr. Justice Davis; 21 Wis. 554; Bel-

375. (2) **Whether the carrier has fairly sought to make plain** his special terms to his customer, or rather to bind the customer while keeping those terms from attracting his attention. Hence those devices, not uncommonly employed with a purpose, but whose purpose is not a material issue, which tend usually to trick the sender out of his rights, and at all events set up equities against the carrier, — such, for instance, as printing the general objects of the carriage in large letters, and the special restrictions in small; stamping obscure words on, obliterating, or covering over, essential phrases; or inserting qualifications out of their natural place, and where they would not naturally attract attention, — are, by our best decisions, strongly discountenanced and disapproved.[1]

ger *v.* Dinsmore, 51 N. Y. 166; 36 Ga. 635; Adams Express Co. *v.* Stettaners, 61 Ill. 184; 93 Ill. 523; Buckland *v.* Adams Express Co., 97 Mass. 124. But see Grace *v.* Adams, 100 Mass. 505, distinguishing former cases decided in that State; 21 Wis. 152; 62 N. Y. 171; 63 Mo. 376; Hadd *v.* U. S. Express Co., 52 Vt. 335. The tendency in many States is evidently to place express receipts containing conditions on the same footing as other inland bills of lading. But such cases lay stress upon the circumstance that the instrument is not given as a mere receipt; but, according to the local usage, as an inland, or even negotiable, bill of lading. See Madan *v.* Sherard, 73 N. Y. 329.

There is, however, some confusion on this point, so far as presumptions of assent are concerned. For, in some States, the rule is broadly stated, that the shipper's assent to limitations contained in a railroad or express bill of lading is not necessarily presumed from receiving it; but the question of actual assent is for the jury to determine. 54 Ill. 88; 86 Ill. 71; 89 Ill. 43, 152; 90 Ill. 455; 160 Ill. 618. § **466**. Receipts not favored as establishing special terms. 109 Iowa, 551.

As to tickets, which are hurriedly bought by those who hasten on board, see 43 N. Y. 264; 48 N. Y. 212; 12 Gray (Mass.), 388; 32 Penn. St. 208. Thus is our descent from a document which naturally invites a bailor's scrutiny, as to special terms, to that which seems rather to repel it. § **467**. Circumstances, with non-objection, might, however, render one a party to the carrier's terms, as would undoubtedly a direct assent to those terms, by signature or orally. § **467**; 176 Mass. 280 (familiarity with the printed express receipts).

[1] § **468**; Brittan *v.* Barnaby, 21 How. (U. S.) 527; Perry *v.* Thompson, 98 Mass. 249; Verner *v.* Sweitzer, 32 Penn. St. 208; 43 N. Y. 264; 10 Ohio, 145; Madan *v.* Sherard, 73 N. Y. 329.

Printing special conditions, simply on the back of the way-bill or

Fraudulent intent on his part is not essential here, in order that the carrier be debarred from asserting the stipulation; but the fact that his course has put the consignor, in the matter of giving indirect assent, at a decided disadvantage.[1]

376. (3) **Seasonableness in the announcement of the special terms.** Under the fundamental rule of contracts, that mutual intent upon which the carriage is actually undertaken must prevail as the true bailment contract, unless both parties are shown to have agreed to a later change. And where carrier and consignor are silent as to terms, and neither custom nor modern statute controls the case, the carriage must be taken to have been upon the terms prescribed by ancient policy. The bill of lading or other document which puts forth or proposes special conditions should come, then, to the sender, or he must be made otherwise aware of such conditions, in time for him to assent or object to the terms, intrust the goods to the carrier or withhold them; and after a bailment is made upon one contract, the carrier cannot, at his sole option, prescribe new terms of carriage.[2]

377. (4) **Bringing the special terms home to the proper party under the consignment.** The express or implied assent of the sender or owner in due season, which is here requisite, may doubtless be given through the medium of agents; yet the sender's agent for delivering goods to the carrier for trans-

other voucher, is held in disfavor. See 16 Wall. (U. S.) 318; 49 Vt. 255; 12 Gray (Mass.), 388. And see English cases 1 C. P. D. 618; 2 C. P. D. 416. But cf. 1 Q. B. D. 515.

[1] § **468**. See also 16 Penn. St. 67; 52 Vt. 335 (document given to an illiterate foreigner, ignorant of the language); 43 N. Y. 264; 73 N. Y. 329 (document handed over at times and in places where it could not be read over by the consignor).

[2] § **469**; 72 N. Y. 70; 47 N. Y. 712; Gott *v.* Dinsmore, 111 Mass. 45; Gaines *v.* Union Trans. Co., 28 Ohio St. 418; 90 Ill. 455; 91 Ill. 268; 74 Mo. 125; 17 Mich. 296; 47 Iowa, 272; 40 Kan. 184; 22 Neb. 721; 79 Tex. 33; 109 Iowa, 551. A receipt directing special attention to terms printed in bill of lading is not seasonable and sufficient notice where the bill of lading showing those terms was given after transportation began. Merchants Co. *v.* Furthmann, 149 Ill. 66.

portation is not necessarily his agent for binding him to special modifications of the carriage contract.[1]

378. (5) **Whether honesty and fair dealing are manifest on the sender's part.** The person employing a carrier must make use of no fraud or artifice to deceive him. Yet the sender, so long as he practises no deception to the carrier's injury, may keep silence over the contents and value of the package he has offered for transportation; leaving the carrier himself to ask such questions for prudence' sake as may not be impertinent.[2]

379. (6) **Whether or not a waiver of the expressed conditions** has been made. Circumstances which imply a waiver by the carrier of express conditions announced in his documents are by no means to be disregarded; and the carrier's own inducement to non-compliance may constitute a waiver.[3]

380. (7) **Whether the special contract was duly made by the carrier or his proper agent** may prove a material issue where the special terms were burdensome rather than advantageous to the carrier. We have seen that a carrier's receiving agent cannot, even by bill of lading, bind him to a fraudulent and fictitious shipment of goods.[4] So, too, in special terms under a shipment to the carrier's disadvantage may the question of a due binding agency sometimes arise.[5]

381. **The effect of the sender's refusal** to accept the special qualification of risks which the carrier proposes, is simply that the carrier may demand extra rates for being an insurer

[1] § **470**. See Fillebrown *v.* Grand Trunk R., 55 Me. 462; 97 Mass. 124; 5 Mich. 368; 89 Ill. 152; 28 Ohio St. 418; Zimmer *v.* N. Y. Central R., 137 N. Y. 460.

[2] § **471**; 4 Burr. 2298; 9 Wend. (N. Y.) 115; 14 C. B. 255; Nitro-Glycerine Case, 15 Wall. (U. S.) 524; Rathbone *v.* N. Y. Central R., 140 N. Y. 48; 103 Ind. 121; 22 La. An. 158; 44 Ala. 468. Cf. 62 N. Y. 35; 69 Ill. 62.

[3] § **472**; Gulf R. *v.* Trawick, 68 Tex. 314; 87 Ga. 734; Merrill *v.* Express Co., 62 N. H. 514; 87 Ky. 626; 118 Ind. 174; 140 N. Y. 48; 158 Mo. 226.

[4] *Ante*, 312.

[5] See International R. *v.* Wentworth, 87 Tex. 311; 1 Mo. App. 474. § **472** a.

of the goods, and carrying on the terms prescribed by public policy; provided, of course, he charges on the whole no unreasonable compensation for his service.[1] Farther than this the carrier cannot rightfully force his customer to his own will. He cannot refuse to carry the goods at all unless the customer yields compliance to his terms, nor so conduct his business as to exclude the sender's option to require the common-law risks; since the rule of the public yields in sense only to a mutual waiver by both parties concerned.[2]

382. As to the proof of a special contract, the special stipulations of common carriage may be written, printed, or simply oral. The true issue in a case of the present sort is, whether a certain contract was entered into; and of this the proof required conforms to usual rules of evidence.[3] Even usage may, to some extent, be resorted to, in proof that such a contract is to be implied.[4] The presumption undoubtedly is, that one who, in the exercise of his public vocation, undertakes to transport a thing, does so subject to the common-law liabilities; and this presumption prevails until overcome by countervailing proof of a special agreement as to the terms of carriage.[5] Where the consignor's acceptance, without objection, of a bill of lading, or other document reciting special conditions, does not, on principles already discussed, operate by way of estoppel, or conclude the question, that mutual assent which is vital to the special contract is a matter of fact to be proven from writings, or mutual words, acts, conduct, and the attendant circumstances of the bailment.[6] Oral

[1] § **473**; 62 N. Y. 171, 179; 57 Ark. 112; 88 Tenn. 430; Railroad Co. *v.* Lockwood, 17 Wall. (U. S.) 357; 153 Penn. St. 302.

[2] *Ib.*; Kansas Pacific R. *v.* Reynolds, 17 Kan. 251; 48 Kan. 210.

[3] § **474**; 5 Mich. 368; 21 Ga. 526; 15 La. An. 103.

[4] Cooper *v.* Berry, 21 Ga. 526; 5 Gray (Mass.), 594; Hibler *v.* McCartney, 31 Ala. 501.

[5] 3 Dutch. (N. J.) 100; 203 Ill. 376.

[6] 28 Ohio St. 418; Boorman *v.* American Express Co., 21 Wis. 152, 158; 89 Ill. 43; 109 Iowa, 551. But as to what constitutes *per se* a special contract of carriage, this is usually a question of law. 26 Vt. 247. A contract wholly in writing and signed by the shipper is not needful, unless the local statute requires it.

negotiations merge in a subsequent written or printed contract, which embodies the final understanding of the parties at the time the carriage is undertaken upon a completed bailment. Such written contract is not to be orally disputed.[1]

383. Of two or more bills of lading issued under the same transaction, that which is delivered to the sender must govern, in case of discrepancy as to special terms; not that retained by the carrier.[2] The formal stipulations which are contained in a solemn bill of lading cannot well be disputed by other less formal writings, as, for instance, the language of a mere account for freight given afterwards by the carrier to the shipper of goods.[3] Should a carrier fraudulently or inadvertently issue two original bills of lading for the same shipment, he will, as late cases hold, render himself liable for such loss as innocent third parties for value may have sustained in consequence.[4]

384. As to the burden of proof under a special contract, in case of loss. Non-delivery of the goods, or their delivery at

[1] 63 Iowa, 611; 36 Minn. 396; Fairfax *v.* N. Y. Central R., 73 N. Y. 167. But the original risks are not to be varied, after the goods are in transit, except by a clear mutual assent. *Ante*, 376. Nor can usage change the written contract expression. 2 Sumn. (U. S.) 567.

[2] § 475; The Thames, 14 Wall. (U. S.) 98.

[3] Phillips *v.* Edwards, 3 H. & N. 813.

[4] Wichita Savings Bank *v.* Atchison R., 20 Kan. 519. And see 72 N. Y. 188; 47 Iowa, 272.

Since bills of lading have a twofold character compounded of a receipt and a contract, they may usually be explained in the former respect, since such receipt affords only *prima facie* evidence of the quantity and condition; but the contract part is not to be thus varied. See § 475 and cases cited. And see *ib.*, as to disputing such receipts, where *bona fide* third parties have advanced on the faith of the bill's recitals. See also The Delaware, 14 Wall. (U. S.) 579; 105 U. S. 7; Pollard *v.* Vinton, 105 U. S. 7; 7 Allen (Mass.), 454; 65 N. Y. 111; 108 Penn. St. 529; 90 N. Y. 430; 20 Kan. 519.

The master of a vessel has long had recognized authority to sign bills of lading for water carriage. Railway and other inland bills, however, are not given commonly by persons of such extensive authority, but rather by freight agents or special clerks. §§ 476, 477. And see *ante*, 312; 9 Fed. (U. S.) 129; Armour *v.* Michigan Central R., 65 N. Y. 111; 44 Md. 11.

the end of the transit in an injured state, such as imputes no fault to the sender, puts the burden of exemption upon the carrier; who, for his immunity in the present case, ought, by proof, to bring himself within the terms of his special engagement. And where the bill of lading or receipt shows the package to have been in good condition when shipped and the sender proves that his own duty was properly performed, the burden is on the carrier to account for an injury.[1] But the doctrine is fairly established, that whenever the carrier under a special contract shows, without compromising himself, that the loss or injury for which he is sought to be made answerable was from one of the expressly excepted causes of that contract, — as by fire, for instance, or a peril of lake navigation, — he repels at once the presumption which the failure to successfully perform the transit raised against him.[2] The party claiming damage may now proceed to show such culpable negligence or misconduct on the carrier's part as really occasioned the loss in question, and ought, therefore, to leave him still chargeable; but the burden of doing so devolves upon this party, no such remissness having been established on the carrier's own showing, and the fact of such special stipulation not being controverted.[3]

[1] § 478; Canfield *v.* Baltimore R., 93 N. Y. 532; 28 Fed. (U. S.) 336. Cf. *ante*, 350.

[2] Ohrloff *v.* Briscall, L. R. 1 P. C. 231; 12 How. (U. S.) 272; Transportation Co. *v.* Downer, 11 Wall. (U. S.) 129; 46 N. Y. 271; 49 N. Y. 249; Thomas *v.* Ship Morning Glory, 13 La. An. 269; 55 Penn. St. 53; Colton *v.* Cleveland R., 67 Penn. St. 211; Denton *v.* Chicago R., 52 Iowa, 161; Little Rock R. *v.* Harper, 44 Ark. 208.

Special exemptions from "breakage," etc., in case of brittle goods, make some difficulty. Some courts incline to favor the carrier in such cases where there is no evidence against him except the receipt in good condition and delivery broken. 150 Penn. St. 170; 101 Mo. 631. As to burden in "bumping," see 44 Minn. 191. All such stipulations of exemption must be sensibly construed. 61 Conn. 531.

[3] § 478. But the rule of a few States is so far hostile to these special exemptions as to impose upon the carrier, in general, the burden of showing affirmatively that the loss in question was occasioned without his fault. 26 Ohio St. 595; United States Express Co. *v.* Backman, 28 Ohio St. 144; 2 Rich. (S. C.) 286; 9 Rich. (S. C.) 201; 28 Ga. 343; Chicago R.

385. The carriage of animals, under a liability qualified by special contract, deserves further mention. This sort of transportation as freight is attended with peculiar risks; and probably there is no other instance in which our railways have of late years endeavored so strenuously to make their customers insurers of their own freight. The course not unfrequently pursued has been to make the customer sign an agreement to attend to the loading, transporting, and unloading himself, to take all risks of injuries to the creatures, and either to go personally, or else send with the animals some special agent to look after their wants. And, as an inducement to these conditions, free tickets, known as "drovers' passes," are commonly issued, both in England and America, to those who thus accompany their freight in cattle-trains, the company at the same time disclaiming responsibility as passenger carrier for the life and safety of such persons.[1] This attempt of the carrier to purchase immunity is found reinforced, in certain instances, by the announcement of oppressive rules against customers who refuse to capitulate. Sometimes, without the shadow of a legal right, the carrier refuses to take cattle aboard unless the sender will sign the contract as presented to him;[2] in other cases he charges, as insurer of the stock, at so high a proportional rate that the customer who elects to abide by the common-law standard of liability must infallibly be ruined.[3] The courts are thus confronted, at the present stage of freight development, with contracts purposely framed for excluding all responsibility on the carrier's part, even for his personal negligence and misconduct; and the difficulty has been to adjust the theory of

v. Moss, 60 Miss. 1003; Brown *v.* Adams Express Co., 15 W. Va. 812. See further, as to burden of proof under a special contract, 40 Vt. 326; 12 Gray (Mass.), 488; L. R. 3 C. P. 14 and cases cited; 61 Ill. 184; 55 Ala. 387.

As to general remedies, see c. 8.

[1] § **479**; *ante*, 353. As to the liability of a carrier for injury to persons travelling on "drovers' passes," see *post*, Part VII. c. 2.

[2] Kansas Pacific R. *v.* Reynolds, 17 Kan. 251.

[3] Railroad Co. *v.* Lockwood, 17 Wall. 357, 359 (1873); 155 Mo. 524.

ultimate accountability for the losses of the transit to a consistent and uniform practice.[1]

[1] The force of the rule continues recognized almost universally throughout the United States, that the carrier cannot, by special contract, exonerate himself from loss or injury to animals arising out of his own negligence or that of his servants. 9 Kan. 235; 9 Bush (Ky.), 740; 69 Iowa, 665; 75 Ala. 596; 17 Wall. (U. S.) 357; 64 Mo. 440; 42 Ill. 474; 87 Wis. 485. And yet an agreement is held valid by which the owner or shipper of cattle shall take the risk of injuries to the animals "in consequence of heat, suffocation, or being crowded." 98 Mass. 239. Cf. 65 Mo. 629; 21 Wis. 80; 68 Ga. 644; 60 Miss. 217; 68 Mo. 268. The disposition to rule thus seems partly to have been influenced by the circumstance that the kind of car used was known to the sender. See 26 Vt. 247; 117 Ga. 832. And that the sender or his agent travelled in charge of the creatures. See 25 N. Y. 442. And that there was special consideration afforded in the reduced rate, and the drover's pass. See 52 Ala. 606; 66 Ga. 485.

In New York, however, the carrier is distinctly permitted to divest himself of liability for negligence under such a contract. Cragin *v.* New York Central R., 51 N. Y. 61; 49 N. Y. 204. And the ground here taken, as well as in certain other States, is, that the carriage of live-stock was not within contemplation of ancient policy, but is a modern practice subject to lighter risks. *Ib.*; Louisville R. *v.* Hedger, 9 Bush (Ky.), 645; 21 Mich. 165. But this theory appears to be without foundation in fact. 52 Iowa, 600; *ante*, 289. The New York rule promotes wrong, and is pointedly condemned by the Supreme Court of the United States. 17 Wall. (U. S.) 357. And decisions in New York show a disposition to nullify in practice, if not overturn, that pernicious doctrine. Mynard *v.* Syracuse R., 71 N. Y. 180; 86 N. Y. 275; 89 N. Y. 370; 93 N. Y. 532. But see 97 N. Y. 87.

Some of our States permit the carrier of animals to stipulate against all liability except for "gross negligence." 34 Md. 197. But, in general, such carrier cannot set up the right to use defective and unsafe cars for the transportation under any special contract. See Railroad Co. *v.* Pratt, 22 Wall. (U. S.) 123; Pratt *v.* Ogdensburg R., 102 Mass. 557; 81 Ill. 504; 10 Ohio St. 65; 17 Mich. 57.

The carrier may stipulate so as not to be liable beyond a fixed sum for injury to or loss of any single animal, provided this valuation be not unreasonable in amount. Squire *v.* New York Central R., 98 Mass. 239, 245; 52 Ala. 606; 56 Ala. 368; 91 Ala. 340; Hart *v.* Pennsylvania R., 112 U. S. 331; *ante*, 366. See, further, 64 Mo. 440; 34 Md. 197; 94 Ind. 281 (delay).

Local legislation sometimes affects this kind of transportation. *Post*, 388. Independently of the statute of 1854 (*ante*, 360) and prior to its passage,

386. **Certain concise expressions acquire from mercantile usage in connection with** the carriage of freight a precision of meaning, which the initial letters alone might not unfrequently convey. These aim in some cases to qualify the common-law liabilities.[1]

387. **That rule of proximate and remote cause** of loss or injury which has been already considered in legal exemptions from liability applies to special contract exemptions offered in excuse by the carrier.[2]

388. III. **Effect of Legislation. We finally consider the carrier's bailment responsibility** as affected by legislation. Our modern English and American enactments concerning freight-carriage aim, in the present respect, for the most part, (1) to lessen the legal risks of transportation as to certain carriers and specified kinds of property; or (2) to curtail the opportunities which otherwise might be afforded a carrier of ridding himself, upon the plea of a special contract so called, of those obligations he properly owes the public. The former object has been mainly sought in the English statutes of 7 Geo. II. c. 15,

the carrier company was allowed to stipulate against injuries to live-stock, "howsoever caused"; even though the loss was occasioned by its own negligence. 7 Ex. 707.

It is reasonable for a railway carrier to stipulate that claims for damages shall be made before the horses are mingled with other stock. 34 Kan 347. Where at least some time elapses after they are thus mingled. 47 Kan. 753. See *ante*, 367. In a mixed custody, the primary duty of looking after the natural wants of the animals rests fairly upon the drover. 119 Penn. St. 577; 73 Ga. 722; 11 Lea (Tenn.), 82.

[1] § **480.** As to "owner's risk," often denoted by the letters "O. R." in a bill of lading or other document, see 44 Wis. 405; 104 Mass. 144; 93 N. Y. 532. The usual rule of policy in this country forbids that such an expression should relieve the carrier of liability for the negligence or misconduct of himself or his servants. But cf. 3 Q. B. D. 195; 8 App. Cas. 703 (English doctrine).

Unless the customer actually understood, or usage gave to the expression a well-defined meaning of which he should be cognizant, he is not bound by them. 103 Ind. 121; 3 Col. 280.

[2] § **480 a**; Davis *v.* Central Vermont R., 66 Vt. 290 (loss by fire expressly excepted); 47 Ark. 97; Lang *v.* Penn. R., 154 Penn. St. 342 (loss by mobs and rioters). See *ante*, 345.

and 26 Geo. III. c. 159, and later American acts, which, for the better encouragement of commercial enterprise, reduce the risks of ship-owners.[1] Of legislation for the latter object there are various statutes, with especial reference to large inland transportation as conducted at the present day.[2]

[1] §§ **481**, **482**; English acts of George II. and George III.; U. S. Sts. of 1851, c. 44, etc. See 3 Wall. (U. S.) 150, as to the act of Congress which limited the liability of ship-owners after the decision in 6 How. (U. S.) 344, so as to exempt in losses by accidental fire. Stricter requirements too, on the shipper's part, are now imposed, in specifying bullion, valuables, etc., consigned for carriage by vessel. The relation of ship-owners in a loss is modified from a partnership.

[2] See §§ **483–486**; *ante*, 360; English Carriers' Acts of 1830 and 1854, etc. We may also note here, that various statutes restrain the transportation of explosives; they also modify the general character of bills of lading so as to protect better a *bona fide* holder for value; or they regulate specially the carriage of live-stock. To such legislation, in its immediate local application, the reader is referred.

As to humane and other provisions of American statutes concerning the carriage of animals, see § **486**; 15 Fed. (U. S.) 209; 68 Ga. 644.

Under the English "Railway and Canal Traffic Act" (whose provisions have since been extended to steam vessels), such carriers continue liable for loss or injury done to animals or goods, in the receiving, forwarding, or delivering the same, whenever occasioned by the neglect or default of the company or its servants, unless the condition specially imposed by the carrier is (1) in the opinion of the court "just and reasonable," and is also (2) embodied in some special contract in writing signed by the owner or sender of the goods. § **484** and cases cited.

One section of this English act requires such carriers to afford all reasonable facilities to the public and to give no undue preference or advantage to any particular individual or description of traffic. There are statutes enacted in many of the United States, whose object is likewise to prevent railways and other carriers from charging unequal or excessive rates, besides the act of Congress concerning interstate commerce. § **485** and cases cited; 124 Mass. 561; 44 Wis. 338; 114 N. Y. 300; c. 8, *post*.

So strong is public sentiment in some parts of the United States against allowing railways to qualify their liability by special contract at all, that the legislation or constitution of certain States makes all such contracts utterly void, or else guards the transaction by requiring the sender's signature. § **485**; 69 Iowa, 485; 62 Mich. 1.

CHAPTER VI.

TERMINATION OF THE COMMON CARRIER'S BAILMENT RESPONSIBILITY.

389. The common carrier's responsibility for specific personal property taken by him ceases as soon as he has delivered it over to the designated party at the end of the transit in pursuance of his undertaking; for here the bailment comes to a natural end. We are to assume (1) that the goods or other personal property thus delivered over are delivered in good condition, or, at all events, injured no more than may be shown to consist with the due performance of the carrier's duty upon the principles already discussed; (2) that no injury has been occasioned by inexcusable delay; since every carrier is bound to perform the transit, and deliver the property over, within what, considering all the circumstances, is a reasonable time.[1]

390. For delays irresistible, occasioned by act of God and other excepted causes, the carrier is, of course, not liable;[2] and usage or a special contract again may tend to relax as, on the other hand, it may increase his responsibility;[3] and, furthermore, the rule is general, that, if the carrier has used due and reasonable diligence in the transportation, under all the circumstances, this will sufficiently discharge him, even though delay were occasioned by some accident or misfortune not irresistible, nor strictly referable to special exception.[4] A delay in putting the goods on the transit may be

[1] § **487.**

[2] 4 H. & N. 847; Lipford *v.* Charlotte R., 7 Rich. (S. C.) 409; *ante*, 322.

[3] See 2 Kern. (N. Y.) 99; The Harriman, 9 Wall. (U. S.) 161; Knowles *v.* Dabney, 105 Mass. 437. *Ante*, 367.

[4] § **488**; Taylor *v.* Great Northern R., L. R. 1 C. P. 385; 14 Wend. (N. Y.) 215; 69 Iowa, 665; 99 Mass. 508; 71 Miss. 741; Wibert *v.* New

excused on a like ground; though a carrier should more properly refuse to receive where his usual facilities cannot be given.[1] On the other hand, a reasonable cause of delay will not justify the carrier's non-performance or negligent performance of his duty; since he ought to apply, in any emergency, reasonably prudent and vigilant efforts to avert or diminish disaster;[2] and the question is always pertinent, whether the loss or injury was due proximately to his own fault or not. And for loss or injury occasioned those employing his services by his unreasonable and inexcusable delay the carrier is liable to them in damages.[3]

391. Moreover, the delivery over should be within a reasonable time after their arrival, so far as in the carrier lies. Reasonable time is not for abstract computation, but is considered with reference to the circumstances. In general, such delivery should be within a reasonable time after all possible cause of detention is removed, but on a proper day and at suitable

York R., 2 Kern. (N. Y.) 245; 4 Whart. (Penn.) 204; 18 Ill. 488; *ante*, 296, 322. Thus, it is held that a railroad company is not liable for delays occasioned by the act of another company crossing its line by sanction of law. Nor where the detention is caused by an unusual influx of business at the receiving point or on the route, the company providing with reasonable diligence to meet the emergency. Nor where a mob of strikers or rioters impedes or interrupts the carriage. *Ante*, 296.

[1] See *ante*, 296, 322.

Our courts are disposed to deal gently with a carrier, whose delay is trivial or is not shown to have caused actual damage. If there be special reason requiring haste, this should have appeared evident — as in case of perishable goods — or the consignor should have made the carrier aware of the fact. 47 Mich. 231; 84 Ill. 36; L. R. 9 C. P. 325; 47 N. Y. 29; 54 Ill. 58; 48 N. H. 455. And see further 80 Ill. 324, as to the duty of customer in such cases.

[2] 34 Conn. 145; 28 Fed. R. (U. S.) 323; 88 N. C. 570; 69 Iowa, 665; 33 Ohio St. 511.

[3] § **488**; D'Arc *v.* London R., L. R. 9 C. P. 325; 13 Allen (Mass.), 381; Branch *v.* Wilmington R., 77 N. C. 347; 65 Mo. 569; 144 N. Y. 200; *post*, c. 8, as to damages; 68 Ga. 805. As where the carrier needlessly deviates or carries out of the way. And see 67 Me. 317 (lapse of life-insurance policy). An unusual delay justifying the carrier ought to be explained by him. 41 Ark. 476; 37 La. An. 468.

hours for such business; and for undue delay induced by his own carelessness, the carrier is liable.[1]

392. Delivery over to the right party is also binding upon the carrier; in other words, to the true consignee on whose behalf the undertaking was assumed. He cannot deliver goods to the wrong person, however. innocently, cautiously, or in the usual course of business, without rendering himself liable as such to the true owner for the disastrous consequences thence ensuing. The common law, in fact, treats such misdelivery as conversion, and makes the carrier suable in trover.[2] Nothing, in short, but culpable fault on the part of the customer himself can excuse the carrier's liability for delivery to the wrong party. But there may be a delivery to the true consignee, mutually intended, which shall discharge the carrier, notwithstanding the real consignee actually imposed upon the consignor by assuming some fictitious name, or otherwise; though here the carrier must have acted honorably by the consignor, as well as with due diligence and according to the true spirit of his undertaking.[3] A delivery

[1] § 489; Stollard *v.* Great Western R., 2 B. & S. 419; Richardson *v.* Goddard, 23 How. (U. S.) 28; 17 Conn. 138; 14 La. An. 453; 12 Ill. 477.

The suitable days or hours to be thus regarded have reference rather to the usual receipt of such consignments than common business dealings with the public. 3 Dana (Ky.), 91; 7 Wis. 1. Cf. 17 Conn. 138; 1 Blatchf. (U. S.) 173 (stormy day); 1 Ben. (U. S.) 46.

[2] § 490; 4 Bing. 476; Southern Express Co. *v.* Dickson, 94 U. S. 549; Collins *v.* Burns, 63 N. Y. 1; Alabama R. *v.* Kidd, 35 Ala. 209; Winslow *v.* Vermont R., 42 Vt. 700; 16 C. B. 163; 109 Mass. 50; Houston R. *v.* Adams, 49 Tex. 748; Libby *v.* Ingalls, 124 Mass. 503; Indianapolis R. *v.* Herndon, 81 Ill. 143; Devereux *v.* Barclay, 2 B. & Ald. 702; Shenk *v.* Phil. Steam Propeller Co., 60 Penn. St. 116.

Delivery on a forged order or through fraud of a stranger will not discharge the carrier. 73 Ill. 224; 71 N. Y. 353. Misdelivery by the carrier's own carelessness or fraud is all the more culpable. 17 Fla. 783; 99 Ala. 416.

[3] 110 Mass. 26; M'Kean *v.* M'Ivor, L. R. 6 Ex. 36; 135 Mass. 278, 283; 160 Ill. 215; 25 Ind. 493; 17 Fla. 783; 113 Ga. 1102; Ky. (1900), 55 S. W. 918; 50 N. Y. 213; 42 Vt. 700. The true principle appears to be, in the case of an impostor, that the carrier must not, carelessly or

to the wrong person can never be excused on the ground that the right one is unknown, and that notice of arrival cannot be given to him; and as delivery must not be made to a stranger, neither should the carrier take a stranger's directions as to any disposition of the goods.[1]

393. Delivery to the owner's or consignee's duly authorized agent is good; provided, however, the carrier is prepared to prove such agency; since the consignee's agent at the terminus for some special purpose is not of necessity invested with full power to accept the particular delivery so as to discharge the bailment. But delivery to the owner's agent embraces delivery to a third person on that agent's direction.[2]

394. Delivery under some document of title should follow the tenor of that document. In pursuance of our modern practice of making over bills of lading for inland carriage as well as transportation by sea, and so passing title to the goods on transit or procuring advances, the carrier is bound to regard such evidence of ownership, and treat the transferee of the bill, and no other, as presumptive consignee of the property therein described.[3] A carrier who, in disregard of his own bill of lading, delivers over the goods intrusted to him without production of the document at all, runs the risk of being sued in trover by any *bona fide* holder of the bill who

wrongfully, aid a swindling transaction, but is bound, in his customer's interest, to regard suspicious circumstances brought to his attention. In case of the false personation of a consignee the carrier is liable.

[1] The Thames, 14 Wall. (U. S.) 98, 107; 39 Ark. 487; Houston R. *v.* Adams, 49 Tex. 748.

[2] 3 H. & N. 1; 2 Cal. 413; 15 Johns. (N. Y.) 39; American Express Co. *v.* Milk, 73 Ill. 224; Joslyn *v.* Grand Trunk R., 51 Vt. 92; § 491.

The carrier need not prove authority in the person to whom the goods were delivered by him, greater than in any other issue in a civil action. Wilcox *v.* Chicago R., 24 Minn. 269. See 42 Neb. 379.

[3] § 492; Alderman *v.* Eastern R., 115 Mass. 233; 14 Wall. (U. S.) 98; Bank of Commerce *v.* Bissell, 72 N. Y. 615; 51 Vt. 92; Bass *v.* Glover, 63 Ga. 745; Dodge *v.* Meyer, 61 Cal. 405. As to showing the consideration of such a document, see 29 Minn. 363. Usage may affect this question. 133 Mass. 154. So may legislation. 102 N. Y. 120.

had meantime taken it for value.[1] And where delivery is thus undertaken "to order," a delivery regardless of assignment or indorsement is not good.[2]

395. Special directions of the consignor must be duly regarded. In order to perform the duty of delivery aright, a carrier must regard such knowledge of ownership as he may have acquired.[3] When an owner ships goods to his own address, or his own order, the carrier cannot, upon any pretext, make delivery to any unauthorized stranger.[4] Again, where railway receipts, the evidence of title, with attached drafts, are furnished the carrier, or he receives other plain instructions from the consignor that the goods are only to be delivered on payment of the drafts, a different delivery will amount to conversion on his part.[5] And, in general, special directions from the consignor for establishing the proper party to whom delivery should be eventually made, must be fairly pursued, in accordance with the carrier's undertaking.[6]

396. Delivery to a paramount owner follows the usual rule. While a bailee cannot avail himself of the title of a third person, even though that person be the true owner, in order to gain title for himself, nor in any case where he has

[1] St. Louis R. *v.* Larned, 103 Ill. 293; Peoria Bank *v.* Northern R., 58 N. H. 203; Forbes *v.* Boston R., 133 Mass. 154. But cf. *ante*, 383, as to duplicate or triplicate bills, and the want of full advantage of negotiable paper.

[2] 81 Ga. 221; 75 Iowa, 573; 119 Penn. St. 24; 123 U. S. 727. Delivery even to a person who was to be notified will not excuse loss by disregard of the bill of lading. 106 N. Y. 579. As to delivery under a bill of lading to which is attached the consignor's draft for collection or acceptance, see 63 Fed. (U. S.) 391; 160 Ill. 401.

[3] § **493**; Finn *v.* Western R., 102 Mass. 283; 9 Penn. St. 148; 1 H. & C. 521. And see Sweet *v.* Barney, 23 N. Y. 335; London R. *v.* Bartlett, 7 H. & N. 400. And see Southern Express Co. *v.* Dickson, 94 U. S. 549 (knowledge that the consignor, and not the consignee owned); 49 N. Y. 188.

[4] 81 Ill. 143; Bank of Commerce *v.* Bissell, 72 N. Y. 615; 51 Vt. 92.

[5] 115 Mass. 230; Libby *v.* Ingalls, 124 Mass. 503; 63 Fed. (U. S.) 391; 160 Ill. 401.

[6] See McEwen *v.* Jeffersonville R., 33 Ind. 368.

not yielded to a paramount title, he is sufficiently excused where he has delivered the property to the true owner on his demand, his own course having been honorable. And hence a common carrier may excuse himself by showing that he actually delivered the goods to the true owner, who had a right to immediate delivery, even though such delivery be not according to the consignor's directions nor the terms of the bill of lading.[1] But, in case of delivery other than according to the original undertaking, it devolves upon the carrier to prove that he has delivered to the real owner.[2]

397. Where a reasonable doubt arises as to the person entitled to delivery, the carrier should not be left without reasonable opportunity of ascertaining his duty.[3] But his absolute refusal to deliver goods to a person entitled to receive them, who tenders payment of freight and other due charges, constitutes a conversion; and whether his caution and delay were reasonable or unreasonable depends upon the facts of the case.[4]

398. The address of goods to the "care of" any one is an authority to the carrier to deliver them to such a party, and so discharge himself. But to such a rule exceptions arise.[5] The consignor's direction, too, to notify a third person of the arrival of goods, is not tantamount to authorizing delivery to him.[6]

[1] § 494; The Idaho, 93 U. S. 575; Western Trans. Co. *v.* Barber, 56 N. Y. 544; 1 Woods (U. S.), 131; 45 N. Y. 387; 44 Minn. 224.

[2] American Express Co. *v.* Greenhalgh, 80 Ill. 68. Collusion by the carrier with third parties is forbidden, as with other bailees. 16 Fed. (U. S.) 57.

[3] § 495; Alexander *v.* Southey, 5 B. & Ald. 247; McEntee *v.* New Jersey Steamboat Co., 45 N. Y. 34 (qualified refusal only).

[4] Richmond R. *v.* Benson, 86 Ga. 203; Hett *v.* Boston & Maine R., 69 N. H. 139; Baltimore R. *v.* Pumphrey, 59 Md. 390. Like other bailees, who are perplexed as between conflicting claimants, the carrier may interplead parties and leave the courts to decide who should have the goods.

[5] § 496; Russell *v.* Livingston, 16 N. Y. 515 ("care of" the carrier's own representative); Fitzsimmons *v.* Southern Express Co., 40 Ga. 330; 46 Ala. 63; 29 Wis. 611.

[6] Bank of Commerce *v.* Bissell, 72 N. Y. 615.

398 a. Where misdelivery occurs through the consignor's carelessness in misdirecting the goods, or in directing them imperfectly, or where, through some delay in delivery, attributable to the owner's act, a loss is suffered, it is not the carrier who should suffer the consequences.[1] But errors of direction on the sender's part do not justify a misdelivery through the carrier's own fault or upon his own conjecture of what the consignor had intended.[2] Misdirection by a sender is more likely to justify the carrier in delay with its attendant consequences than in an erroneous delivery over to any one; but in course of rectifying reasonably the sender's blunders the carrier's responsibility may be reduced to the usual bailment standard.[3]

398 b. Failure to deliver because of legal process is sometimes discussed. An honest carrier should not suffer, where the law defeats his performance by taking paramount custody of the goods, regardless of his wishes, even though others set the machinery in motion, without, as it may quite tardily prove, a good cause. It appears that the actual detention of his goods by legal process may, under reasonable circumstances, be a justifiable defence on the carrier's behalf when sued in trover as for their conversion.[4]

398 c. Stoppage in transitu by the consignor may sometimes prevent and intercept delivery by the carrier. Such a right on the consignor's part may not always avail against a *bona fide* purchaser or pledgee of the goods under bills of lading, but it holds strongly as between the unpaid consignor

[1] § 497; 12 Heisk. (Tenn.) 161; Stimson *v.* Jackson, 58 N. H. 138. See c. 4 as to excuse of "act of customer."

[2] See McCulloch *v.* McDonald, 91 Ind. 240; 115 Ill. 407; Wernwag *v.* Philadelphia R., 117 Penn. St. 46.

[3] 89 Wis. 598. The carrier must regard all his directions as to delivery and not particular marks or descriptions alone. 124 Mass. 503; 100 N. Y. 491. For fraud or carelessness after the carrier's due delivery, he is not chargeable. 51 Iowa, 460.

[4] § 498. See c. 4 as to excuse of "act of public authority." See 117 Mass. 591; 8 S. C. 118; 134 Mass. 288; Stiles *v.* Davis, 1 Black (U. S.), 101; 36 N. Y. 403; 51 Ind. 181.

and his insolvent consignee.[1] It is for the owner, not the carrier, to take active steps in stopping goods *in transitu;* but the carrier is bound to regard such steps.[2]

399. The carrier's duty as to property unclaimed or refused should be considered. Where, after due inquiry, the true consignee cannot be found, or is ascertained to be dead or absent, the carrier should keep the goods until they are claimed, or store them prudently for and on account of the owner.[3] And if the consignee refuses to receive the goods on tender and pay freight, the carrier has likewise the right to store them on the owner's behalf, or retain a further temporary custody as bailee.[4] By acting thus, the carrier divests himself of his extraordinary responsibility, and becomes for his custody, like any warehouseman, liable only for ordinary care and diligence,[5] or even for less, if the circumstances warrant regarding him as a merely gratuitous bailee.[6] Even thus, however, he cannot deliver to a mere stranger, or the wrong party; though for losses by theft, fire, and the like, he should doubtless be held far less rigidly accountable.[7] Nor

[1] § 499; Worsdell, *re*, 6 Ch. D. 783; Newhall *v.* Central Pacific R., 51 Cal. 345; 45 Me. 172; 79 Mo. App. 76; 170 N. Y. 148. See generally, as to the right of stoppage *in transitu*, 2 Schoul. Pers. Prop. § 558.

[2] French *v.* Star Transp. Co., 134 Mass. 288.

[3] § 500; The Thames, 14 Wall. (U. S.) 98; 1 Denio (N. Y.), 45; Witbeck *v.* Holland, 45 N. Y. 13.

[4] Great Northern R. *v.* Swaffield, L. R. 9 Ex. 132; L. R. 5 Ex. 51; 24 Fed. (U. S.) 815. The carrier need not invariably give the consignor notice of such non-acceptance. 1 Denio (N. Y.), 45; 6 Coldw. (Tenn.) 356; American Express Co. *v.* Greenhalgh, 80 Ill. 68. See 27 Kan. 238. Though this seems his natural and prudent course. 96 Ga. 27. Nor is it safe for a carrier to assume that because the consignee cannot be found, the consignor or his agent should receive the goods. 71 Mo. 203. But the carrier should be cautious not to misdeliver upon the consignee's refusal to receive, in disregard of the consignor, or true owner. 83 N. C. 158; 56 Mich. 522; *ante*, 392.

[5] § 500. See peculiar circumstances in 147 Ill. 550; 8 Pac. 56 (refusal of owner to receive, who billed to himself).

[6] 6 Coldw. (Tenn.) 356; 7 Wis. 1.

[7] See 100 Mass. 405; Smith *v.* Nashua R., 7 Fost. (N. H.) 86; 109 Mass. 151; 35 Ala. 209; 81 Ill. 143.

can the carrier, under the strict rule of the common law, make sale of such goods for his charges, unless, possibly, where they must otherwise perish on his hands and become worthless.[1]

400. **In a delivery to joint parties,** one of those parties may show the carrier his sole right to the goods, like any other paramount owner.[2] As a rule, however, the carrier's duty is to deliver according to his consignor's directions; and where the package is directed to two or more persons jointly, he should deliver to both, or to either of them for both.[3]

401. **In short, a delivery should be complete**; and that surrender of possession which constitutes a complete discharge of the carrier's trust must be attended with no circumstance, on his part, such as would impair the title of the consignee, or affect the latter's peaceful enjoyment of the property.[4]

402. **The carrier, with respect to unloading,** has duties which, though varying with time and circumstance, regard always the natural wants and inherent qualities of the thing itself.[5] Reasonable facilities for unloading as well as loading should in general be provided.[6] As to the permitted period for unloading a vehicle, the law implies, in the absence of special contract, that this shall be within a reasonable time after its

[1] Rankin *v.* Memphis, &c. Packet Co., 9 Heisk. (Tenn.) 564.

As to storing in such cases, see Sherman *v.* Hudson River R., 64 N. Y. 254; 11 Allen (Mass.), 308; 13 Allen, 351; Bickford *v.* Metropolitan Steamship Co., 109 Mass. 151. If the consignee of a horse fails to call for it within a reasonable time after its arrival, the carrier may put the animal out to a livery-stable keeper at the owner's charge. L. R. 9 Ex. 132. Local statutes permit certain carriers to store and sell for charges, or to sell perishable goods.

[2] Wells *v.* American Express Co., 55 Wis. 23; s. c. 44 Wis. 342; 4 C. B. N. S. 616; § **501**; *ante*, 396.

[3] *Ib.*

[4] § **502**; Howland *v.* Greenway, 22 How. (U. S.) 491 (carrier's final carelessness).

[5] § **503**. A modern ferry should provide suitable drops and means of ingress and egress. 12 C. B. 742; 7 Cush. (Mass.) 155. And as to animals, see 68 Mo. 268.

[6] 87 Ky. 626; Covington Co. *v.* Keith, 139 U. S. 128.

arrival.[1] Even though the carrier should specially stipulate exemption from risks of unloading so far as the law permits, his duty to unload is presumed to continue.[2] But the bailment might be one of delivering a loaded vehicle, like a receptacle with its contents, for the consignee to empty; and in such a case the delivery should be sufficiently complete to reasonably admit of such unloading.[3]

403. As to methods of unloading, if a common carrier, in pursuance of the duty of making delivery, uses the tackle, machinery, lighters, or cars of a third person, and damage ensues, by the breaking of the tackle or the like, the thing is his *pro hac vice*, so as to make him responsible therefor to his own customer, as he would have been for his own in delivering. But if the consignee, or his agent or other bailee, uses such tackle, machinery, or other convenience for himself, after the carrier's duty is performed, and the goods are received into his own custody and control, the carrier is not chargeable for the defects of the thing.[4]

404. The consignee may intercept his goods on the transit with the consent of the carrier, and assume the risks accordingly; but not necessarily to the prejudice of a consignor or true owner of the goods, nor so as to deprive the carrier of his just reward.[5]

405. Notice or opportunity, without actual delivery applies in certain important modes of conveyance, so that the carrier, on reaching the end of his transit, becomes bound, not to seek out the consignee, in order to make personal delivery, but only to give due notice or opportunity, that the consignee may come and take his goods from the carrier's premises. "Carriers by ships and boats," it has been said, "must stop at the wharf;

[1] 14 Blatchf. (U. S.) 522.

[2] Benson *v.* Gray, 154 Mass. 391.

[3] See Connecting R. *v.* Wabash R., 123 Ill. 594; Independence Co. *v.* Burlington R., 72 Iowa, 535.

[4] § **504**; 14 Wend. (N. Y.) 225; 4 Esp. 462; 11 Met. (Mass.) 509; Loveland *v.* Burke, 120 Mass. 139; Blakemore *v.* Bristol R., 8 E. & B. 1035. *Ante*, 311. See also 50 N. Y. 154.

[5] § **505**; Lewis *v.* Western R., 11 Met. (Mass.) 509, 515.

railroad cars must remain on the track. In these cases, notice should be given to the consignee of the arrival and place of deposit, which comes in lieu of personal delivery." [1] At the same time it has generally been conceded that common carriers are *prima facie* under obligation to make personal delivery to the consignee.[2] Usage and special contract shape the duty very considerably in modern times, as will presently be shown. Thus among inland carriers a railway commonly makes no personal delivery, while with an express or teamster it is the reverse. But that usage or contract ought to be clearly established, under which a carrier can assume to clear himself by simply leaving the goods at his own place of deposit, to be called for, without at least giving the consignee notice of their arrival.[3]

406. The undertaking of C. O. D. (*i. e.*, to collect on delivery) is now a familiar one. Carriers at the present day frequently undertake to collect the consignor's demand upon the consignee simultaneously with making delivery of the goods to the latter party, and to remit the same to the former; and the letters "C. O. D." placed upon the package are in some States held to have acquired a mercantile sense sufficiently importing such a direction from the consignor, who, however, ought to furnish the carrier with receipted bill or other memorandum of the amount to be collected, or place such direction plainly upon the package.[4] This practice doubles or enlarges a carrier's duty as bailee. Carriers undertaking

[1] Gibson *v.* Culver, 17 Wend. (N. Y.) 305, 311; § **506**.

[2] § **506**; 5 T. R. 389; Fisk *v.* Newton, 1 Denio (N. Y.), 45; The Thames, 14 Wall. (U. S.) 98.

[3] 17 Wend. (N. Y.) 305; 16 Vt. 52; 18 Vt. 131. See 408–410, *post*.

Where a notice is requisite from such carriers, a public notice is ruled insufficient. 14 Ga. 277; 3 La. 224; 110 Cal. 348. Notice should be directed and sent with reasonable diligence. 73 Ill. 506. But cf. 399, *ante* (where one cannot be found); 1 Denio (N. Y.), 45; 14 Wall. (U. S.) 98, 107.

[4] § **507**; 79 Ill. 430; American Express Co. *v.* Greenhalgh, 80 Ill. 68; United States Express Co. *v.* Keefer, 59 Ind. 263; Hutchings *v.* Ladd, 16 Mich. 493; Collender *v.* Dinsmore, 55 N. Y. 200. Parol explanation cannot contradict or vary the express language of full written directions.

to collect on delivery are bound either to collect and remit the cash, or else return the goods as for the consignee's default; but express companies, upon whom this duty commonly devolves, sometimes advance to the sender the amount of his bill to save the trouble of remitting afterwards the amount collected.[1] Nor does the undertaking to collect on delivery necessarily keep the bailee strictly liable as common carrier, while the consignee delays payment upon a demand and tender of the goods, and the property continues in the carrier's custody, after a reasonable time or notice to the consignor.[2] In numerous instances, the carrier who takes a parcel with directions to collect on delivery is justified in giving the consignee opportunity to inspect the package before paying, in order to ascertain whether the bill sent for such goods is a correct one.[3]

407. Ratification or waiver by the customer is applicable. The customer may by his acts and conduct, as well as by formal writing, ratify the carrier's imperfect performance or waive a complete delivery by the latter.[4]

408. As a practical issue, we shall now proceed to show, there is considerable uncertainty in determining the exact point at which our modern common carrier's liability terminates in certain cases. For (1) a bailment duty may continue after, as well as before, one becomes a common carrier of cer-

[1] *Ib.* But cf. 76 N. Y. 376; Wells *v.* Am. Express Co., 44 Wis. 342 (goods sent by one carrier, with collection of bill by another, is not a "C. O. D.").

[2] Weed *v.* Barney, 45 N. Y. 344; Hasse *v.* Express Co., 94 Mich. 133 and cases cited. Special contract may reduce liability to such a standard. 60 Ark. 100.

[3] Lyons *v.* Hill, 46 N. H. 49. And see Libby *v.* Ingalls, 124 Mass. 503, as to the practice of sending a railway receipt with draft attached, to indicate that delivery is only to be made on payment of the draft. See also *ante*, 395. The "C. O. D." carrier who knows that the goods were sent in a damaged condition should tell the consignee. 182 Mass. 328.

[4] § **508**; Rathbun *v.* Steamboat Co., 76 N. Y. 376 ("C. O. D." case); Converse *v.* Boston & Maine R., 58 N. H. 521; Dobbin *v.* Michigan R., 56 Mich. 522.

tain goods; (2) delivery over is not a personal one, with certain kinds of carriers.[1]

409. One may be a carrier for transit and a simple bailee after arrival. This is a peculiarity not often noticeable in other bailments, but here constantly to be borne in mind; so that if, for instance, goods which had safely reached the journey's end were accidentally burnt up, or plundered by a mob, before that final delivery over which legally terminates a bailment, a court would often be perplexed to say whether the carrier were liable as such for the loss; or, in other words, whether his standard of responsibility should be deemed exceptional or ordinary. To determine such a question, it is material to consider whether the common carrier is legally bound as such to make delivery over, or the consignee must come and fetch them; and, in the latter case, whether notice must be given and sufficient time allowed to elapse after arrival of the goods to enable such a party fairly to perform his duty. In both respects our law is far from being exact or uniformly applied, and local usage sways the English and American courts considerably. Even where the carrier was bound naturally to make delivery, he often becomes, by reason of the consignee's refusal to receive and pay, or where the consignee is dead or cannot be found, a bailee of the ordinary sort, after fulfilling his carrier duty.[2]

410. Personal delivery is not expected, in the usual case of carriers by vessel or railway. Where goods are brought by water, the rule long sanctioned in Great Britain has been that delivery on the usual wharf will discharge the carrier; and such, too, is the American rule.[3] This applies with especial force to transportation between foreign ports, which for centuries has involved the use of bills of lading; and a bill of lading is quite commonly specific on the point involved, whether in creation or confirmation of some commercial usage as to the method of terminating the vessel's liability. This

[1] § 509.

[2] *Ante*, 399, 406. And cf. *ante*, 309.

[3] 5 T. R. 389; 1 Rawle (Penn.), 203; 4 Pick. (Mass.) 371; 3 Comst. (N. Y.) 322; 23 How. (U. S.) 28.

usage at the present day generally requires the consignee to take off his merchandise in lighters from the vessel's side on its arrival in port; otherwise the carrier shall land the goods on the wharf, or finally shall warehouse them if they are not called for, and advance payment of government duties, at the cost of those entitled to the property, especially if the consignee unreasonably delays doing so.[1] In landing on the wharf or storing goods, the carrier should have delicate, perishable, and valuable merchandise properly guarded against exposure to the weather or depredation; and justice requires that, before or at the time of landing, due and reasonable notice be given the consignee that the goods have arrived and are ready for delivery, in order that the latter may have fair opportunity to protect and remove them, and save risks and special warehouse charges.[2] The carrier should not disregard his own reasonable precautions as warehouseman.[3] The same general usage (except as to paying government duties), together with the issue of bills of lading, applies commonly to carriage between domestic ports and inland transportation by water; though local exceptions may prevail.[4] And in gen-

[1] § 511; L. R. 9 C. P. 355; Wilson *v.* London Steam Nav. Co., L. R. 1 C. P. 61; 46 N. Y. 578; 5 Wall. (U. S.) 481; The Thames, 14 Wall. 98; 52 N. Y. 40; Collins *v.* Burns, 63 N. Y. 1; The Tybee, 1 Woods (U. S.), 358.

[2] The Eddy, 5 Wall. (U. S.) 481; 38 Conn. 143; Morgan *v.* Dibble, 29 Tex. 107; Richardson *v.* Goddard, 23 How. (U. S.) 28; 1 Cliff. (U. S.) 383, 396. Delivery to a drayman not authorized by the consignee, neither discharges the carrier nor dispenses with notice. 15 Johns. (N. Y.) 39; 2 Head (Tenn.), 488. As to newspaper publication by way of notice, see 6 Ben. (U. S.) 517. To land and store the goods without giving notice or an opportunity to inspect does not relieve the carrier. Chase Dec. (U. S.) 125. But a custom to deliver to a warehouseman who notifies is good. 80 Mich. 90. And usage or special provision of the bill of lading may reduce the requirement of notice; thus posting on a bulletin at the custom house has sufficed. Constable *v.* Steamship Co., 154 U. S. 51.

[3] As in requiring a receipt before delivery. Tarbell *v.* Shipping Co., 110 N. Y. 170.

[4] 15 Ill. 561; Union Steamboat Co. *v.* Knapp, 73 Ill. 506; McAndrew *v.* Whitlock, 52 N. Y. 40; 3 Dana (Ky.), 91. See, as to exceptional

eral, after reasonable opportunity for the consignee to take his goods, the strict carrier liability is at an end.[1]

411. As to land carriers it is now generally conceded that railways, like water carriers, are exempt from the duty of making personal delivery. Yet the responsibility of this comprehensive class of inland carriers is, by the more conservative authorities, held to continue after the goods have reached their destination, and until the consignee has had reasonable time to call for and take them,[2] which would seem naturally to require the carrier to give notice of their arrival.[3] In Massachusetts, however, and some other important States, the rule is that the usual conduct of railway business does not require notice to be given to the consignee, but that immediate and safe storage in a freight depot on arrival answers as the proper substitute;[4] and this, as it is held, even though, before a loss occurs, no reasonable opportunity is given a consignee to take his goods away.[5] Even in such extreme instances, however, the legal liability of insurer is taken to

rules for inland transportation, 6 W. & S. (Penn.) 62; 5 Wis. 454. If the consignee presents himself seasonably to receive his goods conformably to contract, the carrier ought not to put him to the expense of storage. Graves *v.* Hartford Steamboat Co., 38 Conn. 143.

As to what is a usual or suitable wharf, as the place of discharging a vessel, there are numerous decisions turning largely upon local usage. See § **511**; 3 Fed. (U. S.) 344; 1 Low. (U. S.) 114, 464.

[1] As to the presumptive duty of making personal delivery, in other kinds of carriage by land, or at least of giving due notice and opportunity to the consignee, see § **512**; Story Bailm. § 543.

[2] § **513**; 35 Ala. 209; 46 Ala. 67; Moses *v.* Boston & Maine R., 32 N. H. 523; Winslow *v.* Vermont, &c. R., 42 Vt. 700; Parker *v.* Milwaukee R., 30 Wis. 689; Railroad Co. *v.* Manuf. Co., 16 Wall. (U. S.) 318; Faulkner *v.* Hart, 82 N. Y. 413.

[3] See 2 Mich. 538; 49 N. Y. 442; 6 Robertson (N. Y.), 120; Maignan *v.* New Orleans R., 24 La. An. 333; 60 Ark. 375.

[4] Shaw, C. J., in 1 Gray (Mass.), 263; 10 Met. (Mass.) 472; Bansemer *v.* Toledo R., 25 Ind. 434; Francis *v.* Dubuque R., 25 Iowa, 60; Jackson *v.* Sacramento Valley R., 23 Cal. 268; McCarty *v.* New York & Erie R., 30 Penn. St. 247; Neal *v.* Wilmington R., 8 Jones (N. C.), 482; 111 Ga. 6.

[5] Rice *v.* Hart, 118 Mass. 201. And see Shepherd *v.* Bristol R., L. R. 3 Ex. 189.

continue after the transit, until the goods are properly discharged and stored; upon which the company ceases to be a common carrier, and assumes the less hazardous posture of warehouseman. And under either rule the carrier risk, after a reasonable time to take away has expired, merges in that of mere warehouseman.[2] For careless discharge or negligent storage of the chattels carried, or carriage to some other point distant from the proper place of delivery, so as to subject the owner to special loss or damage, a railway is of course chargeable, whether it be in the one capacity or the other.[3]

412. We should note that it is the reasonable opportunity, rather than technical notice, which those States insist upon

[1] *Ib.*; 71 Ill. 96; Chicago R. *v.* Scott, 42 Ill. 132; 98 Mass. 212.

The foregoing decisions show on a most important issue an irreconcilable conflict of authority in leading States where railway traffic is conducted, — a situation greatly to be deplored. The subject may be explored at length by examining the opinion of Cooley, C. J., in McMillan *v.* Michigan R., 16 Mich. 103; and the opinion of Gray, C. J., in Rice *v.* Hart, 118 Mass. 201. See also 38 Conn. 143, 151; 42 Ill. 132. It is observable that railway usage has been much insisted upon as the reason of the Massachusetts rule.

In New York the Massachusetts rule is pointedly condemned in a recent case where, certainly, the consignee would otherwise have been put to great hardship. Faulkner *v.* Hart, 82 N. Y. 413. The court here observes that the decisions of a court of one State upon a question of commercial law are not obligatory upon the courts of other States. A late South Carolina case shows the court divided on this question. 11 S. C. 158. In 40 Kan. 184, the carrier said goods had not arrived when they had arrived. And see 91 Tenn. 708; 70 Fed. (U. S.) 764. See 80 Ala. 38. Special stipulations in the way-bill or special contract or local legislation may regulate on this point.

In this collision of State authority, the opinion of the Supreme Court of the United States on this subject is desirable. See 179 U. S. 415.

[2] 92 Wis. 393; Columbus R. *v.* Ludden, 89 Ala. 612. "Reasonable time" begins to run even before a notice is given. *Ib.*

[3] See 6 Gray (Mass.), 542; Rice *v.* Boston & Worcester R., 98 Mass. 212; Louisville R. *v.* Gilmer, 89 Ala. 531; Mitchell *v.* Lancashire R., L. R. 10 Q. B. 256; Cahn *v.* Michigan Central R., 71 Ill. 96; 5 Dillon (U. S.), 428. Towards goods in their possession merely as warehousemen, railways are not bound to exercise more than ordinary care and diligence. Pike *v.* Chicago, &c. R., 40 Wis. 583.

where the consignee is most favored as against railway carriers. For, where the consignee's address is not known to the carrier, the consignee or the consignor should take pains to make it plainly understood; and if, after due inquiry, the railway carrier fails to ascertain such address, the notice is excused, and, after a reasonable time for removal has elapsed, the liability of the carrier who has stored the goods will be changed to that of warehouseman.[1] And if the consignee has had reasonable opportunity to remove his goods, but the railway company consents, for mutual convenience, that they may remain longer in the freight house, the presumption arises that the exceptional risk as public carrier exists no longer.[2]

413. Expressmen and express companies are generally bound, however, to make personal delivery, even though they avail themselves of carriage by rail: and so, too, with wagoners and teamsters generally; this being their common custom, and, indeed, a chief reason with many for employing the service of such a carrier in these days when one might transmit his goods more cheaply as railway freight, to the same point of destination. Where delivery should be made to the consignee at his place of business, delivery should be during business hours, and with reasonable regard to the safety of the goods, and the consignee's convenience; delivery at the consignee's residence, when proper at all, must be made in a suitable manner, and at a suitable time; and, generally speaking, nothing short of prevention by act of God or of public authority or of a public enemy, or by the conduct of his customer, can excuse an express carrier from actual delivery of

[1] § **513**; Pelton *v.* Rensselaer. &c. R., 54 N. Y. 214.

[2] Fenner *v.* Buffalo, &c. R., 44 N. Y. 505, 511. See also 85 N. C. 423; Welch *v.* Concord R., 68 N. H. 206.

Usage sometimes requires the carrier to deliver loaded cars upon an independent track, whereupon his responsibility as bailee ceases, even though the cars are to be subsequently loaded and returned on a new bailment. 66 Ala. 167; 123 Ill. 594. In various cases, the usage arises for consignees to unload in bulk and the cars do not go to the freight house for that purpose. See 72 Iowa, 535; 59 Minn. 161.

the thing to the proper party.[1] Personal delivery dispenses with personal notice and affording reasonable opportunity to remove the goods; which otherwise, in localities where or in seasons when business usage, the character of the goods, and the sender's knowledge and assent, might justify an express company in non-delivery, the law will insist upon.[2] The obligation of a carrier to make personal delivery may be confirmed by special circumstances.[3]

414. To consider the responsibility as warehouseman somewhat further. We have seen, that a carrier may become himself the warehouseman or depositary of goods left upon his hands after his transportation duty terminates; or he may constitute some responsible third party the warehouseman.[4] In the latter case, the nature of the carrier's delivery must determine on whose behalf it is made; for, if the consignee fails, after reasonable opportunity, to take the goods, the carrier has his election to make the third party his own agent, for whose negligence he shall stand responsible, or to divest himself of such risks by making such third party agent of the owner.[5] Where the carrier himself becomes warehouseman of the goods, personally or by his own agent, it is of importance to note whether the transportation duty has ended, or not, upon the principles already discussed. For, in the one

[1] § **514**; Merwin *v.* Butler, 17 Conn. 138; Marshall *v.* American Express Co., 7 Wis. 1; 23 Ill. 197; 6 Bosw. (N. Y.) 235; American Merchants' Union Express Co. *v.* Wolf, 79 Ill. 430.

As to notifying and holding as bailee where the consignee refuses to receive, etc., see *ante*, 399; Kremer *v.* Southern Express Co., 1 Coldw. (Tenn.) 356; Merrill *v.* Express Co, 62 N. H. 514; Marshall *v.* American Express Co., 7 Wis. 1; Witbeck *v.* Holland, 45 N. Y. 13; 92 Penn. St. 323.

[2] See 23 Ill. 197; Packard *v.* Earle, 113 Mass. 280. As to delivering to a consignee's agent, see 99 Mass. 259.

[3] Hyde *v.* Trent Nav. Co, 5 T. R. 389; Cahn *v.* Michigan, &c. R., 71 Ill. 96. As to the force of usage or special contract, see 415, *post*.

[4] *Ante*, 399.

[5] § **516**; Great Northern R. *v.* Swaffield, L. R. 9 Ex. 132; Bickford *v.* Metropolitan Steamship Co., 109 Mass. 151; Hathorn *v.* Ely, 28 N. Y. 78, 81. See Alabama R. *v.* Kidd, 35 Ala. 209, where the contract was to deliver to the carrier's own agent.

case, he remains no longer chargeable as insurer, and under the carriage contract, but must, for loss or injury occasioned while acting in this new capacity, be held answerable only as would any other ordinary bailee for hire, supposing the bailment to be with intended recompense, or as a gratuitous bailee, if the trust be without recompense.[1] In the other case, however, and where the transportation duty has not been fully performed, his liability is essentially that of common carrier, or such as makes the bailee answerable at the common law for losses by rioters, accidental fires, and the like; which rule must further apply where the carrier unjustifiably deposits the goods at some intermediate place on his route, or sends by a conveyance different from that agreed upon, or has carried them carelessly out of the way, or, after their arrival at the point of destination, holds them still, without having as yet given the notice or reasonable opportunity of removal, or made the personal delivery which was incumbent upon him.[2]

415. Usage, special contract, or legislation may affect the common carrier's obligation of delivery, as it often does the transportation undertaking in other respects.[3] This the drift of the present chapter has already indicated.[4] While, gener-

[1] 4 T. R. 581; L. R. 3 Ex. 189; 10 Met. (Mass.) 472; Norway Plains Co. *v.* Boston & Maine R., 1 Gray (Mass.), 263; Francis *v.* Dubuque R., 25 Iowa, 60; Neal *v.* Wilmington R., 8 Jones (N. C.), 482; Bansemer *v.* Toledo R., 25 Ind. 434; Jackson *v.* Sacramento Valley R., 23 Cal. 268. We have already seen that our States rule differently as to the exact point at which the railway carrier divests himself of his responsibility as such, and becomes a warehouseman. *Ante*, 411.

[2] § **516**; 1 T. R. 27; 125 Penn. St. 620; 5 T. R. 389; White *v.* Humphery, 11 Q. B. 45; 6 W. & S. (Penn.) 62.

As to the responsibility of a connecting carrier in sending beyond his own route, see c. 9, *post*. In general, the duty of making proper delivery is the same, whether one receives the property directly from the consignor, or from some other carrier to whom it was originally bailed. 38 Ill. 503; § **517**.

[3] *Ante*, c. 5. The usage or special contract should be reasonable and just.

[4] § **519**. Usage of the port is often set up to justify the peculiar method of delivering from a vessel. See 87 N. Y. 240, as to the designation of

ally speaking, the *prima facie* obligation of a carrier, with regard to delivery, may be affected by a well-established usage consonant to public policy and generally understood, so uniformly and so long ought the usage to have been acquiesced in by the public that a jury would feel constrained to say that it entered into the minds of the contracting parties as part of the contract.[1] Yet it suffices that a carrier does his business according to the regular, known, and ordinary modes, or, if the other party understood it, his own particular modes; and the carrier need not prove that his consignor understood an established usage, for the usage explains itself.[2] As to delivery, which peculiarly concerns the local terminus, and not so much a consignor as the consignee, the course of business at the place of destination may control concerning

an elevator by the consignee. See also 3 Wall. (U. S.) 225. Whether carriers by inland waters may divest themselves of responsibility like carriers by sea or not, usage long established, uniform, and well known may regulate the mode of delivery. The Richmond, 1 Biss. (U. S.) 49. Where a bill of lading is silent as to the particular place or mode of delivery, the usage and regulations of the port or the arrangements made with the consignee should determine; but it is the custom of the particular port, and not of other ports, which governs. 10 Fed. (U. S.) 779. Delivery to the wrong elevator, or at the wrong wharf, is, in such cases, a misdelivery.

For a local usage of railroads to deliver under a bill of lading not containing the words "or order," without requiring production of the document, see 133 Mass. 154. Usage in some of our sparsely settled regions to deliver goods by water at a landing-place where there is neither warehouse nor agent to keep custody, binds customers who are aware of it. 4 McCrary (U. S.), 383. And 46 Ark. 222, affirms the usage, even as against customers not aware of it. And so is it with the custom of delivering by railway at a side track and there leaving the car and its contents for the consignee. *Ante*, 412. Those who do business with the carrier upon such conditions are bound to look after their property when it arrives. Usage may require specially a personal delivery or may dispense with it. See *ante*, 412, 413.

[1] Rushforth *v.* Hadfield, 6 East, 519; Alabama River R. *v.* Kidd, 35 Ala. 209; Cahn *v.* Michigan Central R., 71 Ill. 96.

[2] See 25 Wend. (N. Y.) 660; Farmers', &c. Bank *v.* Champlain Trans. Co., 16 Vt. 52; s. c. 18 Vt. 131; s. c. 23 Vt. 186. Loveland *v.* Burke, 120 Mass. 139.

the proper time, place, and manner of discharging the carrier's duty.[1] But usage or custom cannot prescribe that acts which the law declares to be a delivery shall not sufficiently constitute it, or otherwise overturn what public policy sets up; and, where delivery according to usage becomes from special circumstances unsuitable, the carrier cannot so discharge himself.[2]

416. **Special contract may regulate** the time, place, and manner of delivery, and, as we have incidentally shown, affect very considerably the common carrier's obligation in this and other respects, by stringent or lax provisions; though not, as it appears, to the extent, in America at least, of permitting persons of this profession to stand toward their customers with lesser burdens, under the most favorable aspect, than are sustained by private bailees for hire.[3] Special terms, relative to delivery and the mode of terminating the carrier's responsibility, must, if reasonable of themselves and conformable to public policy, prevail over local usage as well as common law; and the common carrier's performance should in general be in accordance with his engagement;[4] which, as modern transportation is conducted, is quite commonly to be gathered from expressions used in the bill of lading, way-bill, or receipt given for the goods, to which the shipper has actually or by

[1] § **519**. It has been held that a carrier may show usage to deliver at certain stopping-places only. See McMasters *v.* Penn. R., 69 Penn. St. 374.

[2] Reed *v.* Richardson, 98 Mass. 216; 75 Iowa, 573 (usage to disregard bill of lading); Stone *v.* Rice, 58 Ala. 95.

[3] § **520**; *ante*, 363; Gordon *v.* Great Western R., 8 Q. B. D. 44 (a reasonable construction is applied).

[4] A carrier may thus bind himself to transport and deliver without a change of cars. 47 Iowa, 229. Or to deposit in warehouse at the consignee's risk and expense unless the goods are promptly taken. 44 N. Y. Super. 407. Or so as to apply a specific rule as to *ante*, 411. 86 Ala. 159. And see Constable *v.* Steamship Co., 154 U. S. 51; Tarbell *v.* Royal Shipping Co., 110 N. Y. 170. Personal notice by the carrier as to time and place of discharging cargo may be thus dispensed with. 154 U. S. 51. But express agreement for place of landing must be followed. 68 Miss. 803. Express company's special limitation considered where the consignee could not be found. 62 N. H. 514.

legal inference assented.[1] If public policy be not transcended, a special contract may define the character and mode in which the railroad carrier shall hold goods after their arrival, or what acts shall terminate his carrier risk.[2]

417. Legislation, too, may be found affecting the operation of the rules we have considered; and it might well be employed more extensively to expel some of the more glaring inconsistencies of our law touching the delivery obligation of railway and other carriers, and the method of terminating the present relation when the goods have reached their journey's end.[3]

[1] § **520.** The principles set forth in the preceding chapter as to the requirement of mutual assent and reasonableness of interpretation apply to terms qualifying the duty of delivery as well as to other terms of carriage performance. See 14 Blatchf. (U. S.) 9; Hathorn *v.* Ely, 28 N. Y. 78. On the other hand, negligent delay and deviation, or misdelivery or misconduct or careless delivery, should not be excused under the color of special terms of carriage. 68 Ga. 805; Dibble *v.* Morgan, 3 Ben. (U. S.) 276. And see 1 H. & N. 63; Mitchell *v.* Lancashire R., L. R. 10 Q. B. 256; 72 N. Y. 615; 127 N. C. 293; 28 Wash. 439; 52 Ill. 123; 47 Iowa, 262.

[2] Western R. *v.* Little, 86 Ala. 159; Feige *v.* Michigan R., 62 Mich. 1; Draper *v.* Delaware R., 118 N. Y. 118. See 41 Or. 177, as to unloading live-stock.

[3] § **521**; *ante*, 388. See 49 Tex. 748 (course for railways to pursue in delivering freight); 102 N. Y. 120; 15 Fed. (U. S.) 209 (delivery of live-stock); 56 Cal. 584; 49 Tex. 748; 94 Cal. 166; 110 Cal. 348. There are various local statutes which authorize the sale of unclaimed property by certain carriers.

CHAPTER VII.

GENERAL RIGHTS OF COMMON CARRIERS.

418. The general rights of the common carrier which remain for our consideration are: I. His special property in the goods and chattels during the accomplishment of the bailment purpose. II. His right of compensation, with or without the incidental security of a lien.[1]

419. I. Carrier's special property in the things. Every common carrier is invested with a special property in the goods and chattels which a customer confides to him, so that like other bailees for mutual benefit he may maintain an action against any and all persons who disturb his possession thereof and injuriously interfere with the performance of his lawful duties. He may thus replevy the thing from a stranger, or sue in trover for its conversion. He may sue in his own name for a trespass upon or injury to the property carried.[2] The general reason of this right of action in the common carrier's behalf is that, as bailee, he must answer over to the bailor or owner whom he represents for the whole property committed to him; and this is reinforced, in instances like the present, by the consideration that he commonly has a special interest in the particular goods or chattels, as security for his recompense. So ample, therefore, is the remedy afforded the carrier, that, as against trespassers, he has been allowed to recover, in damages, the full value of the goods.[3] So, too, if a carrier by mistake or the fraud of others delivers goods to the wrong person, he

[1] § 522.

[2] § 523; 1 Camp. 451, per Lord Ellenborough. The carrier's recovery of full damages against the wrong-doer will bar the owner. Steamboat Farmer *v.* Macrow, 26 Ala. 189. And see as to carriage by water, Beaconsfield, The, 158 U. S. 303.

[3] 26 Ala. 189; Campbell *v.* Conner, 70 N. Y. 424.

may replevy the goods or sue in damages for their conversion; and this right avails generally against the wrong receiver of the goods and any person subsequently receiving them.[1]

420. The carrier, too, as a principal bailee who employs his own subordinates in the performance of an undertaking, is entitled to sue his servant, sub-contractor, connecting carrier, or other subordinate, by virtue of his own responsibility over to the owner for their acts, and the circumstance that he has employed them, whenever any such party stands chargeable with a breach of contract made with him.[2]

421. II. Carrier's Right of Compensation. As to his right of compensation, with or without the incidental security of a lien, we have shown it in a previous chapter, so highly favored at our law that one may refuse, in the exercise of his public vocation, to transport goods and chattels for any customer, unless first paid his reasonable reward for the service.[3] More commonly, however, is this reward claimed by him at the journey's end as a condition precedent of surrendering the property to the consignee. Where common carriers receive goods in the ordinary course of business, to be transported from one place to another, they may expressly stipulate for any reward which, of itself, is not extortionate, oppressive, or to the special disfavor of individuals; but in the absence of express stipulation, the law implies that the usual and customary or reasonable compensation shall be paid.[4]

422. The word "freight" is often used to denote the recompense of a carrier, — a word which, originating in maritime law, was once restricted to conveyance by water, but now applies as well to inland transportation, though more especially to that by railway. But other words are used with more particular reference to the lesser carriers; such as "charges,"

[1] 80 Ala. 100. Carrier may sue in trover, or waive the tort and sue for value. Johnson *v.* Gulf Co. (Miss.) 34 So. 357.

[2] § **524**; 1 Ind. 532; White *v.* Bascom, 28 Vt. 268; Chicago, &c. R. *v.* Northern Line Packet Co., 70 Ill. 217; Smith *v.* Foran, 43 Conn. 124.

[3] *Ante*, 292; § **525**.

[4] § **525**; 2 Duer (N. Y.), 471; Rowland *v.* New York R., 61 Conn. 103; Louisville R. *v.* Wilson, 119 Ind. 352.

"reward," "hire money," "fare;" this last word applying rather to passengers and their baggage, than to the general conveyance of goods and chattels.[1]

422 a. The consignor of goods, who has once completely delivered them to the carrier, has no right to demand them again, nor to break or prevent their transit, regardless of the carrier's just indemnity; nor would he, by altogether refusing to deliver them according to the contract of transportation, absolve himself from making compensation in damages for his breach of engagement. The approved rule as to carriage by a general ship, extending, perhaps, to other modes of conveyance by land or water, is that one who has laden goods cannot insist on having them relanded and delivered to him without paying the freight that might become due for carrying them, and indemnifying the master against the consequences of signing a bill of lading.[2] But, as regards the question, when lien attaches to the goods, and the earning of freight, as such, commences, authorities are not uniform.[3]

423. Where goods are intercepted by the owner or consignee, before they reach their final destination, he is liable for the full freight or recompense, provided the carrier has done no wrong, and was ready to deliver at their ultimate destination, and does not consent to an abatement of his charges.[4] But where acceptance is made short of the place originally agreed

[1] § 526; 21 How. (U. S.) 527.

See distinction made in railway recompense as between "transportation service" and "switching" or "transfer service" (fixed charge per car), in 110 Ga. 173.

[2] § 527; Thomson *v.* Trail, 2 C. & P. 334, per Lord Tenterden; Tindal *v.* Taylor, 4 E. & B. 219, 227.

[3] Cf. 4 E. & B. 219; Thompson *v.* Small, 1 C. B. 328; 6 Duer (N. Y.), 194 (from delivery and acceptance of goods); Bailey *v.* Damon, 5 Gray (Mass.), 92 (from commencement of voyage if, at least, the carrier might have substituted other goods). When this question arises for application to railway cars, it will be found to present a different aspect from that of carriage by a single vehicle, because of the circumstance that freight cars are attached or left off from a train, according to the nature and amount of personal property requiring present transportation.

[4] § 528; Violett *v.* Stettinius, 5 Cranch C. Ct. (U. S.) 559.

upon, and the mutual understanding appears to justify the supposition that the carrier abates his charges, then the carrier will be entitled only to *pro rata* compensation; which would be the general result of an acceptance where the transit, from some cause exonerating the carrier from liability, was broken up or seriously interrupted.[1] If, however, the consignee or owner intercepts and takes his goods because of the carrier's tortious conduct, or his inexcusable refusal to complete the transit according to his contract, the carrier earns no freight at all. And wherever the carrier inexcusably loses the goods on the way, or they are wrongly delivered, or other act is done which the law visits upon the carrier, rendering their delivery impracticable, he has no right as such to receive freight for their carriage.[2]

424. Indeed, the rule which has long been asserted of carriage by water under a bill of lading is that the contract of transportation is an entire one, so that the carrier can recover no compensation unless he fulfils his engagement by making a complete transit and complete delivery.[3] But to thus permit the customer to derive an advantage at the carrier's expense seems unnecessarily harsh, and such a rule must often discourage the carrier from doing his best where calamity occurs. This doctrine, which probably originated out of regard for the peculiar incidents and responsibilities attending ocean naviga-

[1] Lorent *v.* Kentring, 1 Nott & M. (S. C.) 132; Portland Bank *v.* Stubbs, 6 Mass. 422, 427; Parsons *v.* Hardy, 14 Wend. (N. Y.) 215; Hunt *v.* Haskell, 24 Me. 339.

[2] Portland Bank *v.* Stubbs, 6 Mass. 422, 427; 6 Har. & J. 400; Sayward *v.* Stevens, 3 Gray (Mass.), 97; Mason *v.* Lickbarrow, 1 H. Bl. 359.

[3] § 529; 3 Sumn. (U. S.) 542, 550, and cases cited; Sayward *v.* Stevens, 3 Gray (Mass.), 97. The convenience with which the consignee may supply the deficiency is held not to better the carrier's claim for compensation. Sayward *v.* Stevens, *ib.*

No freight is due, whether full or *pro rata* (under the rule of the text), where a vessel has been captured and condemned with its cargo at an intermediate port, though part of the cargo is restored and sold at the same port. 1 Mason (U. S.), 43. Nor generally in case of a compulsory sale at an intermediate port by reason of the disaster. 3 Ware (U. S.), 139. No freight is earned against the shipper where delivery has become impossible. 4 Blatchf. (U. S.) 443.

tion and the carriage of cargoes, where the presumption is a fair one that intermediate delivery must be immensely inconvenient to an importing merchant, applies with less force to land transit and small consignments; since here, to a much greater extent, one carrier may forward what another has left, and the owner, by telegram or otherwise, may adapt his course to the emergency, so as to reduce the mischief which disaster occasions. Even in water carriage, the courts have broken the force of the rule to some extent, by paying fair heed to the mutual understanding of the parties, as their express contract, acts, or general conduct make it manifest.[1] Moreover the fault of the customer shall not deprive the carrier of his recompense; nor shall temporary stress or delay amount to a breaking up of the transit.[2]

425. Thus, where the carriage contract is not for a gross sum, nor relates to miscellaneous goods, unlike in kind or value, and bearing no definite proportion to one another, but is apparently designed to make compensation for the carriage divisible and apportionable, such a contract will be enforced according to its intent; as, where the freight is stipulated as payable by weight or measurement, or where different portions of the same consignment are upon distinct and separate terms as to freight.[3] Where, too, a common carrier pays damages for the loss of goods by his breach of contract, this is now regarded as tantamount to a safe delivery in many instances, so as to entitle him to the allowance of his freight thereon.[4] And if, from some cause which would clearly excuse a total delivery, as, for example, where part of the goods consigned were destroyed by lightning, without the carrier's fault, or perished

[1] As in a waiver by consignee, 3 Sumn. (U. S.) 542; 3 Gray (Mass.), 97, 104; 2 McL. 422.

[2] 2 McL. (U. S.) 422; Industrie, The (1894), P. 58; 4 Biss. (U. S.) 417; 5 Duer (N. Y.), 538 (leaky barrels).

[3] § 530; 10 East, 295; Sayward *v.* Stevens, 3 Gray (Mass.), 97, 103. As to computing payment by weight, etc., see 6 Ben. (U. S.) 199.

[4] 1 Bay (S. C.), 101; Atkisson *v.* Steamboat Castle Garden, 28 Mo. 124. And see Hagerstown Bank *v.* Adams Express Co., 45 Penn. St. 419. But cf. 8 Gray (Mass.), 215.

from natural decay, the carrier makes delivery of a portion only, courts incline to allow him freight *pro rata* for the portion safely delivered.[1]

426. **As to what may have been actually lost in transit,** the universal rule is, in the absence of some special usage or contract to the contrary, that, provided neither owner nor carrier was in default, and saving, of course, the carrier's common-law risks as an insurer, the goods must perish to the one and the freight to the other.[2] Nor is a special contract which throws risks of loss upon the owner readily assumed to make him pay freight upon what is lost besides.[3]

427. **Where, once more, delivery is incomplete,** and the carrier, after making a partial delivery, unlawfully withholds delivery of the residue, so that the consignee thereupon replevies them, freight may be recovered on the portion already delivered, and also on such portion as may afterwards arrive and be taken by the officer and delivered to the consignee after the beginning

[1] 44 Barb. (N. Y.) 655; The Brig Collenberg, 1 Black (U. S.), 170.

It appears that where a landing of the goods is prevented by the government officials, without the carrier's fault, freight is nevertheless earned. Morgan *v.* North Am. Ins. Co., 4 Dall. 455. See Howland *v.* Greenway, 22 How. 491. But it is otherwise with a seizure caused by the carrier's wrong. Elwell *v.* Skiddy, 15 N. Y. Supr. 73.

[2] § **530**; *ante*, 89; 4 Allen (Mass.), 245.

As to the commercial apportionment of freight, and the circumstances under which it may be claimed, see further, § **530**. Capture involves a loss of freight; but a recapture and performance of the voyage revives the right. Transshipment after disaster may keep the right of freight alive. But this must be deemed affected by a consideration of the carrier's duty in this respect. 1 Sneed (Tenn.), 205; Hopper *v.* Burness, 1 C. P. D. 137. Where goods are so far damaged as to utterly lose their merchantable character, — as where dates are soaked in salt water and reduced to a pulp, — freight is precluded. Asfar *v.* Blundell (1896), 1 Q. B. 123.

The justifiable conduct of the carrier, and his readiness to perform his full engagement so as to benefit the shipper, seems properly to be taken in his favor in all such cases, while his default, or a determination to earn freight regardless of the shipper's interests under an emergency, is taken against him.

[3] N. Y. Central R. *v.* Standard Oil Co., 87 N. Y. 486.

of the service of the replevin, there being, as to all this, no demand and refusal; but as to that portion the possession of which was obtained only by replevin, the carrier cannot, as it appears, recover freight.[1] And, as a general rule, in order to claim freight under his lien the carrier must deliver or tender delivery at the specific place agreed on and not elsewhere.[2]

428. Freight or recompense paid in advance, may, in the absence of any special agreement to the contrary, be recovered back if it is not actually earned; that is to say, in general, unless the carriage has been fully performed consistently with the carrier's undertaking.[3] Otherwise, however, where the freight has been actually earned; and reduced rates for the carriage might furnish a consideration for an absolute payment in advance and the assumption of risks of loss besides.[4]

429. The understanding of the parties, however, in respect of the carriage compensation is quite commonly to be gathered from the language employed in the bill of lading or other contract of affreightment or carriage. The carrier, or the party from whom freight or recompense is claimed, may show, on his behalf, that the actual cargo was different from that described in the bill of lading, the receipt being open to explanation;[5] and thus the carrier may be found entitled to more or less compensation than there appears.[6] The rule is, that though goods should swell or shrink naturally on the transit, so as to weigh more or less at the terminus than when taken on board, this will not affect the right of *pro rata* compensation since this is due only on the amount which is

[1] Boston & Maine R. *v.* Brown, 15 Gray (Mass.), 223; § **531.**

[2] 1 Bosw. (N. Y.) 177, 185; 60 Mich. 56. Thus it is not enough for a vessel to arrive at a wharf; it must unload there. 66 Md. 269.

[3] 4 B. & Ald. 582; Minturn *v.* Warren Ins. Co., 2 Allen (Mass.), 86, and cases cited; 9 Allen (Mass.), 311; § **532.**

[4] 12 Fed. (U. S.) 77; and see 16 Neb. 661.

[5] § **533**; Blanchet *v.* Powell's Colliery Co., L. R. 9 Ex. 74; 1 Sprague (U. S.), 473.

[6] 1 Hilt. (N. Y.) 221; 5 Duer (N. Y.), 538.

actually shipped;[1] but the special engagement serves as the standard for special cases.[2]

430. Liability for freight or recompense rests generally upon the consignee or proper party receiving the goods; "the only discrepancy between the decisions being," as one of our American judges remarks, "whether the damages from injury to, or non-delivery of, the goods, are to be recovered by a separate action or by recoupment from the freight earned."[3] In England it was early decided that, if the consignee of goods received any benefit from their carriage, he could not defend himself from the payment of freight on the ground that the goods had been inexcusably damaged by the carrier to an amount exceeding the freight, but should bring his cross-action.[4] But the modern inclination, and especially in this country, seems to be to allow the injury or partial loss occasioned by the negligence of the carrier to be set off *pro tanto* against his claim for compensation, even though it be to

[1] Gibson *v.* Sturge, 10 Ex. 622.

[2] See, as to the recent construction of certain expressions in this respect, L. R. 2 Ex. 125; L. R. 2 Ex. 333; L. R. 1 C. P. 649; L. R. 8 C. P. 679; L. R. 8 C. P. 465; L. R. 4 C. P. 138; L. R. 9 Q. B. 99.

Of the general rule, Bigelow, C. J., observes, in a leading case on this subject, that it "may be varied or annulled by an express agreement in the charter-party or bill of lading, by which it is provided that money paid in advance on account of the freight shall be deemed to be absolutely due to the [ship] owner [or carrier] at the time of its prepayment, and not in any degree dependent on the contingencies of the performance of the contemplated voyage and the entire fulfilment of the contract of carriage. 4 M. & S. 37; 3 H. & N. 405; Hicks *v.* Shield, 7 El. & B. 633. But, as such a stipulation is intended to control the usual law applicable to such contracts, and to substitute in its place a positive agreement of the parties, it is necessary to express it in terms so clear and unambiguous as to leave no doubt that such was the intention in framing the contract of affreightment. Otherwise, the general rule of law must prevail." Benner *v.* Equitable Safety Ins. Co., 6 Allen (Mass.), 222, 224. This issue is raised in cases where insurance is made upon the freight. See Lawson *v.* Worms, 6 Cal. 365; Atwell *v.* Miller, 11 Md. 348; 12 Fed. R. 77. That recompense may be otherwise varied by special contract, see *ante*, 421.

[3] Hill *v.* Leadbetter, 42 Me. 572, 576; § 534.

[4] Shields *v.* Davis, 6 Taunt. 65; Ritchie *v.* Atkinson, 10 East, 295.

extinguish such claim altogether.[1] The relation of carrier and consignee does not establish the liability of the latter to pay charges or to accept the goods; but where the consignee accepts the goods and the carrier delivers them accordingly, the consignee must pay, as under his own implied contract.[2]

431. But the consignor or shipper is ultimately and originally liable; and independently of an acceptance at the end of the transit, it is the consignor or shipper who is ordinarily bound to pay the freight or recompense on the goods whose transportation he procures, and thus may the carrier doubtless regard him when they are offered for transportation. And if the consignee refuses to receive the goods or cannot be found, the carrier may usually have final recourse to the party who engaged the transportation.[3] But whenever the consignee engages to make payment, he, too, may be held responsible accordingly. The tenor of bills of lading and similar documents of title and transportation, and the conduct of the transferees of such instruments, may aid the carrier in fixing the liability to himself of others, for whose benefit the transportation was conducted; and the receipt of goods unpaid for, by the consignee or proper party, usually imports a promise on the part of such consignee to stand responsible for what, on the whole, may be the carrier's rightful charges.[4] Even though the consignor had sold the goods to the consignee by delivery to the carrier, and the carrier was cognizant of that fact, the consignor is still presumably liable for the freight; but circumstances may repel such presumption and show that the carrier meant to rely upon the consignee alone.[5]

[1] Hinsdell *v.* Weed, 5 Denio (N.Y.), 172; Boggs *v.* Martin, 3 B. Mon. 239; Bancroft *v.* Peters, 4 Mich. 519; Hill *v.* Leadbetter, 42 Me. 572; Leech *v.* Baldwin, 5 Watts (Penn.), 446; Fitchburg R. *v.* Hanna, 6 Gray (Mass.), 539; Dyer *v.* Grand Trunk R., 42 Vt. 441. And see c. 8, *post*.

[2] Central R. *v.* MacCartney, 68 N. J. L. 165.

[3] § **535**; 13 East, 565; Christy *v.* Row, 1 Taunt. 300; Holt *v.* Westcott, 43 Me. 445; Wooster *v.* Tarr, 8 Allen (Mass.), 271.

[4] Hill *v.* Leadbetter, 42 Me. 572; 3 Ben. (U. S.) 39.

[5] Union Freight Co. *v.* Winkley, 159 Mass. 133.

432. So strongly do the courts now regard the consignor of property for transportation as originally liable for the carrier's compensation, that the shipper named in a bill of lading may commonly be sued by the carrier for his remuneration, even though he was not the true owner thereof, provided the carrier has seen fit to waive his right of lien and to deliver the goods without receiving payment of his carriage dues.[1] And the clause customarily inserted in bills of lading, directing payment of freight by the consignee or his assigns, is, by the current of English and American authorities, intended only for the benefit of the carrier; so that, if he delivers without receiving such payment, he may recover of the consignor instead.[2] But where the carrier procures the further stipulation in such bill of lading that the freight shall be payable to him, it is held that he ought personally or by agent to be present to receive payment from the consignee at the proper time and place. In general, the tardy and negligent performance of a duty respecting payment which the carrier owes may, in case of the consignee's subsequent insolvency, be reasonably visited upon himself instead of his consignor, because of the two innocent parties he has occasioned the loss.[3]

433. Where the consignee receives his goods under a bill of lading, this is evidence from which a contract may be inferred to pay freight in consideration of the carrier's surrender of his lien thereon;[4] and some cases seem to presume the contract to pay very strongly under such circumstances.[5] But

[1] § 536; Wooster *v.* Tarr, 8 Allen (Mass.), 271.

[2] *Ib.*; Fox *v.* Nott, 6 H. & N. 630; Shepard *v.* De Bernales, 13 East, 565; Holt *v.* Westcott, 43 Me. 445; Woodward, J., in Thomas *v.* Snyder, 39 Penn. St. 317, 322. In Weguelin *v.* Collier, L. R. 6 H. L. 286, certain language contained in the bill of lading was held equivalent to the usual clause, "he or they paying freight."

[3] Thomas *v.* Snyder, 39 Penn. St. 317; § 535.

[4] § 536; 13 East, 399; 3 Bing. 383; Sanders *v.* Vanzeller, 4 Q. B. 260; Parke, B., in Young *v.* Moeller, 5 E. & B. 755, 760.

[5] Merian *v.* Funck, 4 Denio (N. Y.), 110; 3 E. D. Smith (N. Y.), 187. See Hinsdell *v.* Weed, 5 Denio, 172, as to the effect of receiving the goods in part, after a partial loss. See also 68 N. J. L. 165.

if the consignee designated in the bail of lading indorses the bill over before receiving the goods, his liability becomes thereby transferred, together with the right to claim them;[1] and whoever obtains the delivery of goods under such a bill contracts, by implication, to pay the freight due on them.[2] A refusal by the consignee to accept, unless upon deduction for damage done the goods, does not constitute acceptance of the consignment, and a contract to pay freight.[3]

433 a. Where goods are consigned by the terms of the bill of lading, so that delivery is made to one party as the agent for another, the receiving party incurs no personal liability for the freight; but his principal will rather become bound as the true consignee.[4] And if the carrier delivers to the indorsee of a bill of lading he cannot recover freight from the purchaser after delivery from the indorsee.[5] One to whom a bill of lading is assigned merely as security is not liable for the freight if he does not receive the goods.[6]

434. A carrier may be entitled to the reimbursement of incidental charges and expenses reasonably incurred in the performance of the transit, which his special contract does not

[1] 13 East, 399; Dougal *v.* Kemble, 3 Bing. 383; Tobin *v.* Crawford, 5 M. & W. 235; 9 M. & W. 716.

[2] *Ib.*; Merian *v.* Funck, 4 Denio (N. Y.), 110. Dougal *v.* Kemble, 3 Bing. 383, is a case in point where this rule was rigorously enforced. And the assignee who, as such, receives the goods, may be held liable for freight, even though the bill of lading was made after the goods were sent to a public warehouse. 3 E. D. Smith (N. Y.), 187.

The English Bills of Lading Act strengthens this doctrine as enforced in that country, by providing in substance that the rights and liabilities of the consignee or indorsee shall pass from him by indorsement over to a third person. Act 18 & 19 Vict. c. 111; Smurthwaite *v.* Wilkins, 11 C. B. N. S. 842. But, as concerning the carrier's knowledge and assent to such transfer, see Lewis *v.* M'Kee, L. R. 2 Ex. 37; L. R. 4 Ex. 58.

[3] Davis *v.* Pattison, 24 N. Y. 317.

[4] Amos *v.* Temperley, 8 M. & W. 798; Grove *v.* Brien, 8 How. (U. S.) 429; Miner *v.* Norwich R., 32 Conn. 91; 7 Bosw. (N. Y.) 204.

[5] 28 Fed. (U. S.) 335.

[6] Blanchard *v.* Page, 8 Gray (Mass.), 281; 2 Sprague (U. S.), 49. And see, as to a surety, Trask *v.* Duvall, 4 Wash. 181. See also 7 Biss. (U. S.) 365; § 537.

restrain him from demanding; but he cannot charge for services which were not performed, nor for expenses not reasonably incurred, nor, in general, overcharge, or demand exorbitant and unlawful recompense. Sums thus extorted from a consignee or customer, and paid under protest, the aggrieved party may recover from the carrier as for money had and received.[1] Nor ought a carrier in general, without some sort of authority from the consignee, to perform acts upon the goods outside of his transportation contract, such as may subject the consignee to extra expense, even though this might prove in a measure beneficial; as where a carrier undertakes at his own discretion to make good the ordinary wear and tear of the transit at his consignee's cost, or makes personal delivery, at a special charge, in teams of his own employing, when his legal duty was to let the consignee come and remove them from his depot in whatever mode he might choose for himself.[2]

435. **On the other hand, where the sender imposes,** and has fraudulently or even carelessly induced a transportation at reduced rates, the carrier may, upon discovering the fraud or error, require payment of his regular and proper charges for carrying the goods.[3] But where no deceit or imposition of any kind was practised by the sender, and no inquiry was made as to the contents or value of the package, the carrier cannot charge more than his agreed recompense, on any plea that it proved more hazardous or more valuable than he had supposed.[4]

[1] § 538; Garton *v.* Bristol & Exeter R., 1 B. & S. 112; 15 Neb. 390; Great Western R. *v.* Sutton, L. R. 4 H. L. 226; Heiserman *v.* Burlington R., 63 Iowa, 732. In Peters *v.* Scioto R., 42 Ohio St. 275, the customer's right to recover illegal exactions as not paid voluntarily is ruled quite strongly. Here payments were made periodically, instead of upon each shipment.

[2] Richardson *v.* Rich, 104 Mass. 156. See Cahn *v.* Michigan Central R., 71 Ill. 96.

[3] § 539; Fry *v.* Louisville R., 103 Ind. 265; Smith *v.* Findley, 34 Kan. 316.

[4] Baldwin *v.* Liverpool Steamship Co., 74 N. Y. 125 (where nitroglycerine was thus carried).

A carrier who agrees with the sender to carry goods at less than the regular rates is bound thereby. 16 Neb. 661.

436. Demurrage is an allowance which marine law makes by way of indemnity to the carrier where the vessel has been detained unreasonably long in loading or unloading the cargo through the fault of the customer.[1] If this right exists at all, so as to afford a lien, independently of contract, statute, or usage tantamount to law, it is confined to carriage by water; and while railroad carriers may store in case of delay and charge storage rates, or perhaps sue for special damages, they cannot, it is held, claim demurrage, in that technical sense, nor enforce such a claim by a lien upon the goods.[2] Yet our latest decisions show that the term "demurrage" has come into considerable use among railroad carriers; and if the knowledge of such a custom be established in any State jurisdiction, a reasonable demurrage charge may be imposed by the carrier in a proper case without consulting the shipper specially.[3] Demurrage under marine law, and irrespective of special contract, imputes fault to the party who failed to unload; and hence a consignee's reasonable diligence in unloading must depend upon the particular circumstances.[4]

436 a. As to tariff rates, it is constitutional for a State legislature which has not abdicated fundamental powers to fix the maximum compensation which railway and other carriers shall charge the public.[5] But a State cannot, under our Federal

[1] § **540**; Bouv. Dict. "Demurrage."

[2] Chicago R. *v.* Jenkins, 103 Ill. 588; 15 Neb. 390; East Tennessee R. *v.* Hunt, 15 Lea (Tenn.), 261. A railway may stipulate for reasonable charges for such delay where the customer is to unload the car for himself. 88 Ga. 563. See also Kentucky Co. *v.* Ohio R., Ky. (1896).

[3] Penn. R. *v.* Midvale Street Co., 201 Penn. St. 624 (application in close analogy to shipping, where consignee, who had bound himself to unload from special cars, detains them unreasonably long for that purpose). And see 88 Ga. 563.

[4] Delay by reason of the strike (1889) at London dock was held to constitute no claim for demurrage, in Hick *v.* Rodocanachi (1891), 2 Q. B. 626; aff. (1893) App. 22. Cf. 25 Q. B. D. 320.

[5] See § **541**; Peik *v.* Chicago R., 94 U. S. 164; Chicago R. *v.* Ackley, 94 U. S. 179. And see as to power of State commissioners, 133 Cal. 25; 126 Mich. 113; 78 Miss. 550.

Modern legislation is frequently directed against the tendency of rail-

constitution, regulate rates of transportation to and from another State.[1]

437. Recompense may be enforced at the journey's end. The compensation of the common carrier, whose pay has not been taken in advance, continues, at his option, recoverable upon the lien security of the goods and chattels themselves; which is so common a means of assistance in obtaining one's dues under his bailment performance, and so highly advantageous, that the law presumes, wherever a carriage undertaking is performed as to certain property without previous reward, that the carrier meant to retain its possession at the end of the transit until fully remunerated; and this, whether the transportation were by land or water.[2] In its character and extent this lien is quite similar to that of innkeepers and ordinary mutual-benefit bailees which we have elsewhere discussed.[3] Thus, there may arise in favor of the carrier, by virtue of a wide-spread custom or usage, or under some special contract, a general lien upon his customer's goods, for a general balance of accounts; but that which alone the law can be said to favor is a particular lien upon the goods transported, for the particular charges and expense incurred in respect of them.[4] This particular lien of the carrier is superior to that of any pledgee or other bailee who had procured the carriage of the goods; but he cannot extend it to the prejudice of other rights.[5]

ways and other common carriers to make excessive and wrongful charges, and penalties are prescribed for the offence. *Ante*, 299. See, *ib.*, concerning the extent of the carrier's duty not to transport at unequal or excessive rates.

[1] Wabash R. *v.* Illinois, 118 U. S. 557. And see c. 10.

[2] § **542**; 2 Ld. Raym. 752; 2 E. D. Smith (N. Y.), 195; 1 Schoul. Pers. Prop. §§ 378-380; The Eddy, 5 Wall. (U. S.) 481; Long *v.* Mobile R., 51 Ala. 512; 110 Ga. 173; cases *infra*.

[3] *Ante*, 99, 256.

[4] 6 East, 519; 7 East, 224; Wright *v.* Snell, 5 B. & Ald. 350; 102 Fed. (U. S.) 358; Adams *v.* Clark, 9 Cush. (Mass.) 215.

[5] Cooley *v.* Minnesota R., 53 Minn. 327. Thus as against a consignor's stoppage *in transitu* the carrier's lien will hold for charges and expenses upon that consignment, but not for an unpaid balance due from

438. As to what charges such a lien protects. The carrier may usually retain particular goods, by virtue of his lien right, until the freight and charges due thereon for his whole transportation are paid or tendered him, and he cannot be compelled to give them up sooner. This lien, moreover, extends to all the proper freight and storage charges upon the goods throughout the whole of a continuous transit over successive lines; since the last carrier or final warehouseman may advance what was lawfully due his predecessors, and hold the property as security for his reimbursement.[1] But the carrier's lien does not protect overcharges;[2] nor charges unenforceable of legal right;[3] nor a repayment from the consignee of what has been already paid in advance.[4] It does not as a rule secure former freight remaining unpaid, or the customer's general indebtedness;[5] nor acts performed towards the property which were entirely outside of what was expressed or implied in the carriage contract.[6] Yet the carrier's lien is sometimes specially extended so as to cover the extraordinary expenses which may have been reasonably incurred on the

the consignee on other consignments. Potts *v.* N. Y. R., 131 Mass. 455; Pennsylvania R. *v.* Oil Works, 126 Penn. St. 485; 102 N. C. 390; Penn. Co. *v.* Georgia R., 94 Ga. 630. See *ante*, 104.

[1] § **543**; 8 Gray (Mass.) 262; Briggs *v.* Boston & Lowell R., 6 Allen (Mass.), 246; White *v.* Vann, 6 Humph. (Tenn.) 70; Schneider *v.* Evans, 25 Wis. 241; 1 Hilt. (N. Y.) 499; 85 Ga. 343. And see *post*, c. 9, as to connecting carriers.

[2] Long *v.* Mobile R., 51 Ala. 512.

[3] For carrying mailable matter contrary to the provisions of Congress, the carrier has neither right of action nor lien. Hill *v.* Mitchell, 25 Ga. 704. As to a carrier's lien on goods which he transports on behalf of his government, see Dufolt *v.* Gorman, 1 Minn. 301; Briggs *v.* Light-Boats, 11 Allen (Mass.), 157; The Davis, 10 Wall. (U. S.) 15.

[4] Travis *v.* Thompson, 37 Barb. (N. Y.) 236; Marsh *v.* Union Pacific R., 3 McCr. (U. S.) 236.

[5] Adams *v.* Clark, 9 Cush. (Mass.) 215; Leonard *v.* Winslow, 1 Grant Cas. (Penn.) 139; Pharr *v.* Collins, 35 La. An. 939.

[6] Richardson *v.* Rich, 104 Mass. 156; Steamboat Virginia *v.* Kraft, 25 Mo. 76; Wiltshire Iron Co. *v.* Great Western R., L. R. 6 Q. B. 776; 102 Fed. (U. S.) 358.

transit, with respect to the property, without authority from the owner, but for the just benefit of all concerned.[1]

439. But the carrier, as against the true owner, has no lien on goods delivered him for transportation by a wrong-doer without such owner's express or implied assent; and this, though he carry them or pay back charges upon them innocently; inasmuch as no one is to be deprived of his property without his consent.[2] Nor can one who has carried a thing for the sole convenience of the mere hirer thereof, and at his request, acquire a lien upon the property available against the owner.[3] And while it must be generally admitted that the carrier's lien, and his right to retain possession, prevail as against the general owner until his reasonable charges be paid him, the courts, nevertheless, rule that this lien and right of possession are so far personal to him that a wrong-doer who has acquired possession cannot set up any such defence to the suit of the general owner.[4] But where the owner or his agent was at fault in procuring transportation to some point, or over some route not intended, the carrier's lien is good for his own charges and those advanced by him, provided they be reasonable and incurred in good faith.[5]

[1] Hingston *v.* Wendt, 1 Q. B. D. 367 (rescue of cargo with a cost of salvage, in a stress of weather and shipwreck, where the carrier was not at fault).

[2] § 544; 16 Irish C. L. 405; 1 Doug. (Mich.) 1; Robinson *v.* Baker, 5 Cush. (Mass.) 137; 8 Gray (Mass.), 262; 9 Gray, 231. See King *v.* Richards, 6 Whart. (Penn.) 418.

[3] Gilson *v.* Gwinn, 107 Mass. 126.

All this would seem to indicate that the carrier, in respect of his lien, is less favored as against a true owner than the innkeeper; though whether the doctrine of this case would apply so as to utterly exclude the carrier's lien upon property belonging to another, which the passenger has transported as part of his own baggage, *quære*. A strong reason for preferring the innkeeper in issues like this might be, that the custody and shelter of any owner's property in an inn can hardly fail to be beneficial to him, while transporting it to a distance without his authority is more likely an aggravation of the injury occasioned by the dispossession itself. See *ante*, 256; and see 72 Ga. 655.

[4] Ames *v.* Palmer, 42 Me. 197.

[5] Briggs *v.* Boston & Lowell R., 6 Allen (Mass.), 246.

440. Continuous possession is necessary in order to preserve one's lien security; hence the general doctrine of liens requires the carrier who claims its benefit to retain possession of the goods, and not deliver them up while his dues remain unsatisfied. An unqualified and voluntary delivery to the consignee entitled will, as a rule, discharge the lien, if the carrier was not defrauded into making it;[1] but so highly favored is the bailee's right of lien as to particular goods upon which he has performed an unremunerated and beneficial service, and so concomitant must be the acts of making delivery at the end of a transit and receiving compensation for the carriage, that acts of incomplete or conditional delivery are not, by the leading authorities, deemed decisive of an intention to waive one's convenient right of lien upon the property. Thus, the transfer of goods from a vessel to the warehouse should be considered, if the terms of the contract or local usage can justify the construction, not an absolute delivery, but rather a deposit for the time being in the warehouse, so as to preserve the carrier's constructive possession.[2] The discharge of a cargo on a wharf with notice preserves the lien.[3] Again, should the consignee procure a delivery of the goods to himself by a false and fraudulent promise to pay the freight due as soon as they are received, or otherwise gain their possession by dishonest stratagem or theft, or by coercion of the carrier, the carrier's lien is not waived, but he may disaffirm and sue the consignee in replevin.[4] And, as in other cases of lien, the carrier might make a special delivery, as for enabling the consignee to inspect the condition of the property, or to put it in repair, without impairing his right to hold it for security of the transportation charges, except, possibly,

[1] § 545; Bigelow *v.* Heaton, 4 Den. 496; 3 T. R. 119; Sears *v.* Wills, 4 Allen (Mass.), 212; Bowman *v.* Hilton, 11 Ohio, 303; Bags of Linseed, 1 Black (U. S.), 108; 51 Iowa, 338; 43 Fed. (U. S.) 480.

[2] Bags of Linseed, 1 Black (U. S.), 108; Mors Le Blanch *v.* Wilson, L. R. 8 C. P. 227; The Bird of Paradise, 5 Wall. 545, 555; (1894) 1 Q. B 483.

[3] The Eddy, 5 Wall. (U. S.) 481.

[4] Bigelow *v.* Heaton, 6 Hill (N. Y.), 43.

as against intervening *bonâ fide* third parties for value, without prior notice of such a lien claim.[1] Where, however, his lien has once been utterly waived and extinguished, the carrier cannot, by merely regaining possession of the goods, enable himself to reassert it.[2]

441. Nor is lien lost by a partial delivery, as the courts incline to rule. Thus, where several cargoes or instalments of coal are successively transported for one owner, and portions thereof carried away and delivered from time to time from the carrier's premises at the place of destination, the presumption is that the carrier keeps and means to keep his lien upon that which remains for the freight and storage of all the cargoes or instalments together.[3] A corresponding presumption may apply to partial deliveries made for a customer on a round trip.[4] For the rule is, that for conveying goods the carrier may detain the whole or a part of the goods until the freight on all is paid.[5] Whether the mutual intent of the parties was to discharge the lien, under such circumstances, contrary to presumption, a jury must determine.[6]

442. Total delivery with a reservation is sometimes considered. Following out the principle which applies as between vendor and vendee, we might, perhaps, conclude that the carrier has the right to deliver the goods fully upon an express or implied condition that his lien shall not be divested until his charges are fully paid;[7] though it blunts the edge of the law to infer qualifications of this character in favor of parties who have totally surrendered actual possession without clearly expressing by writing or otherwise what rights they mean to reserve; and superior equities may

[1] See 1 Schoul. Pers. Prop. § 385; *ante*, 100.

[2] *Ib.*; Lien lost by carrier's assignment. 175 Mo. 518.

[3] § 441; Lane *v.* Old Colony R., 14 Gray (Mass.), 143. And see 14 Blatchf. (U. S.) 274.

[4] Fuller *v.* Bradley, 25 Penn. St. 120.

[5] Boggs *v.* Martin, 13 B. Mon. (Ky.) 239; 94 Ga. 630; § 441.

[6] New Haven Co. *v.* Campbell, 128 Mass. 104.

[7] Hoar, J., in Lane *v.* Old Colony R., 14 Gray (Mass.), 143, 148; The Eddy, 5 Wall. (U. S.) 481.

certainly arise in favor of third parties where the carrier has so surrendered.[1]

443. Special agreement may be shown: and the parties to a carriage undertaking may frame their contract so as to affirm the existence of the lien, or so as to extend or modify it, or even to exclude it altogether; and on this point the language of a bill of lading, way-bill, or other like document, or the charter-party of a vessel, may be found conclusive.[2] And while the presumption must be in favor of the carrier's lien, and his intention, if need be, to exercise such a right, this presumption may be overcome by a direct exclusion of the right in the contract of carriage, or by the insertion of some stipulation which is wholly incompatible with its existence. To stipulate that credit shall be given for the consignee's dues would be inconsistent with such a right; or, again, to stipulate that the goods shall be unconditionally delivered before the freight is paid.[3] But where language somewhat ambiguous is employed, justice requires that the carrier should receive the benefit of the doubt; and hence language importing that the payment or adjustment of the carriage dues shall be concurrent or simultaneous with the delivery of the goods, or, at all events, leaving the duty of making a delivery antecedent to such payment or adjustment in doubt, is not to be construed into a stipulation for displacing the carrier's lien.[4] Even a stipulation which amounts to giving the consignor or customer a slight credit may be controlled where the general language used imports an intention to claim the usual right of lien: though credit might be promised for so long a period as to justify the inference that the lien was not to attach, but that the personal responsibility of the customer was trusted.[5] Ques-

[1] § 547.

[2] § 548; 5 M. & S. 180; Pinney *v.* Wells, 10 Conn. 104; McLean *v.* Fleming, L. R. 2 H. L. Sc. 128; Kirchner *v.* Venus, 12 Moore P. C. 361.

[3] The Bird of Paradise, 5 Wall. (U. S.) 545, 556.

[4] See 1 Sumn. (U. S.) 571; 2 Sumn. (U. S.) 600; 14 M. & W. 798; Tamvaco *v.* Simpson, L. R. 1 C. P. 371; Paynter *v.* James, L. R. 2 C. P. 348.

[5] The Kimball, 3 Wall. (U. S.) 42.

tions of this character, however, arise more particularly with reference to water than land carriage.[1]

444. A right of lien for unpaid instalments of freight or recompense may exist by virtue of the arrangement made for paying or adjusting the freight to the carrier. Problems of this character are very intricate for solution; but the better opinion appears to be that when an acceptance for freight or an instalment thereof is overdue and unpaid, this, even though it were given for an instalment payable in advance, leaves the carrier free to stand upon his lien right, unless he has clearly waived it; since a bill of exchange or promissory note does not extinguish or operate as payment of a debt unless the parties have so expressly agreed.[2] But sums stipulated to be paid in advance, and not dependent on the carrier's contract, have not the incidents of freight, and are not, unless by virtue of usage or special contract, protected by the carrier's lien.[3] Notwithstanding one instalment of the stipulated freight has been paid on arrival, and the balance is made ex-

[1] § 548. In Westminster Hall and the Supreme Court of the United States, where the mutual binding of the ship and cargo for carriage dues under a charter of affreightment has proved an exceedingly interesting question, the manifest inclination has been in favor of the doctrine that while lien for freight, which is a common-law right, may be mutually displaced or waived by special stipulations of carriage inconsistent with and destructive of it, this displacement or waiver is not shown, but the right remains, unless the special agreement is absolutely inconsistent with the retention of the goods for lien security. See The Bird of Paradise, 5 Wall. (U. S.) 545, 558; 3 H. & N. 715; 15 East, 554; Kirchner *v.* Venus, 12 Moore P. C. 361, and cases cited; Howard *v.* Macondray, 7 Gray (Mass.), 516; Pinney *v.* Wells, 10 Conn. 101. But it is often a matter of nice construction to determine whether the terms of commercial contracts exclude the lien right or not. In England, where such cases more commonly arise, 12 Moore P. C. 361, militates against, 2 C. B. N. S. 134, and Neish *v.* Graham, 8 E. & B. 505. See also, as to the sea carrier's claim of lien for "dead freight," 5 H. & N. 931; L. R. 1 C. P. 689; L. R. 6 Q. B. 522.

[2] § 549; Steamer St. Lawrence, 1 Black (U. S.), 533; The Kimball, 3 Wall. (U. S.) 37, 45.

[3] The Bird of Paradise, 5 Wall. (U. S.) 545, 562, How *v.* Kirchner, 11 Moore P. C. 21.

pressly payable on delivery of the goods, the presumption of intention favored would be that delivery and payment are concurrent acts, so as to leave the carrier's lien right unimpaired.[1]

445. Where the damage done to the goods exceeds the proper recompense for carrying them, and the carrier is culpable for such damage, his lien is displaced, inasmuch as he owes indemnity.[2]

446. The legal effect of the carrier's lien is, that he may retain the goods and suspend delivery thereof until his compensation and rightful charges for their transportation are properly adjusted; and if the lien be upon merchandise carried on the high seas, the carrier may enforce it by proceedings *in rem*.[3] But no carrier has a right by virtue of a lien — which, in common law, is practically only a right of detainer — to sell the goods as of his own motion, and so reimburse himself; nor would he, by such sale, confer title upon another more than could any wrong-doer.[4] This hardship has, in some measure, been rectified by local legislation, which provides, to a considerable extent, that unclaimed property in the hands of certain carriers, such as railways or express companies, or, more generally, that goods transported by steam or sailing vessels, or other specified carriers, may be sold to pay the carriage charges; and, moreover, directs how the sale shall be conducted and the proceeds applied.[5] And since the carrier, with property left on his hands, in an emergency, is a sort of trustee for the rightful owner or party in interest, he may, on such a consideration, though not by right of the lien, make a fair and open sale of the property where the goods are perishable, or other extreme occasion occurs for prompt and decisive action on his own responsibility, and, deducting his freight

[1] Paynter *v.* James, L. R. 2 C. P. 348.

[2] See Miami Co. *v.* Port Royal R., 38 S. C. 78.

[3] The Bird of Paradise, 5 Wall. (U. S.) 545, 555.

[4] § 550; Lecky *v.* McDermott, 8 S & R. (Penn.) 500; Briggs *v.* Boston & Lowell R., 6 Allen (Mass.), 246; 24 Me. 339; Sullivan *v.* Park, 33 Me. 438; Indianapolis R. *v.* Herndon, 81 Ill. 143.

[5] § 550. And see *ante*, 399.

and charges out of the proceeds, retain the balance for disposition according to law;[1] but, so perilous must be such a course on his part, it is very doubtful whether the carrier is under any obligation, after fulfilling his contract of transportation, to make such sale at all.[2] Under all circumstances the carrier's sale should be openly and fairly conducted, with a just regard to the owner's interest.[3]

447. Independently of any lien security, a carrier may, after relinquishing possession of the property transported, bring his action at law to recover his rightful compensation; unless, indeed, he has stood upon his legal right of claiming pay in advance. The principles here applicable have already been incidentally set forth and the rule applies generally.[4]

448. Payment of the transportation dues and delivery of the goods are concomitant or concurrent acts; so that neither consignor nor carrier is obliged to perform on his part until the other is ready to perform the correlative duty.[5] And under the ordinary bill of lading, given for carriage by water, freight is demandable only when the goods are discharged from the vessel, and the party to whom delivery is owed has reasonable opportunity to examine into their condition; while, on the other hand, the carrier is under no obligation to part with possession of the goods, or make actual delivery, except upon

[1] Rankin *v.* Memphis Packet Co., 9 Heisk. (Tenn.) 564; 2 Story (U. S.), 81, 97. By virtue of his special undertaking, the carrier is sometimes empowered to make sale of the goods at the place of destination, — in other words, he is both carrier and factor for his customer; but this is quite a different case.

[2] § **550**; Rapp *v.* Palmer, 3 Watts (Penn.) 178. *Quære*, whether a special contract of the parties may give the carrier a power to sell. Sayward *v.* Stevens, 3 Gray (Mass.), 97, 105. The provision of a bill of lading to this effect, even if assented to by the consignor, does not necessarily conclude the consignee and all other possible parties in interest.

[3] See Nathan *v.* Shivers, 71 Ala. 117.

[4] § **551**; *ante*, 430, 431. As to the carrier's recompense by way of offset in a suit against him for damages, see *post*.

[5] Tate *v.* Meek, 8 Taunt. 280; Adams *v.* Clark, 9 Cush. (Mass.) 215; Long *v.* Mobile R., 51 Ala. 512; 1 Bosw. (N. Y.) 177, 185; § **552**.

payment or tender of his lawful dues.[1] A consignee may test the goods reasonably; but his opportunity to inspect does not empower him to insist upon unreasonable or useless tests.

449. When, therefore, the party to whom the goods were to be delivered offers to pay the freight and charges rightfully due, the carrier's refusal to deliver them is a breach of his contract duty, for which an action of assumpsit will lie; and all that the consignee need aver and prove, in support of such action, is his readiness to pay the freight, the demand of the goods, and the carrier's refusal to make delivery.[2] Indeed, where the carrier's non-delivery is clearly wrongful, as, for instance, where he refuses to give the property up, except on payment of that which the lien does not protect, or the fulfilment of a condition which he has no right to impose, trover may be brought against him instead, with a suitable averment on the plaintiff's part.[3] Replevin of the goods also lies, as modern authorities hold, for the carrier's wrongful refusal to give them up, and this to the forfeiture, it may be, both of his lien and compensation for freight;[4] and where the carrier has, by his delay in transporting and making delivery of the goods, injured the consignee to an amount equal to the freight charges, it is held that the consignee may maintain replevin for the goods, without paying or tendering the freight.[5] But, in general, to enable the consignee to sue the carrier for withholding delivery of the goods, he must tender the freight; nor should the carrier's request for reasonable time to ascertain and verify, especially on a long, continuous line, what freight

[1] See Vitrified Pipes, *in re*, 14 Blatchf. (U. S.) 274; Black *v.* Rose, 2 Moore, N. S. 277; Lanata *v.* Ship Henry Grinnell, 13 La. An. 24.

[2] 2 Saund. 352 *n.* 3; Porter *v.* Rose, 12 Johns. (N. Y.) 209; Long *v.* Mobile R., 51 Ala. 512, 513; 9 Cush. (Mass.) 215.

[3] *Ib.*; Marsh *v.* Union Pacific R., 3 McCr. (U. S.) 236; Richardson *v.* Rich, 104 Mass. 156.

[4] Cutting *v.* Grand Trunk R., 13 Allen (Mass.), 381; Humphreys *v.* Reed, 6 Whart. (Penn.) 435; Boston R. *v.* Brown, 15 Gray (Mass.), 223; Dyer *v.* Grand Trunk R., 42 Vt. 441. And see next chapter.

[5] Dyer *v.* Grand Trunk R., 42 Vt. 441. And see Hall *v.* Cheney, 36 N. H. 26; Alden *v.* Pearson, 3 Gray (Mass.), 342.

may be lawfully due, be necessarily construed into an absolute refusal on his part to perform his duty.[1]

450. The rights of carrier and consignee are mutual, in such a connection; and hence it follows that, since no consignee is bound to pay freight until the goods are delivered, or offered for delivery, independently of an express contract to do so, the carrier cannot sue such a party for his freight until he has at least tendered the goods. And where a carrier by vessel stands upon his legal right not to deliver the cargo, or any part of it, until his freight is paid, and the consignee of the cargo stands upon his right not to pay freight until the cargo is discharged, ready to be completely delivered, neither is in a position to sue the other.[2]

451. Goods shipped as entire are not to be treated as though in portions. Neither carrier nor consignee can require, as of right, that goods under one bill of lading shall be delivered in parcels, on a separate payment of freight for each parcel.[3] Nor where a shipment is landed in parts, can freight upon the whole shipment be demanded upon a part delivery.[4] The delivery of part of a consignment does not operate as a delivery of the whole.[5]

[1] § 552.

[2] § 553; 14 Blatchf. (U. S.) 274; 1 Bosw. (N. Y.) 177, 185; 60 Mich. 56; McCullough *v.* Hellweg, 66 Md. 269. The assignee of a bill of lading may have the cargo weighed and examined to verify quantity and quality. But he cannot require a delivery without paying freight, nor insist upon unreasonable methods of weighing. 1 Sprague (U. S.), 473. Vexatious conduct in this respect may be construed into a refusal to accept delivery. *Ib.* And a tender of the cargo to the consignee, though not formal, may be sufficient where the consignee refuses unjustifiably to receive it, and a reasonable time is given him to accept. 1 Fed. (U. S.) 619. Subsequent landing of the cargo is not sufficient after a refusal to deliver; but notice of such landing should be given to the consignee or a subsequent demand. 14 Blatchf. (U. S.) 274; 66 Md. 269.

[3] 14 Blatchf. (U. S.) 274. And see Paynter *v.* James, L. R. 2 C. P. 348.

[4] Brittan *v.* Barnaby, 21 How. (U. S.) 527.

[5] Jeffris *v.* Fitchburg R., 93 Wis. 250; § 554.

CHAPTER VIII.

REMEDIES AGAINST COMMON CARRIERS.

452. The customer has usually the disadvantage, in a suit against the carrier, since the latter stands commonly upon his possession and lien right for his own indemnity, without taking further initiative. Three leading causes of action are recognized in favor of the customer as against the common carrier: I. For inexcusably refusing to receive goods offered him for transportation. II. For transporting them, or accomplishing the bailment purpose, so that they become inexcusably lost or injured. III. For his negligence or misconduct in delivering them over, after his transit is completed.[1]

453. I. **Where the common carrier inexcusably refuses to receive** goods offered him for transportation. The obligation of the carrier, in this respect, with its true limitations, has already been sufficiently considered.[2] The usual form of common-law action against the carrier, for such refusal, is case; and the plaintiff should aver that he was ready and willing to pay the defendant the amount such party was legally entitled to receive for receiving and carrying the goods in question; an absolute tender of recompense not being, under these circumstances, an indispensable prerequisite to maintaining one's suit.[3] The consignor or owner whose property is inexcusably refused

[1] §§ 555, 556.

[2] *Ante*, 291 *et seq.*

[3] Pickford *v.* Grand Junction R., 8 M. & W. 372; 11 Ex. 742, 758; Galena R. *v.* Rae, 18 Ill. 488; McGill *v.* Rowand, 3 Penn. St. 451; Fitch *v.* Newberry, 1 Dougl. (Mich.) 1; New Jersey Steam Nav. Co. *v.* Merchants Bank, 6 How. (U. S.) 344; Pittsburgh R. *v.* Morton, 61 Ind. 539. And see, as to the right to sue the carrier for discriminating unjustly in favor of certain customers, § 374. Where the refusal to carry alleged other reasons than non-payment, a tender of freight money need not be averred. 68 Tex. 49.

transportation is the proper party to sue the carrier on such a grievance, rather than any mere consignee.[1] In general cases where the breach of a duty toward the whole public is incurred, special remedies such as mandamus will lie; though not usually where the injured party has another, specific and adequate, under the common law.[2]

454. II. **Where transportation or the accomplishment of the bailment purpose is such** that the goods become inexcusably lost or injured. In this instance of surpassing importance it is a matter of regret that our law should not, in all points, make the bailment remedies clear and certain, more than the bailment rights. These remedies we shall, however, proceed to state with as much precision as the nature of the case admits.

455. (1) **Concerning the form of action**, this, at common law, may be *ex delicto* or *ex contractu*. So long as the common-carriage occupation was considered simply as a public duty, its breach was deemed tortious, and the carrier was suable in an action on the case founded upon the custom of the realm; but when contract began to assuage the rigor of public policy, it became established that the carrier should be held liable in assumpsit on his undertaking; and hence the modern usage to lay hold of the advantages of the action *ex contractu*, while preserving those likewise of that more ancient remedy against carriers, *ex delicto*, which the practice of earlier centuries commended.[3] Where the transaction and the character of the loss

[1] Lafaye *v.* Harris, 13 La. An. 553; *ante*, 292. Where one sues for the carrier's refusal to transport goods tendered him, the measure of damages is the difference between the value of the property at the place of tender and its value at the desired destination, less expenses of transporting. 22 Hun (N. Y.), 533; Taney (U. S.), 485; Galena R. *v.* Rae, 18 Ill. 488. See also, as to damages, Houston R. *v.* Smith, 63 Tex. 322.

[2] See *ante*, 292. Injunction to prevent discrimination is sometimes permitted. 27 Fed. (U. S.) 529. Or injunction to compel the performance of a public obligation. 34 Fed. (U. S.) 481.

[3] §§ **557, 558**; 1 Wils. 282 (1750), per Dennison, J.; Tattan *v.* Great Western R., 2 E. & E. 844; Baylis *v.* Lintott, L. R. 8 C. P. 345; Orange Bank *v.* Brown, 3 Wend. (N. Y.) 158; Smith *v.* Seward, 3 Penn. St. 342;

require the plaintiff to show in variance of the common-law liability, a contract, express or implied, with the carrier, to support his action, contract is the true remedy; otherwise, the preferable form of action is tort. And in case of a special contract, especially a written one, action should be brought on that contract and not upon an implied one.[1]

456. The action ex delicto, which may be safely brought as an action on the case where one seeks to charge the carrier on a simple breach of duty depending on the common law and public policy, or on some other tort or misfeasance, has this advantage, that, if it be uncertain whether some or all of certain parties are liable, the plaintiff may recover against all who are liable, while the rest go free, since the action itself is several and not joint; whereas one who sues in assumpsit must prove the liability of all against whom he brings his suit.[2] And, further, in respect of non-joinder or misjoinder, where

School District *v.* Boston, &c. R., 102 Mass. 552; Baltimore R. *v.* Pumphrey, 59 Md. 390.

The above cases concede to the aggrieved party quite a free choice of remedies against a defaulting carrier, as between the action *ex delicto* and the action *ex contractu*, unless it is incumbent upon him to show some special contract, express or implied; and this, though there be in reality a privity of contract between the parties.

But in England (where the choice of action in this respect may affect the question of costs as limited and prescribed by statute) the disposition appears manifested to narrow the plaintiff's election if possible. See Baylis *v.* Lintott, L. R. 8 C. P. 345 (hackney coach carelessly carrying baggage and losing it), which was held to set forth a cause of action founded in contract. In Tattan *v.* Great Western R., 2 E. & E. 844, a form of declaration somewhat similar was considered to amount to case and not contract. But Cockburn, C. J., in that case expressed his regret at the anomalous state of the law, by which an option was given to the plaintiff to sue in either form. In Baylis *v.* Lintott, the remarks of Bovill, C. J., indicate a similar regret, and the opinion, besides, that where the cause of action alleged is not founded wholly on the breach of duty, but the declaration sets forth in substance a promise and consideration, this must be considered to amount to contract and not tort.

[1] Knight *v.* St. Louis R., 141 Ill. 110; Boaz *v.* Central R., 87 Ga. 463.

[2] § 559; 3 Brod. & B. 54; Tattan *v.* Great Western R., 2 E. & E. 844; Pozzi *v.* Shipton, 1 P. & D. 4; Smith *v.* Seward, 3 Penn. St. 342; Lake Shore R. *v.* Bennett, 89 Ind. 457.

the form of action is *in delicto*, the defendant carrier cannot set up in abatement that he is one of several part-owners of a ship, or co-proprietors in a land carriage, and that the other part-owners or co-proprietors are not joined as parties in the suit.[1] Still another advantage of this form of action is, that the duty of the carrier in the premises need not be set out in the pleadings, nor proved, with as much particularity as would be requisite were the suit brought on a carrier's contract undertaking. For it is enough that the proof conforms substantially to the statements in the declaration, and that the declaration, without alleging any promise on the carrier's part, states, by way of inducement, that defendant is a common carrier, and that certain goods and chattels were delivered him, to be carried from A to B for a certain reasonable reward; and assigning, as injury, that the defendant carelessly and negligently behaved, so that the goods and chattels were lost.[2]

457. A count in trover may be added to the other count when declaring in an action on the case against a carrier; which, too, is sometimes advantageous to the party who brings a suit. And this practice is permissible wherever there may be the same judgment applicable to both counts, notwithstanding the plea be a different one.[3] Conversion imports, however, a wrong more transcendent than the mere negligent omission of an act which the carrier owed, or even his careless and negligent performance of duty; for by conversion one fundamentally deals with another's property without right as though it were his own;[4] and our previous discussion of the law of bailments shows that a bailee renders himself liable in trover where he, without permission, undertakes to sell, pledge, give away, or otherwise misappropriate the property which has been confided to his keeping. But, in a more technical sense, and with less

[1] *Ib.*; Orange Bank *v.* Brown, 3 Wend. (N. Y.) 158.

[2] See 1 Chit. Pl. 248; § 559.

[3] 2 Wils. 319; Govett *v.* Radnidge, 3 East, 62, 69; Hawkins *v.* Hoffman, 6 Hill (N. Y.), 586; Dwight *v.* Brewster, 1 Pick. (Mass.) 50; Packard *v.* Getman, 6 Cow. (N. Y.) 757; Johnson *v.* Strader, 3 Mo. 359; Bullard *v.* Young, 3 Stew. (Ala.) 46.

[4] *Ib.*; § 560; Bowlin *v.* Nye, 10 Cush. (Mass.) 416.

reference to the wilful conduct of the bailee, trover against a carrier will be supported by proof that the carrier or his servant misdelivered the goods, though this were by mistake, by a delivery to the wrong person;[1] or, as one might reasonably add, that he delivered to the right person, in violation of the conditions imposed upon such delivery.[2] In order to maintain trover as for conversion against a common carrier, a demand is needful wherever the fact of conversion is not decisive; so that the converting intent and behavior, as thus fixed upon the party, may be established in legal proof; for trover cannot be sustained without some proof of conversion. But formal demand is dispensed with where such demand would be useless, and the fact of conversion is clearly enough shown, independent of such formality; as where the carrier has already transferred the thing to some party, as he had no authority to do, or where the property has been actually lost or destroyed by him;[3] or where he refuses to deliver, except upon payment of charges which he has no right to claim, or on some other condition which he cannot lawfully exact.[4] In certain instances, a clearly tortious refusal may establish conversion against the carrier, even where the demand upon him was irregular.[5] And if the carrier has sold the goods and retains the proceeds, whether a demand be needful or not, before an action of assumpsit can be maintained against him for such proceeds, the

[1] *Ante*, 392; Devereux *v.* Barclay, 2 B. & Ald. 702; Claflin *v.* Boston & Lowell R., 7 Allen (Mass.), 341.

[2] See Murray *v.* Warner, 55 N. H. 546, 550, where goods were delivered to a carrier, "C. O. D.," for collection on delivery, and he delivered them to the consignee without payment. This was an action of case with a count in trover. See also Pontifex *v.* Midland R., 25 W. R. 215, as to delivery to a consignee after notice of stoppage *in transitu*. And see Trowell *v.* Youmans, 5 Strobh. (S. C.) 67.

[3] Alden *v.* Pearson, 3 Gray (Mass.), 342.

[4] *Ante*, 449; Adams *v.* Clark, 9 Cush. (Mass.) 215; Richardson *v.* Rich, 104 Mass. 156; Long *v.* Mobile R., 51 Ala. 512.

See *ante*, 450, as to the requirement of a tender of freight where one sues as for non-delivery of the goods; payment and delivery being concomitant acts.

[5] Marine Bank *v.* Fiske, 71 N. Y. 353.

carrier's own action against such plaintiff, to recover a balance due for freight, is held a sufficient refusal to enable the latter to sue without making a demand.[1] Demand and refusal do not, of course, conclude a carrier guilty of conversion, but serve only as evidence in an issue otherwise open to explanation; and, if it prove that the carrier lost or injured the goods by his mere negligence or default, this supports the count of case, but not that of trover.[2]

458. **Where, however, the remedy against the common carrier is ex contractu,** assumpsit is the regular form of action, this being applicable generally to all contracts not under seal whose breach is alleged, whether the promise was express or only implied. It is manifest that, by thus relying upon an undertaking rather than a duty imposed by public authority or custom of the realm, the plaintiff takes a far more extensive range of our modern common-carrier law than he could by suing *ex delicto*, and may well cover those constantly occurring instances where the liability which furnishes a cause of action against the carrier is found qualified and restrained in some manner by the terms of a bill of lading or other special contract, whose provisions cannot be disregarded; while, furthermore, an implied promise to carry will be almost inevitably deducible from the carrier's mere acceptance, sufficient to sustain assumpsit for a loss or injury.[3] As contrasted with the action *ex delicto*, that *ex contractu* has certain advantages

[1] Stevens *v.* Sayward, 3 Gray (Mass.), 108.

[2] Dwight *v.* Brewster, 1 Pick. (Mass.) 50; Hawkins *v.* Hoffman, 6 Hill (N. Y.), 586, 588.

As to a further possible advantage, in respect of gaining costs, under the limitations imposed by practice acts, where one sues for the tort rather than under a contract, see 2 E. & E. 844; Baylis *v.* Lintott, L. R. 8 C. P. 345.

Replevin does not lie by the consignee against a common carrier employed to carry "C. O. D.," before payment and delivery; for to sue in replevin one should be entitled to the immediate and exclusive possession of the goods. Lane *v.* Chadwick, 116 Mass. 68. Carrier in such a case is still agent of the consignor. *Ib.* Cf. 449, *ante*.

[3] § 561. See 2 Chitt. Pl. 342, 355, 7th ed. for the form of declaration appropriate to suing a land carrier in assumpsit.

of its own. The action survives, unlike that grounded in tort, against the carrier's personal representatives; a consideration of less consequence, however, where the carrier is a corporation. The plaintiff, too, may join the common money counts, if he has other appropriate causes of action. He can maintain assumpsit where trover would have laid instead, as for misdelivery and misappropriation.[1] But, as already intimated, by suing in assumpsit, the plaintiff cannot join a count in trover, since contract and tort furnish separate and distinct causes of action; nor can he join and disjoin parties defendant, at his convenience, but must bring all co-defendants together into his suit, and prove them all liable together.[2]

459. Local practice, however, tends to assimilate forms of action more closely, and overcomes in many respects the technical distinctions of the common law. Thus, in some parts of the United States, the plaintiff, when it is deemed doubtful to which class a particular cause of action belongs, may join a count in contract with a count in tort, averring that both are for one and the same cause of action; though the joinder of actions of contract and tort be not permitted.[3] If the bailment be made under circumstances which do not justify a conclusion that the carrier entered into a contract relation with him for the thing's conveyance, the bailor, it is held, cannot sue *ex contractu*; but he may, nevertheless, be entitled, in some instances, to bring his action *ex delicto* as for an injury done to his property through the negligence or misconduct of the bailee.[4]

[1] § **561**: 5 B. & Ald. 342, 349.

[2] *Ante*, 457; § **561**; Patton *v.* Magrath, 1 Rice (S. C.), 162.

[3] § **562**; Alling *v.* Boston & Albany R., 126 Mass. 121 (local statute).

[4] Martin *v.* Great Indian R., L. R. 3 Ex. 9; Hannibal R. *v.* Swift, 12 Wall. (U. S.) 262.

Such is the distinction sometimes raised where articles are transported as a passenger's baggage, for which the bailee might be held responsible under circumstances of loss by default, not as carrier, but in some less onerous capacity. See *post*, Part VII. c. 4; Flint R. *v.* Weir,

460. Admiralty proceedings, we should add, are sustainable against a defaulting common carrier whose transportation is substantially by sea or those navigable waters over which our admiralty courts take jurisdiction; though not to the exclusion of an aggrieved party from the common-law courts.[1] The chief ground for sustaining a libel of this character appears to be that, in such a case, the contract of affreightment may be viewed as a maritime contract, and the service undertaken by the carrier a maritime service; but, where the issue is made upon one's breach of a legal duty, it might be said, instead, that there was a marine tort, committed on the navigable waters, of which admiralty might properly take cognizance.[2] The peculiar relation of the State and Federal courts, under the Constitution of the United States, whereby admiralty jurisdiction is enforced independently of State authority, may commend this method of procedure as a preferable one in many cases where the carrier by water is in default; not to speak of those more general advantages which a libel *in rem* and an appeal to the familiar rules and methods of procedure recognized by commercial countries might afford the aggrieved party.[3]

461. (2) **Concerning the party plaintiff,** where goods are lost or injured in transportation. Here, again, is to be found a considerable diversity of opinion, notwithstanding the general rule that an action should be brought in the name of the person whose legal right of ownership has been thereby affected; for the carriage of goods often imports one owner at the

37 Mich. 111. But one may sue in tort for breach of common-law duty, even though the carrier receives under a special contract with limitation. 28 Mont. 297.

[1] Citizens' Bank *v.* Nantucket Steamboat Co., 1 Story (U. S.), 16; New Jersey Steam Nav. Co. *v.* Merchants Bank, 6 How. (U. S.) 378; The Thames, 14 Wall. (U. S.) 98; Shepherd *v.* Harrison, L. R. 5 H. L. 116; § 563.

[2] The holder of a bill of lading for water carriage has a threefold remedy, — against the master on his undertaking, against the owners personally, or against the vessel *in rem*. Ole. (U. S.) 12, 15; 1 Ware (U. S.), 263. And see Blum *v.* The Caddo, 1 Woods (U. S.), 64.

[3] § 563.

place of bailment delivery, to be succeeded by another at the terminus of the route, the latter being the more immediate party to controversies with the carrier over the loss or injury of that which would in due course have reached his possession unimpaired.[1] The theory of ownership suffers in the modern construction of this right to sue the carrier, however well it may establish that the mere servant or agent, who has contracted solely for another without having any direct beneficial interest in the bailment transaction, is not the proper party plaintiff in the case. Even here, one like a warehouseman, a carrier, or other principal bailee, having a beneficial interest in the subject-matter of the carriage contract, may, by reason of his privity with the carrier who occasions a loss, his beneficial interest, and his own obligation to answer over to the true owner, be the suitable party plaintiff.[2]

462. The consignor is generally favored as the party properly entitled, in cases of land carriage, to sue the carrier; and this not only for the latter's wrong or breach of contract in connection with accepting the goods for transit, but likewise, though less positively, where loss or injury occurs while the bailment purpose is being accomplished. The most widely accepted reason of this appears to be that, at the time the loss or injury occurs, and the carrier becomes in default, the consignor is still the owner, general or special, of the property bailed.[3] But this very admission of general and special ownership leaves open a potential right of action against the carrier, apart from an absolute proprietorship of the thing. And, further, the inclination of various eminent authorities

[1] § 564; 8 T. R. 330; Law *v.* Hatcher, 4 Blackf. (Ind.) 364; Sanford *v.* Housatonic R., 11 Cush. (Mass.) 155. That, as against the true owner and shipper who sues him, the carrier cannot set up that he transacts his business under a fictitious name, in violation of statute, see Wood *v.* Erie R., 72 N. Y. 196. See also Blum *v.* The Caddo, 1 Woods (U. S.), 64, and cases cited.

[2] § 564; Shields *v.* Davis, 6 Taunt. 65; *ante*, 431; c. 9, *post*.

[3] § 565; Freeman *v.* Birch, 1 Nev. & M. 420 (laundress, who paid for the carriage of her customers' linen, allowed to sue for a loss by the carrier); Green *v.* Clarke, 12 N. Y. 343; 1 Head (Tenn.), 158; 92 Va. 102.

is, in a word, to respect the consignor's right to bring his action, because of his original contract with the carrier, and his liability over to the owner, apart from any personal ownership in the thing.[1] The consignor is pronounced the proper party to bring the action against the carrier, where he plainly continues to be the owner throughout the transit, and was necessarily such at the time when the loss or injury in question must have occurred. Such is the case where an owner transports goods by a carrier, which are to be sold on commission.[2] Or, where the goods are so sent on a conditional sale to the consignee, that a complete transfer of title and property therein must await their arrival and the full accomplishment of the carrier's service.[3] Or, on a like principle, where they are sent "C. O. D.," and the carrier fails to return either the goods or the money.[4] Or where, because of a vendee's fraud or non-compliance with the Statute of Frauds, no transfer of the right of property and risk of loss has actually taken place, but the consignor remains the owner.[5] Or where a principal sends goods to his mere factor or agent.[6]

463. The consignee, on the other hand, is considered the proper party to sue the carrier in case the goods become lost or injured in transit, whenever delivery of goods to the carrier is on behalf of a consignee in whom is the property therein, with the accompanying risks of ownership, whether such title antedated the consignment, or operates by virtue thereof; and, if the circumstances show that the carriage contract was made

[1] Davis *v.* James, 5 Burr. 2680, per Lord Mansfield; Freeman *v.* Birch, 1 Nev. & M. 420; Atchison *v.* Chicago R., 80 Mo. 213; *post*, 464. Cf. Coombs *v.* Bristol R., 3 H. & N. 1.

[2] Sanford *v.* Housatonic R., 11 Cush. (Mass.) 155.

[3] Swain *v.* Shepherd, 1 Moo. & R. 224.

[4] United States Express Co. *v.* Keefer, 59 Ind. 263. And see *ante*, 406; Spence *v.* Norfolk R., 92 Va. 102.

[5] Coats *v.* Chaplin, 3 Q. B. 483; 6 Moore, 469; Stockdale *v.* Dunlop, 6 M. & W. 224; Stephenson *v.* Hart, 4 Bing. 476; 3 H. & N. 510; Law *v.* Hatcher, 4 Blackf. (Ind.) 364; Carter *v.* Graves, 9 Yerg. (Tenn.) 446.

[6] 5 B. & Ald. 350; Price *v.* Powell, 3 Comst. (N. Y.) 322; Green *v.* Clarke, 2 Kern. (N. Y.) 343.

by or on behalf of the consignee, so that the carrier undertook as the consignee's bailee, the consignor will not be permitted to sue him at all.[1] The consignee who has bought the goods and paid the freight for their transportation is certainly a proper person to sue, and, as it would appear, the only proper one.[2] So, too, has the consignor been denied the right to sue, where he sent as a mere agent of the consignee, having no personal responsibility in the employment of the carrier, and exercising no discretion in the choice of the transportation means.[3] And as to water carriage it is frequently asserted that the property in the goods shipped is *primâ facie* in the consignee, who may sue accordingly.[4]

464. But the test of a contract relation with the carrier appears to have controlled, rather than that of ownership, in several instances; though this, perhaps, is a doctrine most frequently relied upon to maintain a consignor's standing in court, where the general property to the goods had confessedly passed out of him before the loss occurred. This privity of contract with the carrier, which is most strongly manifested where the plaintiff actually selected the particular carrier and paid or agreed to pay him for the transportation of the goods, is a strong and reasonable ground of action, and may very conveniently be insisted upon, where no party claiming better rights has intervened to perplex the carrier with other issues of property transfer and legal ownership.[5]

[1] § **566**; 8 T. R. 330; Fragano *v.* Long, 4 B. & C. 219; Brown *v.* Hodgson, 2 Camp. 36; Everett *v.* Saltus, 15 Wend. (N. Y.) 474; Ilsley *v.* Stubbs, 9 Mass. 63; Bonner *v.* Marsh, 10 Sm. & M. (Miss.) 376; 18 Barb. 32; Kirkpatrick *v.* Kansas City R., 86 Mo. 341.

[2] South Alabama R. *v.* Wood, 72 Ala. 451. Cf. 103 Ind. 553.

[3] Thompson *v.* Fargo, 49 N. Y. 188.

[4] Lawrence *v.* Minturn, 17 How. (U. S.) 100; Coleman *v.* Lambert, 5 M. & W. 502; 1 Woods (U. S.), 64. See also Pennsylvania Co. *v.* Holderman, 69 Ind. 18. One who has made advances on the consignment may sue as consignee. 3 Blatchf. (U. S.) 289.

[5] § **567**; Mead *v.* Southwestern R., 18 W. R. 735. And see 5 Burr. 2680; Freeman *v.* Birch, 1 Nev. & M. 420; Goodwyn *v.* Douglas, 1 Cheves (S. C.) 174; Blanchard *v.* Page, 8 Gray (Mass.), 281, 289; 13 Ill. App. 490.

465. Now as to general or special ownership. Where the bailee of property delivers it to a carrier for transportation, the rule is that either the bailee or the bailor may, in general, sue the carrier for its loss or injury;[1] the court taking heed, as between these parties themselves, that each interest shall be protected out of the judgment, but not permitting the defendant, who is only once answerable, to object. And, as to a bailment for transportation by the agent of an undisclosed principal, the rule is that either the agent or the real principal may sue upon it, saving the defendant's right, in the latter case, of being placed in the same situation at the time of disclosing the real principal, as if the agent had been the contracting party.[2] Hence, the principal himself, even though undisclosed by his agent, may sue the carrier in his own name to recover damages for loss or injury of the property sustained while bailment accomplishment was in progress.[3] Where one having a special property in the goods bailed them for transportation, the carrier cannot volunteer the defence that some one else was the owner.[4] And the consignee of property to be sold by him on commission may sue for all damages caused to himself and the owner.[5]

[1] § 568; White *v.* Bascom, 28 Vt. 268; Freeman *v.* Birch, 1 Nev. & M. 420; *ante*, 462.

[2] Sims *v.* Bond, 5 B. & Ad. 393, per Lord Denman.

[3] *Ib.*; Higgins *v.* Senior, 8 M. & W. 834; Beebe *v.* Robert, 12 Wend. (N. Y.) 413; Taintor *v.* Prendergast, 3 Hill (N. Y.), 72; Elkins *v.* Boston & Maine R., 19 N. H. 337; Sanderson *v.* Lamberton, 6 Binn. (Penn.) 129. This rule applies, notwithstanding the Statute of Frauds. Higgins *v.* Senior, *supra*. And see New Jersey Steam Nav. Co. *v.* Merchants Bank, 6 How. (U. S.) 344, where the same doctrine was approved in the celebrated case of the loss of the steamer Lexington in Long Island Sound. Here a bank had delivered to Harnden's express a large amount of specie for transportation, but Harnden had in his own name contracted with the Steam Navigation Company for its due conveyance.

[4] Denver R. *v.* Frame, 6 Col. 382.

[5] Boston & Maine R. *v.* Mower Co., 76 Me. 251.

The joint owners of personal property intrusted to a common carrier have been permitted to sue together for its loss, notwithstanding the receipt which the carrier gave for the property when he received it acknowledged that he had received it from two of them, — the joint ownership of

466. As to the right of suit under a bill of lading or similar document. If the right to sue the carrier turned strictly upon legal ownership at the time of loss, this would be so hard a matter to determine conclusively in those modern instances where the title to inland freight, as well as that carried by water, is transferred in transit by symbol, that the delinquent carrier would too often profit by the misconception of plaintiff parties, and baffle their efforts; for legal ownership and the right to demand the goods as consignee may change over and over while one transportation purpose is being accomplished. The better opinion, then, is decidedly to the effect that the shipper named in a bill of lading may sue the carrier for injury or loss of the goods, although he has retained no property, general or special, therein; for though some third party, not appearing in such document of title, might maintain his own action against the carrier, it does not follow that the shipper cannot sue as upon his original contract with the carrier.[1] And if the shipper, under a bill of lading, can overcome any presumptions to the contrary, and show that he is the true owner of the goods therein described, he is doubtless entitled

the other plaintiff being unknown to him. § 569; Day *v.* Ridley, 16 Vt. 48. And a receipt given by the consignee on arrival of the goods, though purporting to acknowledge their receipt in good order, does not necessarily estop a consignor from suing as of right for the carrier's negligent transportation. Sanford *v.* Housatonic R., 11 Cush. (Mass.) 155. A part owner of goods may sue for their loss where the contract was made with him. Cantwell *v.* Pacific Co., 58 Ark. 487.

An action against a common carrier for goods and chattels belonging to a minor child ought to be brought in the name of the child. See 2 C. & P. 578; Baltimore Steam Packet Co. *v.* Smith, 23 Md. 402. Though the fundamental principle here considered is simply that of ownership. By the common law a wife's personal property vests, for the most part, in her husband; and though the married women's legislation and the modern doctrine of separate property has greatly changed this state of things, it remains true that, as to things personal which are not the separate property of the wife, and are lost or injured by the common carrier, the husband, and not the wife, should sue. Hawkins *v.* Providence, &c. R., 119 Mass. 596; Furman *v.* Chicago R., 57 Iowa, 42.

[1] § 570; Shaw, C. J., in Blanchard *v.* Page, 8 Gray (Mass.), 281, 289. But cf. 3 B. & Ald. 277; Potter *v.* Lansing, 1 Johns. (N. Y.) 215.

to bring the action in his own name.[1] As concerns the assignee and transferee of goods under a bill of lading, wherever it is shown that the consignor was the consignee's agent, and shipped the goods for his principal's account or by his order, the consignee may doubtless maintain his action against the carrier.[2] Where it is stated in such a document that the goods are consigned to a person named therein for his account and risk, the inclination appears to have been, in the older cases, to let the right of action go by legal ownership, rather than expect the shipper himself to sue.[3] And we may conclude from the latest cases that, whatever the shipper's own right of action as such, the party who holds the bill of lading, as such bills are now usually availed of in inland or sea transportation, has a *primâ facie* ownership of the goods sufficiently enabling him to sue the carrier for their loss or damage in transit.[4] But here we assume that the bill was negotiable in form.[5]

[1] Sargent *v.* Morris, 3 B. & Ald. 77; Price *v.* Powell, 3 Comst. (N. Y.) 322. And see Moore *v.* Sheridine, 2 Har. & M. 453, where the consignment was "to A or B." For suit by the assignee of an insolvent consignee, see Mass. Loan & Trust Co. *v.* Fitchburg R., 143 Mass. 318.

[2] Blanchard *v.* Page, 8 Gray (Mass.), 281, 289.

[3] *Ib.*; 1 Johns. (N. Y.) 215.

[4] § 570; Barber *v.* Meyerstein, L. R. 4 H. L. 317; Shepherd *v.* Harrison, L. R. 5 H. L. 116; 4 McLean (U. S.) 325; Arbuckle *v.* Thompson, 37 Penn. St. 170; Price *v.* Powell, 3 Comst. (N. Y.) 322; Conard *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 386, 445; The Thames, 14 Wall. (U. S.) 98. The tendency here is to permit one to sue, like the holder of negotiable paper, even though not the beneficial party in interest. In favor of other consignees and under inland bills of lading a similar right to sue has been recognized, though one be not the beneficial party. Mobile R. *v.* Williams, 54 Ala. 168. See also Chaffe *v.* Mississippi R., 59 Miss. 182.

The party who was or becomes owner of the goods by assignment from the shipper or otherwise, and who becomes lawful holder of the bill by indorsement or otherwise, and who really sustains the damage may sue the carrier accordingly. Shaw, C. J., in 8 Gray (Mass.), 281.

[5] The mere assignee of a non-negotiable bill of lading cannot, under the general rule of assignments, sue in his own name. 141 Ill. 110. And the consignee should not sue where the consignor made the contract, unless he is holder of the bill of lading issued. 81 Ga. 792.

467. To conclude as to the proper party plaintiff. In general, the right of one to bring an action against the carrier, as a special rather than general owner, or by virtue of the carrier's promise or breach of public duty, will not exclude the real owner in interest from intervening and bringing suit in his own behalf in respect of the goods. Such is the usual principle pertaining to bailments. And hence a suit by the consignor, or by the consignee, might avail against a common carrier, where the other party, or some third person with claims paramount to both, had the right to step in and anticipate one's recovery of damages. The practical result of this would be that the carrier himself could not set up the plaintiff's want of interest or authority to bring the suit, but would have to respond fully to him on the legal assurance that one satisfaction on such a fair and *primâ facie* showing of authority would debar any and all other possible parties in interest from pursuing him for the same delinquency;[1] and that a judgment once obtained in his favor on the merits of the case would, in like manner, conclude the potential as well as the actual plaintiff.[2] But where the theory of general or special ownership is untenable, and one party holds himself out to the carrier as having no interest at all, the case is different; for the weight of authority favors the proposition that the person having both the right of property and the right of possession is the party to sue, whether consignor or consignee.[3] And inasmuch as a delivery to an agent for and on behalf of his principal will transfer the property equally with a delivery to the principal himself, delivery may be made to a carrier as

[1] § **571.** See Nicolls *v.* Bastard, 2 C. M. & R. 657; *ante*, 39, 60, 91, 127, 182, as to other bailees; Elkins *v.* Boston & Maine R., 19 N. H. 337; Steamboat Farmer *v.* McCraw, 26 Ala. 189.

[2] In Green *v.* Clarke, 12 N. Y. 343, this doctrine availed on behalf of a carrier as against the special owner, where the general owner had already sued and lost his case.

A release in full to the carrier by the consignor without authority from the consignee does not debar the latter from suing for damages. City R. *v.* Chicago R., 63 Wis. 93.

[3] Potter *v.* Lansing, 1 Johns. (N. Y.) 214; The Venus, 8 Cr. (U. S.) 252; Brandt *v.* Bowlby, 2 B. & Ad. 932; 1 Woods (U. S.), 64.

strictly on the consignee's behalf.[1] What the conflicting decisions in England and the United States chiefly maintain, however, with some legal inconsistency, is that in doubtful cases the carrier shall not dispute the right of either consignor or consignee to bring the suit; and furthermore, that because one of these parties has the right to sue, it does not follow that the other might not have sued instead.[2]

468. (3) **Concerning the party defendant.** It has already been observed that where the common carrier is sued for a loss or injury to the goods *ex delicto*, the non-joinder or misjoinder of parties defendant is not of vital consequence, whereas if the suit were *ex contractu*, such an error would be fatal.[3] In further considering the question against whom a suit should be brought, the principles brought into view in former chapters are to be remembered; so that one who seeks to bring his common-law action correctly must be careful to sue the principal carrier, — not the servant or subordinate; the person, firm, or company which, as public carrier, has the actual control, direction, and management of the transportation service hired by the customer, — not the mere proprietor of a route or vehicles; the actual bailee who holds himself out to accomplish the bailment purpose, — not his sub-bailee with whom the bailor had no privity.[4] All these points have been discussed in place already.[5] But, on familiar principles, either the agent of an undisclosed principal may be sued, or the principal himself; and an undisclosed party may be held liable as the partner in fact of a carrier, whose personal responsibility was at stake in performing the public service he professed.[6] Where, again, the agent or servant of a carrier so far exceeds the permitted and ostensible scope of his authority as to dis-

[1] 1 Woods (U. S.), 61; 1 Atk. 248; 1 Johns. (N. Y.) 15.

[2] § 571. A mere borrower from the consignee, who had no privity with the carrier, cannot sue for loss or injury. 73 Ga. 472.

[3] *Ante*, 456.

[4] *Ante*, 283.

[5] As to the carrier to be sued where there is a line of connecting carriers, see *post*, c. 9.

[6] § 572; *ante*, 465.

charge the principal or master, or where one professes to be such an authorized servant or agent while he is not such, nor was held out by the true carrier as such at all, the party aggrieved by his conduct may sue him personally.[1] And if it appears that the contract was made with the carrier's servant alone, and independently of the true carrier, though this might not prevent the carrier himself from disaffirming the contract, and claiming the compensation for the service as his own, like any master whose servants another has sought to tamper with and corrupt, yet it is held that the servant, and not the carrier, must be sued for losing or injuring the thing so intrusted.[2]

469. **The master of a ship or vessel has been regarded** as a person of such vast and independent authority, — one who must be greatly trusted by all having dealings with him, as chief executive in a hazardous transportation involving possible contingencies where his sole discretion must determine what should be done with ship and cargo, and as efficient representative, moreover, of all concerned at distant ports, — that, upon considerations of convenience and public policy, these have long been considered personally liable as common carriers, by way of exception to the usual rules of agency, so that one suffering loss or injury of freight from some inexcusable cause can, at his election, proceed against either master or owner. This conforms to the tenor of the civil law, and, indeed, to the almost universal law of nations.[3] Convenience, in this respect, however, regards chiefly the pecuniary respon-

[1] *Ante*, 284.

[2] *Ib.* This rule has been applied to the driver of a stage-coach, who receives parcels. And, as against the owner of a vessel who makes a charter-party of which shippers are kept ignorant, see The Figlia Maggiore, L. R. 2 Ad. & E. 106.

Partners or joint associates in a common transportation may well be joined and made answerable for a loss therein occasioned, although some of them have no interest in the vehicle of transportation. Ansell *v.* Waterhouse, 6 M. & S. 835; Fairchild *v.* Slocum, 19 Wend. (N. Y.) 329. This subject is more fully treated, *post*, c. 9. See Aigen *v.* Boston & Maine R., 132 Mass. 423.

[3] § **573**; Morse *v.* Slue, 1 Vent. 190; Elliott *v.* Rossell, 10 Johns. (N. Y.) 1.

sibility of a defendant; and perhaps this rule concerning the master has its foundation in a general solicitude that one brought into such intimate contact with the customer by affreightment contract, bill of lading, and otherwise, shall have the ship where it may be bound firmly for the engagement, regardless of the owners, or their attempted qualifications of liability. The present tendency of the decisions appears to be against charging the master of a vessel unduly in a personal capacity for the acts and conduct of others which cannot be brought home to him, either as the principal contracting party, or as a wrong-doer; and this more especially where the injury or loss appears disconnected with the period of actual marine service.[1]

470. Various formalities are prescribed under local statute with respect to suing joint-stock companies and corporations, which have only a local operation, but must be locally observed.[2]

471. (4) **Concerning the declaration and pleadings** in cases of loss or injury. Inasmuch as the action against the carrier *ex delicto* is founded so nearly in what, from a different approach, might be called a contract breach of duty or misfeasance, difficulty may arise from drawing a declaration of a tenor unsuitable to the form of action. Thus, averments of a "promise" or a "consideration," on the carrier's part, or of "an agreement," befit the action *ex contractu* rather than that on the case for tort, notwithstanding his "negligent conduct" and "misfeasance" be likewise relied upon;[3] and it is always

[1] § 573; 6 C. B. N. S. 894, 911; Sandeman *v.* Scurr, L. R. 2 Q. B. 86; Walston *v.* Myers, 5 Jones (N. C.), 174. The master having been sued to judgment on a bill of lading, the owner cannot be sued, although the judgment be unsatisfied. Priestly *v.* Fernie, 3 H. & C. 977.

[2] § 574. Thus, in New York, it is provided that suits against joint-stock companies shall, in the first instance, be prosecuted in the name of the president or treasurer; but that after judgment against the company, and the return of execution unsatisfied, the members may be sued individually; while, in Massachusetts, the members of the company may be sued as partners in the first instance. See Gott *v.* Dinsmore, 111 Mass. 45 (a suit against the "Adams Express Company"); *ante*, 286.

[3] See Baylis *v.* Lintott, L. R. 8 C. P. 345, distinguishing Tattan *v.* Great Western R., 2 E. & E. 844.

important that the pleadings should correspond to the distinctive character of the action.[1] In laying the cause of action *ex delicto* on the custom of the realm or State, an express allegation that the defendant is a common carrier seems quite material; and a demurrer founded on a real omission of such allegation would probably be good;[2] yet after a verdict against him, rendered upon proof of all the material facts, it may be too late for the defendant to raise such objection.[3] The allegation of compensation or consideration need not be specific even in actions for a loss or injury *ex contractu;* and it is enough to allege that the consideration of conveying the particular property was a certain reward, or a reasonable hire and reward, without stating what that reward was.[4] If the action is brought *ex delicto*, no allegation of a compensation or consideration paid, or agreed to be paid, ought to be made at all.[5] The quantity and quality of the goods to be conveyed may be generally described without great nicety, where the action does not rely upon a bill of lading, or other special instrument making a minute description of the property.[6] Where, in fact, the recovery sought is damages for an inexcusable loss or injury to a thing, and not, as in replevin, the thing itself, and where the plaintiff's ground of action is a breach of the carrier's general duty, or of some promise on his part, to be

[1] § **575.** But as to the joinder of counts of contract and tort in local practice, see *ante*, 459. See also 68 Ga. 344.

[2] Averment that defendant is a corporation created by the laws of the State, and engaged in operating a railroad, and carrying corn and grain in cars furnished by itself, etc., is equivalent to an averment that it is a common carrier. Toledo R. *v.* Roberts, 71 Ill. 540. And in a suit upon a special contract of a railroad company "to carry," etc., there need be no express averment that defendant is a common carrier. 36 S. C. 110.

[3] Pozzi *v.* Shipton, 8 A. & E. 963. And see Jones *v.* Pitcher, 3 Stew. & P. (Ala.) 135. For insufficient allegation of right to sue where a consignor sued for non-delivery to his consignee, see 69 Ind. 18. And as to consignee who does not allege ownership, see 103 Ill. 553. See forms of declaration in 4 Rob. Prac. 780–783; 9 W. Va. 33.

[4] Clarke *v.* Gray, 6 East, 564; 78 Tex. 307; Ferguson *v.* Cappeau, 6 Har. & J. 394; Hall *v.* Cheney, 36 N. H. 26.

[5] Hall *v.* Cheney, 36 N. H. 26; Baylis *v.* Lintott, L. R. 8 C. P. 345.

[6] 2 Saund. 74 *a;* § **575.**

inferred from circumstances only and an off-hand delivery and acceptance, courts do not insist upon a very closely drawn declaration. While the real ground of complaint should be disclosed, the duty safely to convey and deliver, or the promise, may be set forth in general language; the grievance may be stated to be non-delivery within a reasonable time; and it is not deemed material to set forth the particular means by which the loss occurred.[1]

472. But where the ground of action is a special contract qualifying the carrier's common-law risks, care should be taken to declare this contract correctly and specifically, and not set up material terms that were not therein contained, nor omit material terms, nor allege a different contract from that actually made, nor sue as for breach of one's duty and misfeasance as "common carrier," as though he had transported in his public and unqualified capacity.[2] This rule has been strongly asserted where the action was *ex contractu* in form. Where the complaint in a suit against a common carrier counts upon a breach of his common-law liability, and the evidence shows a special contract, the variance is often held fatal;[3] though as some cases contend, there is no real variance unless the suit was *ex contractu*.[4] And it would appear that where the action is in tort, and not contract, the plaintiff need not

[1] § **575**; Raphael *v.* Pickford, 5 M. & G. 551; Peck *v.* Weeks, 34 Conn. 145; Williams *v.* Baltimore R., 9 W. Va. 33. Thus, in trespass on the case, the allegation that the goods "were, by the negligence of the carrier, wholly lost" to the plaintiff, is equivalent to an express denial of their delivery over. And see McCauley *v.* Davidson, 10 Minn. 418. But where the real grievance was the failure to return unloaded cars, this peculiar grievance should be alleged. 123 Ill. 594.

[2] § **576**; White *v.* Great Western R., 2 C. B. N. S. 7; 10 C. B. 454; 7 Ex. 699, 705; Davidson *v.* Graham, 2 Ohio St. 131; Camp *v.* Hartford Steamboat Co., 43 Conn. 333; 110 N. C. 338; 26 Vt. 247; Mann *v.* Birchard, 40 Vt. 326; Lake Shore R. *v.* Bennett, 89 Ind. 457; 90 Ind. 459.

[3] 89 Ind. 457; Hall *v.* Pennsylvania Co., 90 Ind. 459. *Supra*, § **478**.

[4] 102 Mass. 552; Clark *v.* St. Louis R., 64 Mo. 440 (the liability, where tort is alleged, does not arise from a special contract, but in spite of it). It may be worthy of note that our American rule does not favor the old English idea of a "special acceptance" by the carrier. See *ante*, 359.

allege a special agreement, but may leave the carrier to prove one if he can.[1]

473. **In the declaration of an action against the carrier ex delicto,** there might be a divisible averment, so that enough being proved to sustain the plaintiff's action, the other part of the charge might be treated as surplusage, and suffered to fail.[2] But where the action is brought *ex contractu*, no such opportunity of division is afforded, for the contract must be proved materially as alleged.[3] If the declaration in assumpsit states an absolute contract, and the proof establishes a contract in the alternative, or *vice versa*, this is a fatal variance, whether the plaintiff had the option, and has determined it, or it was left to the defendant.[4] And where one terminus of the transportation is stated, and another is shown, the plaintiff must fail, unless such variance be nominal only, and not real.[5] But, as good authorities have stated, the form of action, whether *ex contractu* or *ex delicto*, does not materially affect the evidence necessary to maintain it; and even when the declaration is in case, the contract with the carrier, or rather the particular duty from which the liability results, and on which it is founded, must be correctly, not incorrectly, stated. For, in an action on a tort arising out of a contract, a misstatement of the contract or a material variance in the proof is fatal, if it goes to the essence of the action; and where the plaintiff suing in tort goes into a detailed statement of his cause of action, he encounters a risk of vital discrepancy, similar to that of a plaintiff relying on the action of contract.[6]

[1] Clark *v.* St. Louis R., 64 Mo. 440; 17 Blatchf. (U. S.) 421; 39 Ark. 423. But cf. 455. A mere limitation of damages against him, as it were, by the carrier's special contract, need not be noticed in pleading against him; but a stipulation that under circumstances, such as losses by fire or robbery, he shall not be liable at all, must be stated. Abbott, C. J., in Latham *v.* Rutley, 2 B. & C. 20.

[2] See Butt *v.* Great Western R., 11 C. B. 140; 87 Ga. 734.

[3] § 577: Hughes *v.* Great Western R., 14 C. B. 637; Weed *v.* Saratoga R., 19 Wend. (N. Y.) 534; 9 W. Va. 33; 81 Ga. 602.

[4] Penny *v.* Porter, 2 East, 2; Stone *v.* Knowlton, 3 Wend. (N. Y.) 374.

[5] Woodward *v.* Booth, 7 B. & C. 301; 2 Stark. 385.

[6] § 577; Austin *v.* Manchester R., 16 Q. B. 600; 1 Bing. N. C. 162;

474. (5) **Concerning the proof in suits for loss or injury.** We have indicated in former pages the evidence required on the part of a plaintiff in order to sustain his suit against a common carrier; the carrier's evidence in defence; also where the burden of proof lies in this, as in other bailments, at any particular stage of the case. The contract, express or implied, with the defendant carrier must be proven by the plaintiff, whether a tortious breach of public duty or a breach of contract be relied upon; next, a bailment delivery of the goods; lastly, the carrier's failure to deliver the goods over at the journey's end, or his delivery in unsuitable time or condition, in one of which the alleged grievance consists.[1] A bill of lading, written receipt, check, or other token of acceptance, may well establish the contract and delivery; the receipt, of course, being open to explanation, but not special-contract terms of a document, admissible of themselves, and brought home, actually or by legal implication, to the bailor.[2] The carrier may set up exemption under his special contract by way of exoneration, or defend on the general grounds of excuse which the common law admits.[3] Proof of demand and refusal, or an apparent conversion, should place the carrier who is sued *ex delicto* sufficiently in the wrong to oblige him to clear himself; and in general, when non-feasance or negligence is charged upon the carrier, slight evidence in support of his allegation will suffice on the plaintiff's part, whatever the form of action.[4] But some evidence ought to be adduced, such as brings the default home to the carrier, and leaves it unlikely that others, for whose acts he is in no measure responsible, as, for instance, the customer or his agents, caused

Mann *v.* Birchard, 40 Vt. 326; Jordan *v.* Hazard, 10 Ala. 221; Baltimore R. *v.* Pumphrey, 59 Md. 390; Stump *v.* Hutchinson, 11 Penn. St. 553; Toledo R. *v.* Roberts, 71 Ill. 540, 542.

In suing for unreasonable delay, an allegation of non-delivery within a reasonable time is specific enough. 101 Cal. 187.

[1] § **578**; 15 Fed. (U. S.) 867.

[2] See McCotter *v.* Hooker, 4 Seld. 497; 81* Penn. St. 315.

[3] § **578**: *ante*, 324.

[4] § **578**; Chicago *v.* Dickinson, 74 Ill. 249.

the loss or injury.[1] The common law disqualifies interested parties from testifying in their own behalf; but this disqual-

[1] *Ib.*; Morley *v.* Eastern Express Co., 116 Mass. 97. As to the fact of non-delivery because the consignee could not be found, and the carrier's evidence on this point, see Witbeck *v.* Holland, 45 N. Y. 13. See, further, South Alabama R. *v.* Wood, 71 Ala. 215; 66 Ala. 167. The responsibility for short delivery is on the carrier, and the burden is on him if he seeks to exonerate himself. 16 Fed. (U. S.) 145. And though a special contract should exempt the carrier from liability for injuries "from fire," he may be presumed negligent if he refuses to give any information as to how or where the fire occurred. 87 Penn. St. 395. And so generally may fault be imputed to a carrier if he refuses all explanation of loss or injury. Kirst *v.* Milwaukee R., 46 Wis. 489. Where there is a contract limiting the carrier's liability to injuries caused by negligence, the burden is on him to show from what cause a loss or injury occurs. Shriver *v.* Sioux City R., 24 Minn. 506; 28 Fed. (U. S.) 336.

But an apparent conflict in the authorities is noticeable, where goods are lost under a special contract of immunity from specified risks. Some courts put the burden pretty strongly on the plaintiff to show the defendant's negligence, such as the special contract cannot relieve. Others, again, pronounce it good policy to increase the carrier's burden, so that he should show both that the cause was within the excepted risks, and that he was not negligent in respect thereto, nor were his agents. *Ante*, 384. The difference of circumstances will, we think, help to correct the discrepancy. And it would appear the better opinion that the carrier's proof of exculpation should go so far as to present, on his part, some particular occasion of loss or injury, such as the common law or his special contract would excuse; which presentation of the facts, as he makes it, imputes to him and his servants no culpable negligence or default; and that having done this, he need not affirmatively prove further that he was not negligent, but rather leave this for the plaintiff to establish if he can. But specific acts of negligence being shown by a preponderance of evidence against the carrier, he should now, with his better opportunity of ascertaining the specific facts, disprove the charge. See *ante*, 384. The prolonged controversy in the courts over rules on this point shows how stubbornly fought and how finely drawn are carrier suits at the present day.

In an action against the carrier for non-delivery of goods, although the allegation is a negative one if put in issue, the burden of proof is upon the plaintiff, and he must give some evidence of non-delivery, according to the obligation assumed by the carrier, before the latter is required to prove delivery. Roberts *v.* Chittenden, 88 N. Y. 33. But non-delivery being shown as a fact, a presumption of liability on the car-

ification is, to a considerable extent, removed by modern legislation, which favors, on the whole, the admission of all interested parties to the witness-stand, leaving to the cross-examination of opposing counsel, and the equal opportunity for parties to confront and contradict one another, the means of eliciting the whole truth.[1]

rier's part arises, and the burden is on him to show good excuse for non-delivery. 15 Fed. (U. S.) 686.

Where, again, the carrier delivers goods in a damaged condition, the onus is on him to show that he is not in fault, and the injury being shown, he is *prima facie* inculpated. But the plaintiff must first show the injury; and the injury must be such, by his presentment of the case, as to exclude all inference that the loss occurred otherwise than by the carrier's fault. Thus, to show that an animal transported by vessel was delivered in a sickly condition without external mark of injury, imputes nothing more than the natural effect of a voyage upon a feeble creature, and this does not sufficiently charge the carrier. 3 Woods (U. S.), 380; though the special facts of such condition might impute more. Dow *v.* Packet Co., 84 Me. 490. And if in a suit for animate or inanimate property the damage might as well be attributed to natural causes as to negligence, the plaintiff cannot recover. Ocean S. S. Co. *v.* McAlpin, 69 Ga. 437; 150 Penn. St. 170 (brittle goods); 101 Mo. 631. Where, on the other hand, a bill of lading shows the package to have been in good condition when shipped, and the proof shows that the goods were properly packed, and the damage of a kind not likely to have been due to an excusable peril, the burden is on the carrier to account for the injury. 28 Fed. (U. S.) 336; 168 Penn. St. 209. A consignee's receipt for the goods on their delivery over, as being in good order, is *prima facie* evidence in the carrier's favor. Ocean S. S. Co. *v.* McAlpin, 69 Ga. 437. And where the loss or injury was not discovered until after the delivery over at the journey's end, the burden is on the plaintiff to show that it must have occurred before the bailment ended. Canfield *v.* Baltimore R., 75 N. Y. 144 (jewelry abstracted from a box and nails re-driven).

The carrier may show that the loss or injury proceeded from some non-apparent cause previous to his reception of the goods; and this, notwithstanding the bill of lading or other document acknowledges their receipt in good condition. 3 Cliff. (U. S.) 184. Such receipt being shown, however, the carrier has the burden of showing that the loss occurred after he had ceased to be carrier. Browning *v.* Trans. Co., 78 Wis. 391.

As to defence of bad packing, see 37 Fed. (U. S.) 611.

No loss of goods shipped or delivered at any other time than that alleged in the writ can be admitted in proof. 70 Me. 290.

[1] § 578.

475. The defendant to the action ex delicto pleads, by way of general issue, "not guilty," or words of other form which amount to such a plea; and under this general issue a carrier may prove most matters of defence allowable in action on the case. But "not guilty" operates as a denial of inexcusable loss and damage, and not of such special matters as the acceptance of the goods by himself; though a loss proximately by act of owner or customer, as, for instance, by the consignor's own negligence, ought apparently to be available to the carrier on such a plea as well as loss by act of God or of a public enemy.[1] Where the action is brought *ex contractu*, the general plea "non assumpsit" operates as a denial of any contract to the effect alleged in the declaration, and of any such bailment as would raise a promise in law to the effect claimed by the plaintiff.[2] But, apparently, the general denial does not here extend to special matters in avoidance of liability upon which the carrier means to rely.[3] Admissions of the carrier, or of his servant acting within the scope of his agency, which relate immediately to the loss may, as part of the *res gestæ*, be of much avail to the plaintiff;[4] while, on the other hand, there has been much difficulty found in drawing the line between those cases where, under the old rules of evidence, a carrier's servant could, and where he could not, be admitted to testify on his employer's behalf, without procuring a release, so as to

[1] § 579; 5 M. & W. 669; Wyld *v.* Pickford, 8 M. & W. 443; Hoyt *v.* Allen, 2 Hill (N. Y.), 322. Cf. 3 C. B. 1; 6 Scott, N. R. 951.

[2] Dale *v.* Hall, 1 Wils. 281; 4 Bing. N. C. 314.

[3] See Houston R. *v.* Harn, 44 Tex. 628, where the carrier meant to rely specially upon the plaintiff's release of the contract for shipment of the articles, or only a partial loss And, as to a limitation under his special contract, see Westcott *v.* Fargo, 61 N. Y. 542.

[4] Kirkstall Brewery Co. *v.* Furness R., L. R. 9 Q. B. 468, and cases cited; Burnside *v.* Grand Trunk R., 47 N. H. 554; 6 Gray (Mass.), 450; Lane *v.* Boston & Albany R., 112 Mass. 455. Where the acts of the agent will bind his principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him if made at the same time, and constituting a part of the *res gestæ*. § 579; Story Agency, § 134. But not loose general admissions against the carrier who employs him. 140 Mass. 510.

make sure that the carrier, if held liable to the customer, would not turn round and sue him personally.[1]

476. On the principle of necessity, the usual rule of disqualification has been relaxed in the loss of some trunk or closed receptacle with its contents, where only the plaintiff or party in interest can disclose what those contents were, and the circumstances in connection with the bailment and the original contract fail to establish the fact. As to the extent of this exception, however, the authorities are not clear and harmonious; though, independently of legislation, the better authority tends to confine it to cases where no other certain testimony, less *ex parte* in character, is accessible. In the bailment of freight in large amount and of considerable value, under a bill of lading or other similar document, the recitals of the instrument evince the mutual understanding on this point; and in general the application of the rule to freight must, at best, be quite a narrow one.[2]

477. As to the sufficiency of evidence, if there be some evidence which tends to prove all the material allegations on the plaintiff's part, the sufficiency thereof is usually to be left to the discretion of the jury, our courts being disposed to favor the consignor or consignee, upon even slight proof of material facts not disproved by the other party; but where there is a fatal variance between the proof and the allegations, or where there is no evidence whatever on some material point necessary to be proved in order to make out the cause of action, the court, on motion of the defendant, should order a non-suit.[3] Where evidence of the carrier's negligence is conflicting the

[1] § **579**; Moran *v.* Portland Steam Packet Co., 35 Me. 55; Bailey *v.* Shaw, 4 Fost. (N. H.) 297; and see *ib.*, as to the owner qualifying by a release to plaintiff under the old rule.

[2] § **580**; 2 C. & P. 613; Doyle *v.* Kiser, 6 Ind. 242; Wright *v.* Caldwell, 1 Mich. 51; Adams Express Co. *v.* Haynes, 42 Ill. 89 (not to apply at all to the transportation of freight); 6 W. & S. (Penn.) 495; 22 Ill. 278; 12 Ga. 217; Part VII. c. 4, where the rule is applied to baggage.

[3] § **581**; 1 Cal. 108; 116 Mass. 97; Lane *v.* Boston & Albany R., 112 Mass. 455; Deming *v.* Railroad, 48 N. H. 455.

court will not set forth rules as supposing certain facts were proved, but submit all the evidence to the jury.[1] Proof of actual payment, or of an express promise to pay, freight on the goods, is not, in general, requisite in order that one may maintain his suit against the carrier; for the willingness to pay is readily presumed.[2] And on the more formal points slight evidence will often suffice to make out one's *prima facie* case against the carrier.[3]

478. (6) **Concerning the damages recoverable against the carrier** in suits for loss or injury on the transportation. The principle is that the plaintiff or rightful party must be fully indemnified against such pecuniary damage as he sustains by the carrier's inexcusable breach of duty or of contract, so far as this damage is consequential upon the carrier's undertaking in question by a reasonable construction of its terms. Hence, the general measure of damages, in case of such loss or injury by the carrier, is the value of the goods at the place of intended delivery at the time they should have been delivered; and market value is, apart from contract, the common test of value.[4] Whether the suit be framed *ex contractu* or *ex delicto*

[1] Aigen *v.* Boston & Maine R., 132 Mass. 423; 128 Mass. 221; Baltimore R. *v.* Keedy, 75 Md. 320. Leaving the jury thus to ascertain the facts, the court may rule what the liability would be in case certain facts were found by them. 48 Kan. 321.

[2] Hall *v.* Cheney, 36 N. H. 26; 6 Har. & J. (Md.) 394.

[3] Chicago R. *v.* Dickinson, 74 Ill. 249.

[4] § **582**; Ringgold *v.* Haven, 1 Cal. 108; Parmelee *v.* Fischer, 22 Ill. 212; Hackett *v.* Boston R., 35 N. H. 390; Dean *v.* Vaccaro, 2 Head (Tenn.), 488; Peet *v.* Chicago R., 20 Wis. 594; Sherman *v.* Hudson River R., 64 N. Y. 255. This principle is applied where gold coin is lost at a time when it commands a premium in the market. 98 Mass. 550. Punitory damages are not, in general, allowable in suits of the present character, unless positive misconduct appears. Toledo R. *v.* Roberts, 71 Ill. 540; Wall *v.* Cameron, 6 Col. 275. Under counts against the carrier merely as carrier or bailee, the plaintiff cannot recover for losses specially resulting from the misrepresentation or deceit of the carrier's agent. Maslin *v.* Baltimore R., 14 W. Va. 180; Mitchell *v.* Georgia R., 68 Ga. 644; 44 Ark. 439.

As to damages under a contract limiting the amount for so much per box, package, etc., see 93 Ill. 523. A just valuation in case of loss might

the same general rule applies, and the measure of damages is equally within the control of the court.[1] Where goods are delivered but not in good condition, the carrier is liable for the difference between their actual market value at the time and place of delivery, and the sum which would represent their value were they delivered uninjured.[2] For negligent delay and culpable default in transporting the goods, so that there is a loss incurred by their depreciating in value, the measure of damages against the carrier is the difference between the value of the goods to the owner or proper party at the place of intended delivery at the time they ought to have arrived, and their value at the time they in fact arrived,[3] a reasonable time being allowed for their delivery.[4] The carrier's unreasonable delay in delivering the goods is no defence to his action for freight, without some proof of the damage thereby sustained; such as their fall meantime in the market value; though for actual and proximate damage occasioned by his unreasonable and unexcused delay, the carrier may doubtless be held answerable.[5]

be imposed by contract in advance; or a reasonable limit to the time of making claims for damages. *Ante*, 366, 367. Cf. 23 Wend. (N. Y.) 306 (accepting goods at intermediate point); 5 Bosw. (N. Y.) 625 (as to loss before the transportation commences); 48 Barb. (N. Y.) 127.

[1] Baltimore R. *v.* Pumphrey, 59 Md. 390.

[2] Jellett *v.* St. Paul R., 30 Minn. 265; 23 Fed. (U. S.) 463; 29 Fed. (U. S.) 530.

[3] Proof of partial delivery goes only in mitigation of damages by way of defence. 44 Tex. 628; Deming *v.* Railroad, 48 N. H. 455; 4 Harring. (Del.) 448; 13 Allen (Mass.), 381; Ward *v.* New York Central R., 47 N. Y. 29; Texas R. *v.* Nicholson, 61 Tex. 491; 46 Ark. 485; Newell *v.* Smith, 49 Vt. 255, 266, per Powers, J.; Scott *v.* Boston, &c. Steamship Co., 106 Mass. 468; 81 Ga. 602; Weston *v.* Grand Trunk R., 54 Me. 376; Devereux *v.* Buckley, 34 Ohio St. 16.

[4] See Sherman *v.* Hudson River R., 64 N. Y. 254; 82 Tex. 104.

If no market at the point, an approximate calculation is made. 85 Tenn. 69. And the first market day possible after the arrival of animals unreasonably delayed may serve as a standard. 157 U. S. 124.

[5] 1 Holmes (U. S.), 232, *ante*, 322. And see 54 Ark. 22; 85 Ga. 497.

Special items, such as advance freight or insurance premiums paid, or special telegrams and correspondence are sometimes allowable. 61 Fed.

479. But the rule of damages against the carrier awards only such damages, in favor of the aggrieved consignor or owner, as the contract or the circumstances of the particular bailment fairly contemplated as the natural result of such delinquency and non-fulfilment. And hence, if the article be desired for some special purpose, so as to render the loss, injury, or delayed carriage of the thing unusually disastrous to the party entitled, the fact ought to have been specially stated or notified at the outset, so as to form part of the mutual agreement for transportation, else the plaintiff cannot afterwards claim to have it enter as an element into the computation of damages.[1] But, subject to this duty on the customer's part, he may recover for special damage where the special responsibility was properly and seasonably brought home to the carrier so as to form part of the original contract.[2] And there are certain special damages which without special notice to the carrier

(U. S.) 860. As to interest from date of demand, etc., if needful to make plaintiff whole, see § **582**; 4 Allen (Mass.), 112; Newell *v.* Smith, 49 Vt. 255; 45 Iowa, 470; Murrell *v.* Dixey, 14 La. An. 298; 13 Mo. 352.

[1] § **583**; Hadley *v.* Baxendale, 9 Ex. 341; L. R. 1 C. P. 329; Woodger *v.* Great Western R., L. R. 2 C. P. 318; 54 Ark. 22; Chicago R. *v.* Hale, 83 Ill. 360; U. S. Express Co. *v.* Root, 47 Mich. 231 (claim by reason of delay in receiving a package of posters which were sent by express); Mather *v.* American Express Co., 138 Mass. 55 (damages for the carrier's loss of an architect's plans confined to replacing them). Injury to the plaintiff's business, by reason of non-delivery, is too remote for consideration, *per se*, in assessing damages. Baltimore R. *v.* Pumphrey, 59 Md. 390. And unless a carrier has been notified of the urgent necessity for prompt carriage, his negligent delay renders him liable only for the usual and ordinary damages. 62 Tex. 639. See 19 Q. B. D. 30 (damage in loss of samples).

Where damages are merely nominal, only nominal damages will be awarded. See 1 Woods (U. S.), 131, as to a carrier's misdelivery to one who delivered promptly to the right party. Where by bad stowage the article is wholly spoiled for commercial purposes, the carrier is liable accordingly. 16 Blatchf. 516 (sacks of salt placed near powdered arsenic).

[2] *Ib.* See L. R. 3 C. P. 499; Cutting *v.* Grand Trunk R., 13 Allen (Mass.), 381; 48 N. H. 455; 31 Kan. 385; Grindle *v.* Eastern Express Co., 67 Me. 317; Illinois Cent. R. *v.* Southern Co., 104 Tenn. 568 (penalty under consignee's contract with another); 75 Ga. 745; 48 Ark. 502.

may be deemed incidental to his undertaking.[1] Certain articles, as, for instance, wearing-apparel and family relics, are not fairly compensated by a rule of damages which is deduced from the computation of market rates, so that actual value to the owner must be computed by other evidence.[2]

479 a. Where the carrier pays or settles with the owner as for a total loss of the goods transported, the property therein becomes in law and conscience transferred to him, and inures to his benefit.[3] So, too, where the carrier is sued for damage to the goods, his proper allowance for freight is a fair offset; and if he settles, as for a total loss or conversion of goods which have disappeared, he ought to have his full recompense deducted.[4]

480. III. Where the carrier acts negligently or wrongfully in delivering the goods over after his transit is completed. What has been said under the preceding subdivision of this chapter may furnish the guiding principles where a remedy is sought in the present instance. Any complaint against the carrier for injury to the goods while on the transit and also after the transit has ended, under one continuous possession, states one and the same continuous cause of action.[5] So, too, may the failure of the carrier to deliver goods on demand be

Speculative profits, peculiar to a plaintiff's business and unknown to the carrier, should not be reckoned. 3 Wall. Jr. (U. S.) 229.

[1] Thus, where cattle are transported for breeding purposes, death or the miscarriage of animals already pregnant, which is caused by the carrier's careless collision, may be deemed an incidental damage of such transportation. New York R. *v.* Estill, 147 U. S. 591. And see as to loss of crude turpentine from negligent delivery of a still-worm, 77 Ga. 412.

[2] Denver R. *v.* Frame, 6 Col. 382. Cf. 61 Tex. 550. For this rule, as applied to lost baggage, see *post*, Part VII. c. 4. And see Green *v.* Boston & Lowell R., 128 Mass. 221 (loss of a family portrait, with damages enhanced because it was the only one and could not be replaced). The cost of replacing or reproducing, if possible, should be considered. 58 S. W. 918 (Tex. Civ. App. 1900).

[3] § 584; Hagerstown Bank *v.* Adams Express Co., 45 Penn. St. 419.

[4] Mass. Trust Co. *v.* Fitchburg R., 143 Mass. 318; Miami Co. *v.* Port Royal R., 38 S. C. 78.

As to the customer's set-off, etc., against the carrier, see *ante*, 430.

[5] Armstrong *v.* Chicago R., 45 Minn. 85.

treated as a breach of his original contract, even though the loss occurred while they were stored after arrival.[1] But the rule itself may have a peculiar application: as in the case where the goods arrive safely, but the carrier neglects his duty in respect of notifying or trying to find the consignee, and meanwhile they spoil or depreciate in market value;[2] or where he unreasonably delays or refuses to make such delivery as his undertaking bound him to make,[3] or makes a misdelivery.[4] So may a carrier who has performed his public duty be held responsible on the footing of a warehouseman or lesser bailee.[5]

481. That payment of freight is due, on the one hand, when the goods reach their destination, and a delivery to the proper party on the other, so that neither party can demand priority of performance, we have already seen; and hence that assumpsit for the carrier's breach of contract may lie where the consignee has put him in the wrong, or even trover, as for an act of conversion.[6] But replevin may sometimes be the more convenient means of getting possession of the goods, and determining the true title, where the carrier wrongfully refuses to give up the goods;[7] which form of action, however, is not in theory well applied to the mere unjust detention of goods received and held on a contract.[8] A carrier's conversion renders him absolutely liable for the safety of the goods, as one no longer a rightful bailee.[9]

482. An acceptance of goods in whole or in part, by the owner, short of the place of delivery originally intended, bars his action

[1] § **585**; Wilson *v.* California R., 94 Cal. 166.

[2] Zinn *v.* New Jersey Steamboat Co., 49 N. Y. 442.

[3] See Chicago R. *v.* Stanbro, 87 Ill. 195.

[4] For the measure of damages, where the carrier wrongfully refused delivery, see 4 Fed. (U. S.) 548. And see Mass. Trust Co. *v.* Fitchburg R., 143 Mass. 318; 1 Woods (U. S.), 131.

[5] See Anderson *v.* North-Eastern R., 9 W. R. 519.

[6] § **585**; *ante*, 449, 450.

[7] Dyer *v.* Grand Trunk R., 42 Vt. 441; Boston R. *v.* Brown, 15 Gray (Mass.), 223.

[8] § **585**.

[9] Richmond R. *v.* Benson, 86 Ga. 203.

against the carrier for all damage or loss thereto subsequently occasioned; but such acceptance constitutes no bar to his action for their inexcusable loss or damage if occasioned previously.[1] And, in general, the mere acceptance of goods by the consignee or owner, or any lawful retaking of the same from the carrier by the proper party before or at the time and place when the transit is completed, does not estop him from claiming damages; nor does his payment of freight or submission to a judgment therefor;[2] for nothing short of a release, on his part, or full satisfaction, can thus operate upon his right of action.[3]

483. Where the carrier makes extortionate or illegal charges, either in advance of carriage or at the termination of the transit, the party entitled to due performance, who pays the same under protest, may sue for the unlawful excess in an action for money had and received.[4] Indeed, it is held that the injured party need not even have paid under protest, so long as he did not voluntarily submit to the extortion.[5] But a bill in equity to recover overcharges is not maintainable.[6]

484. A conflict of laws may occur in the pursuit of remedies, by or against a carrier. When a contract is made in one State or country to transport goods over a line extending through two or more States or countries, and loss or injury occurs, it

[1] 23 Wend. (N. Y.) 306; Lowe *v.* Moss, 12 Ill. 477; Cox *v.* Peterson, 30 Ala. 608; Atkisson *v.* Castle Garden, 28 Mo. 124.

[2] Schwinger *v.* Raymond, 83 N. Y. 192.

[3] § **586.** And see *supra*, c. 6. One may pay freight and sue for damages, or set up his damages by way of counter-claim in an action to recover the freight, or he may bring a cross-action. Schwinger *v.* Raymond, 83 N. Y. 192.

[4] Great Western R. *v.* Sutton, L. R. 4 H. L. Cas. 226; 1 B. & S. 112. See Wilson *v.* Harry, 32 Penn. St. 270.

[5] § **587**; Heiserman *v.* Burlington R., 63 Iowa, 732. Cf. 100 N. Y. 194, where payment was made without objection. See local English and American legislation as to unfair and excessive charges, etc.

[6] Not even though several companies are thus liable. Scott *v.* Erie R., 34 N. J. Eq. 354. If a carrier charges extortionately and refuses to deliver, the consignee who tenders freight money is not bound to keep his tender good. East Tennessee R. *v.* Hunt, 15 Lea (Tenn.), 261.

is held that the rights of the parties will be governed by the laws of the State or country where the loss or injury happened.[1] But as a general rule, a personal contract is supposed to have been entered into with reference to the law of the place where made; and if formalities are there requisite to give it validity, those formalities must have been observed; for the law of the place of contract determines the right.[2] On the other hand, the law of the place where the action is brought generally regulates the remedy; and hence prescribes the modes of proof by which the terms of the contract are made known to the court, as well as the form of the action by which it shall be enforced.[3] But the law of the place of performance must frequently determine the mode of fulfilling such a contract, and the measure of liability for its breach.[4]

[1] 49 N. H. 9; Gray *v.* Jackson, 51 N. H. 9.

[2] Milwaukee R. *v.* Smith, 74 Ill. 197; Fairchild *v.* Philadelphia R., 148 Penn. St. 527.

[3] Colt, J., in Hoadley *v.* Northern Trans. Co., 115 Mass. 304. In this case, the forum of the remedy was held to determine what should be evidence of the assent of the shipper to a bill of lading; though this decision in effect nullified the law of the State where the contract was made. See also 111 Mass. 45.

[4] Brown *v.* Camden R., 83 Penn. St. 316. A contract which limits the carrier's liability, must, if valid where made, be upheld in the State where the loss occurred. 82 Iowa, 477. And see § 588.

CHAPTER IX.

CONNECTING CARRIERS.

485. **A topic which involves at this day problems of great intricacy** remains for a special investigation. The law of connecting carriers absorbs the principles set forth in our preceding chapters, and then leads us into a deeper labyrinth, where the aspect of liability presented is that of two or more adjoining lines engaged in some continuous transportation of goods and chattels. What reciprocal rights and responsibilities as between carrier and customer pertain peculiarly to this connecting and continuous transportation, this chapter will consider; and we may premise that American States have formulated independent rules under this head so greatly at variance with one another and with English precedent as seriously to embarrass the private individual who seeks redress for loss or injury. By the process, however, of lease and consolidation during the past few years, this problem, with others, has sought its own practical solution, through the combination of connecting inland carriers by railway and steamer into trunk lines of lessening number and increasing magnitude, so as to supplant, if possible, by a single responsible and economical management the control which was formerly diffused among various companies independent of one another. For while a carriage monopoly badly directed is a sure curse to the community, a well-directed one may prove no less a blessing; and in taking our chances between the two we gain at least the advantage of concentrating the public vigilance upon more definite objects.[1]

486. **The nature of this carriage by connecting routes brings familiar principles into view** associated with the responsible

[1] § 589. See c. 10, *post*, as to national regulation of the subject.

calling of a common carrier.[1] In fact, our doctrine of connecting carriers, in the new and enormous business traffic by land and water to which steam transportation has given rise during this nineteenth century, extends the general doctrines of partnership and agency, which courts, English and American, applied to stage-coaching arrangements, more simple but similar, some eighty or a hundred years ago.[2] At the present day, where railroad and other steam carriers connect on a continuous route, the doctrine of agency supplements that of partnership in determining the nature and limits of each carrier's liability. We may assume that if a carrier company which owns, by consolidation, or is the responsible lessee of various connecting carriage routes, undertakes a transportation, this company is essentially the only carrier for the entire distance. Or, again, if there be a partnership of carriers, — a relation less strictly to be affirmed of companies than of individuals, — the partners are liable together by reason of their community in traffic. But once more, to take the status of the case as usually presented, the doctrine of agency applies to a through carriage. And here the carrier who receives goods and chattels for some point beyond his own terminus takes the property (1) as a principal who employs the connecting carriers as his own agents, and thus makes himself responsible for the whole distance; or else (2) as the agent of himself and the connecting carriers, namely, so as to be principal and responsible bailee for his own route only; each connecting carrier being in like manner a principal and responsible bailee for his share of the journey.[3]

487. The main consideration in determining the true status of a connecting carrier, as among the foregoing theories, is this:

[1] We have seen that the responsible party who undertakes the transportation must always be considered; and also the principal, as distinguished from the mere agent or employé of a carrier. *Ante*, 288.

[2] § **590**; Waland *v.* Elkins, 1 Stark. 272; Fairchild *v.* Slocum, 19 Wend. (N. Y.) 329; s. c. 7 Hill, 292.

[3] § **590**. One may, without being a responsible carrier at all, offer himself as agent of various connecting carriers who must severally answer for losses on their own lines; being himself a mere forwarder and no carrier. *Ib.*

how did the carrier hold himself out, or permit himself to be held out, to the public? And this is a consideration which fundamentally obtains whether of the partnership or agency relation. For though a dormant or secret partner or an undisclosed principal, when discovered, may be sued by an injured party, it is a familiar principle that one who offers or allows himself to be offered as a partner or principal must abide the consequences, and cannot shield himself against the claims of those who contracted upon the faith of such offer by setting up any private and secret arrangements of his own with the parties who used his name, by way of disputing or modifying his open risks. For such arrangements avail only as among the parties themselves and those in privity with the arrangement. Inasmuch as an undisclosed principal or a secret partner, who was such in point of fact, is liable to the public on general principle, because of his community of interest, an arrangement between connecting carriers in the nature of a partnership or a mutual agency may be shown to charge a carrier for losses which occur outside his own route, and for which he assumed no direct or positive relation towards the customer. But while arrangements of this kind are sometimes exposed in the courts, more especially for confirming a liability which other evidence tended to fasten immediately upon such a carrier, as of a party held out in a measure for the undertaking by his own permission, they are treated with disfavor where the carrier afforded no such reliance to the customer when the transportation was undertaken. Such private arrangement, or, indeed, any special contract by one carrier to transport over other lines must, at all events, be established by proof. And what the law favors in all such controversies is liability, first of all, for a loss occasioned on one's own route, and while the goods were in one's own possession; next, liability on another, and especially the receiving route, when a through liability was clearly assumed by such carrier.[1]

[1] § 591. See Insurance Co. *v.* Railroad Co., 14 Otto (U. S.), 146; 1 McCr. (U. S.) 312; Aigen *v.* Boston & Maine R., 132 Mass. 423; Whitworth *v.* Erie R., 87 N. Y. 413; St. Paul R. *v.* Minneapolis R., 26 Minn. 213; 21 Fed. (U. S.) 25.

488. As to partnership arrangements it may be generally stated that where carriers associate together, without taking a common name or entering into a close community of profits, but with the purpose merely of transporting through freights and dividing the receipts in prescribed proportions according to distance, they do not constitute a partnership, nor are they jointly liable for loss or injury occurring to the goods transported.[1] Not even the advertisement of the connecting carriers as forming a line under a common name and the employment of a common agent will sufficiently charge them as partners to the public.[2] But where several carrier companies having connecting lines between two points form an association under a specified name, for the carriage of goods from one point to the other, and their agent duly authorized receives goods and gives a bill of lading in the name of that association, they are partners, so far as the customer is concerned, and may be held liable jointly and severally for any loss occurring in the transportation; supposing, of course, no special terms in the bailment impose a different liability.[3] On the whole this onerous partnership of railroads is not readily affirmed.[4]

489. Through contracts of freight are permissible: and railway and other transportation companies have undoubtedly at the present day the power, unless forbidden by their charters, to contract for transportation through an entire distance, beyond

[1] § **592**; Insurance Co. *v.* Railroad Co., 14 Otto (U. S.), 146; Hot Springs R. *v.* Trippe, 42 Ark. 465; Darling *v.* Boston & Worcester R., 11 Allen (Mass.), 295. And see Wehmann *v.* Minneapolis R., 58 Minn. 22; St. Louis R. *v.* Neel, 56 Ark. 279; Gass *v.* New York, &c. R., 99 Mass. 220.

[2] 4 Woods (U. S.), 268. Here there was no community in profits or losses, nor common use of vehicles, and the bill of lading issued was in the name of the associated carriers alone.

[3] Block *v.* Fitchburg R., 139 Mass. 308; 104 Mass. 122. And see 4 McCr. (U. S.) 368; 4 Mo. App. 35.

[4] § **592** See further, Gill *v.* Manchester R., L. R. 8 Q. B. 186; Swift *v.* Steamship Co., 106 N. Y. 206; 102 Mass. 557; 49 N. Y. 9; 22 Wall. (U. S.) 123 (mutual agency or partnership established). See also Wilson *v.* Harry, 32 Penn. St. 270; 25 Wis. 241.

their own routes, and over any connecting lines. Such is the well-settled rule, both in the United States and in England.[1] In such a case the company is liable in all other respects upon the other lines as upon its own; and the public has a right to assume that the contracting company has made all the arrangements necessary to the proper fulfilment of the obligations it thus assumes.[2] Carriers, to speak more generally, whether natural or legal persons, may so bind themselves to deliver goods and chattels beyond the strict limits of their line as only to exonerate themselves by a safe carriage through the entire journey.[3] Nor is such a contract when made by a chartered company to be presumed *ultra vires*. Corporations are supposed to contract within their just powers; and the doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong. When, therefore, a contract is not on its face necessarily beyond the scope of the powers of the corporation by which it was made, it will be presumed valid until the contrary be proved.[4]

[1] § 593; 8 M. & W. 421; Bristol R. *v.* Collins, 7 H. L. 194; Gill *v.* Manchester R., L. R. 8 Q. B. 186; 7 H. & N. 986; Railroad Co. *v.* Pratt, 22 Wall. (U. S.) 123, and cases cited; Knight *v.* Portland R., 56 Me. 234; Buffett *v.* Troy R., 40 N. Y. 168; Southwestern R. *v.* Thornton, 71 Ga. 61.

[2] Railway Co. *v.* McCarthy, 6 Otto (U. S.), 258.

[3] 22 Wall. (U. S.) 594; 48 N. H. 339; Hill Manuf. Co. *v.* Boston & Lowell R., 104 Mass. 122; Noyes *v.* Rutland R., 27 Vt. 110; Baltimore Steamboat Co. *v.* Brown, 54 Penn. St. 77.

[4] § 594; Railway Co. *v.* McCarthy, 6 Otto (U. S.) 258; Union Water Co. *v.* Fluming Co., 22 Cal. 620; Morris R. *v.* Railroad Co., 29 N. J. Eq. 542; Whitney Arms Co. *v.* Barlow, 63 N. Y. 62; 2 H. & N. 703; 54 Penn. St. 77; Perkins *v.* Portland R., 47 Me. 573; Clyde *v.* Hubbard, 88 Penn. St. 358; 13 Gray (Mass.), 124. An enabling statute may be found in some States in aid of this right. 24 N. Y. 269; 45 N. Y. 524; 13 Gray (Mass.), 124. As to change in the Connecticut rule, see 33 Conn. 166, commenting upon 22 Conn. 1.

In 24 N. Y. 269, the principle of the text is admitted to apply to connecting roads extending beyond the limits of the State. And such, agreeably to the necessities of traffic, is the general rule of our States. 88 N. C. 547; 22 Wall. (U. S.) 123; 13 Gray (Mass.), 124.

490. Concerning the principles of liability to be applied in a loss, where connecting carriers transport, the cases, English and American, appear fairly in accord: (1) If the connecting carriers undertake the transportation of goods for a customer in the close relation of a mutual agency with joint principals or a partnership, the receiving company or general agent makes a contract which binds all, jointly and severally, for any loss or injury which may occur on the route; and in case of loss or injury, the customer may sue accordingly.[1] (2) If the receiving carrier agrees to carry the goods through to their destination, and beyond his own route, this carrier is to be treated by the customer like a principal who employs his own agents; hence, for a loss or injury thus occurring the customer should sue him; such carrier being assumed to have his own remedy over against the delinquent carrier, and to undertake towards the public to transport in the capacity of common carrier for the entire distance.[2] (3) But where the receiving carrier, either for himself alone, or as the mere agent of other principals connected with him in the carriage, undertakes the transportation, he is liable only for his own route as common carrier, and for safe storage and due delivery to the next carrier in turn; in other words, he is a mere forwarder, except for his own portion of the journey.[3]

491. There is, however, much confusion and variance to be found in the decisions under connecting carriers, for the reason that proof and presumptions are applied differently to determine what, in a given case, was the carrier's actual engagement to his customer; whether, in point of fact, there was a partnership or mutual agency, or an undertaking to be a through carrier, or simply an undertaking to be a forwarder beyond one's own route. For, plainly enough, a carrier may by special contract with his customer overcome the presumption that his undertaking was upon one footing rather than another, and may modify considerably the usual liabilities of

[1] § **594**; *ante*, 488.

[2] Southwestern R. *v.* Thornton, 71 Ga. 61; § **594**.

[3] § **594**, and see *post*, 492, 493.

any such capacity. The proof which overcomes the usual presumption, and establishes a special contract relation, may be oral or written, direct or circumstantial. But what proof shall suffice, and what shall be the usual presumption in the absence of countervailing proof, we must now inquire;[1] and here we find that English and American rules are discordant.

492. The English presumption favors the idea of a through transportation; for in Great Britain, whose railroad system is snug and compact, inheriting to a remarkable degree the traditions of stage-coach conveyance, the disposition has been, from the first, to regard the company which receives a parcel and books it for a certain destination, as intending to be a carrier, by implication, for the whole distance.[2] This, in a leading case, decided not long after the introduction of steam inland locomotion, was pronounced the rule, notwithstanding payment in advance for the carriage had been declined by the booking company, whose route was well known to extend only part way to the final destination, and the loss of the goods occurred at a point beyond, which was traversed by a connecting railway.[3] And the House of Lords has gone so far in this direction as to insist, in a stubbornly contested case carried up on final appeal, that where the contract for carriage is made thus exclusively with the first company, the owner cannot sue any of the subsequent companies on the route for their miscarriage.[4] Here we discover, then, a strong disposition to favor our second principle of liability where the carriage of goods is undertaken over connecting routes; so that a railway or other receiving carrier appears in England presumably the party actually bound to see that freight accepted for a certain point is duly delivered at the place of destination.

[1] § 595.

[2] § 596; Muschamp *v.* Lancaster R., 8 M. & W. 421; 5 H. & N. 274; Bristol & Exeter R. *v.* Collins, 7 H. L. 194.

[3] § 596; 8 M. & W. 421 (a *prima facie* undertaking to carry to destination).

[4] Bristol & Exeter R. *v.* Collins, 7 H. L. 194, on appeal, reversing 1 H. & N. 517; which reversed s. c. 11 Ex. 790; 4 H. & N. 615; 5 H. & N. 274. Cf. Gill *v.* Manchester R., L. R. 8 Q. B. 156.

The English rule favors, therefore, rule (2), in *ante*, 490.

493. In America, on the other hand, where railways transcend State limits, and bring distant cities into closer communion by cutting paths through intermediate forests and over prairies, where it must often be an inconvenience to sue the first carrier alone, and where, in fact, this sort of extended transportation is novel and *sui generis*, the more obvious disposition has been to regard each of several successive companies, where no special undertaking appears to the contrary, as liable in the common-carrier capacity only for the space of its own route, and intending beyond this no more than safe storage, and due delivery to the next carrier in succession.[1] More particularly does the railway which receives the goods marked to some point beyond its own line find immunity against the subsequent miscarriage of a connecting company where nothing like a partnership or agency relation is shown to exist between the two, and the first railway neither took pay for carriage of the goods beyond its own terminus, nor agreed to send them through on its own responsibility. The simple receipt of goods so marked will not, then, *prima facie* import a promise to carry them to their final destination, according to our leading authorities.[2] The preponderance of authority in this country favors, therefore, the presumption that each carrier in a continuous transportation is only a forwarder beyond his own line; so that the receiving carrier is no more than the agent of others succeeding him in the carriage.[3]

[1] § **597**; Converse *v.* Norwich Trans. Co., 33 Conn. 166; Nutting *v.* Conn. River R., 1 Gray (Mass.), 502; 23 Vt. 186; Railroad Co. *v.* Berry, 68 Penn. St. 272; 88 N. C. 547; 19 S. C. 353; 43 Mich. 609; Knight *v.* Providence R., 13 R. I. 572; 19 Ohio St. 221; 59 N. Y. 611; 16 Mich. 80; Schneider *v.* Evans, 25 Wis. 241; Montgomery, &c. R. *v.* Moore, 51 Ala. 394; Sherman *v.* Hudson River R., 64 N. Y. 254; Perkins *v.* Portland R., 47 Me. 573; Brintnall *v.* Saratoga, &c. R., 32 Vt. 665; Crawford *v.* Southern R., 51 Miss. 222; Lawrence *v.* Winona R., 15 Minn. 390; 53 Kan. 157; 86 Va. 248.

[2] Burroughs *v.* Norwich & Worcester R., 100 Mass. 26; Lock Co. *v.* Railroad, 48 N. H. 339, and authorities cited; 51 N. H. 9; 76 Tex. 195. And see 14 Otto (U. S.), 146; 16 Wall. 318; Railroad Co. *v.* Pratt, 22 Wall. 123.

[3] The American rule favors, therefore, rule (3) in *ante*, 490.

494. There are, however, American decisions in the highest courts of some States, which harmonize more closely with the English doctrine in this respect,[1] and regard the mere receipt of goods destined beyond one's own route as tantamount to a through undertaking for common carriage in the absence of an express disclaimer by the receiving carrier. And, it should be observed, our present contention is for a *prima facie* case only; which, by the showing of attendant circumstances, or usage, might be so readily overcome, in a particular case, that doubtless some explicit disavowal of responsibility beyond one's own route, in the contract of transportation, is always prudent wherever one carrier receives goods, to be sent by connecting lines beyond his own terminus, each carrier of whom is to transport on his separate risk.[2] Under English or American presumptions, that most onerous principle of partnership, or joint and several liability in a connecting carriage, the first above stated, finds the most disfavor, and requires the strictest proof.

495. The carrier who actually occasioned the loss may at all events be sued, according to the usual American rule. For while English courts have pronounced the receiving carrier exclusively liable for a loss over the whole route,[3] no such rigid adherence to legal consistency is favored in this country. On the contrary, the carrier company which in point of fact can be shown to have occasioned the loss or injury is suable by the customer, as American courts have ruled, even though the first carrier may by his sufficient and express contract have assumed the transportation risks for the entire distance. And just as an innocent and non-contracting carrier is, on the one

[1] Kyle *v.* Laurens R., 10 Rich. (S. C.) 382; 24 Ill. 332; Rome R. *v.* Sullivan, 25 Ga. 228; 74 Ill. 197; Mulligan *v.* Illinois Central R., 36 Iowa, 181; East Tennessee R. *v.* Rogers, 6 Heisk. (Tenn.) 143; Mobile R. *v.* Copeland, 63 Ala. 219; 38 Ga. 37; Halliday *v.* St. Louis R., 74 Mo. 159; 79 Iowa, 527; 160 Ill. 648.

[2] § **598.** "It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country." Mr. Justice Davis, in Railroad Co. *v.* Man. Co., 16 Wall. (U. S.) 318, approving the other rule.

[3] *Ante*, 492.

hand, shielded if possible, so, on the other, is the disposition strong to hold a connecting carrier answerable for his own negligence.[1]

496. By special contract, unquestionably, whatever the presumption, a carrier may, in America, as well as in England, assume to transport beyond his own limits;[2] and such a contract, it is generally admitted, is inferable from circumstances independently of an express stipulation.[3] Any written document given duly to the consignor by way of receipt, and as an expression of the carriage terms, bears upon this question; the force and meaning of such documents come frequently before the court for construction; and writings furnish not only evidence, but the best evidence, of what the contract really was. But material surrounding circumstances should be submitted as part of the case to a jury; and where there is competent evidence on which such jury may lawfully find the existence of the through contract alleged, the court ought not to determine the issue by its own arbitrary construction of particular writings.[4] Usage, too, and the general business course of the

[1] § **599**; Aigen *v.* Boston & Maine R., 132 Mass. 423, *per curiam;* Packard *v.* Taylor, 35 Ark. 402. "I have not met with an American case in which the rule has been pressed to the extent of holding that the owner cannot come on any carrier by whose default the loss or damage actually happened." Perley, C. J., in Lock Co. *v.* Railroad, 48 N. H. 339. And see 110 Cal. 348. Even under the English rule, exception may be shown in this respect, as where a railway partnership relation existed. Gill *v.* Manchester R., L. R. 8 Q. B. 156.

[2] § **600**; *ante*, 489.

[3] See Crawford *v.* Southern R., 51 Miss. 222; Cutts *v.* Brainerd, 42 Vt. 466; Najac *v.* Boston & Lowell R., 7 Allen, 329; Locke Co. *v.* Railroad, 48 N. H. 339; 51 N. H. 9, 24; 22 Wall. (U. S.) 23.

[4] Myrick *v.* Michigan Central R., 107 U. S. 102; 14 Wall. (U. S.) 484; 22 Wall. (U. S.) 123. Receipt of the entire pay, by the receiving carrier, affords a fair presumption of an entire contract. Railroad Co. *v.* Pratt, 22 Wall. (U. S.) 123; Evansville R. *v.* Marsh, 57 Ind. 505.

In construing documents of carriage, the whole language and tenor of the instrument should be fairly considered. Such words as "transport" or "carry" (which are equivalent) are distinct from the idea of "forwarding." 22 Wall. 123. Cf. 6 Heisk. (Tenn.) 143 (an extreme case); 42 Vt. 466. And see Myrick *v.* Michigan Central R., 107 U. S. 102;

receiving carrier may be shown as tending to establish on his part the assumption of a through liability.[1]

497. **The acts and admissions of such corporate agents and officers as usually attend to freight** may fairly bind the company in all undertakings of this character.[2] And it is adjudged that a company which has held itself out in such a manner, and for so long a time, as a common carrier to a place beyond its own terminus, that the corporators may be presumed to have knowingly assented thereto, is estopped to deny the validity of a through contract for carriage entered into by its usual agent.[3] So a depot agent who receives and forwards freight can, in the absence of special instructions made known to the public, bind his company to send through merchandise;[4] yet a cautious shipper will scrutinize such agent's authority, unless it can be reasonably inferred from previous dealings, or the company has held itself out for business to such points.[5] While a company may thus render itself responsible to the customer beyond its limits, it cannot, of course, bind companies owning the connecting roads, without in some manner procuring their consent or acquiescence thereto.[6]

498. **A through receipt of the goods**, according to some American decisions, while importing by itself no absolute undertaking to be responsible for the whole journey, is a circumstance which, with the other facts in a given case, may be weighed by the jury. This should perhaps be pronounced the most rational doctrine of the three we have stated, as to presump-

Ortt *v.* Minneapolis R., 36 Minn. 396; Harris *v.* Grand Trunk R., 15 R. I. 371; East Tennessee R. *v.* Rogers, 6 Heisk. (Tenn.) 143 (an extreme case). That a carrier who stipulates for through liability becomes liable for misdelivery by the connecting carrier to whom he has delivered the goods, see Clyde *v.* Hubbard, 88 Penn. St. 358. See 24 Fed. (U. S.) 509.

[1] Lowenburg *v.* Jones, 56 Miss. 688; § 600.

[2] See 27 Vt. 110; § 601.

[3] Perkins *v.* Portland, &c. R., 47 Me. 573; *ante*, 489.

[4] Watson *v.* Memphis R., 9 Heisk. (Tenn.) 255.

[5] Grover Sewing Machine Co. *v.* Missouri Pacific R., 70 Mo. 672.

[6] See Bank of Kentucky *v.* Adams Express Co., 93 U. S. 174; Chicago, etc. R. *v.* Northern Line Packet Co., 70 Ill. 217; Newell *v.* Smith, 49 Vt. 255; 34 Hun (N. Y.), 97 (verbal agreement).

tions, though not the most exact of application.[1] The carrier's receipt of goods directed beyond his own route may charge him accordingly (even in some American States which deny the presumption favored by the English courts), when other circumstances concur to fasten upon him the intent of sending the goods through on his sole undertaking with the owner. Receiving with the goods thus directed freight-money in advance for the whole distance should strongly manifest such an intent;[2] and the transportation methods of the connecting roads, the manner in which their through business is held out to the public, to one another, and to the particular customer, bear forcibly upon the issue thus presented, of the receiving carrier's liability for goods beyond his own line, according as the bailment must justly have contemplated; which issue circumstances, as well as positive stipulation, may in good reason resolve.[3]

499. **But, on the other hand, special contract may exclude** a through liability, since it is no part of a common carrier's obligation to carry goods on his own risk beyond his terminus. Hence he may lawfully stipulate, on receiving property for a distant destination, that he shall not be liable as common carrier beyond his own route, — a most convenient means, doubtless, of countervailing these troublesome presumptions, and

[1] See the learned opinion of Perley, C. J., in Lock Co. *v.* Railroad, 48 N. H. 339; 51 N. H. 9, 24; § **602**.

[2] § **602**; 24 Ill. 232; 19 Wend. (N. Y.) 534; Adams Express Co. *v.* Wilson, 81 Ill. 143; Baltimore Steamboat Co. *v.* Brown, 54 Penn. St. 77. Even in the leading case of Muschamp *v.* Lancaster R., 8 M. & W. 421, the consignee's offer in advance of freight-money to the terminus was not declined by the carrier in any such manner as denied his right to be paid for the continuous transportation. Such evidence is not conclusive. 68 Miss. 14. The methods of receiving payment or of entering charges should be scrutinized as to meaning. 87 Me. 299.

[3] Hill Manuf. Co. *v.* Boston & Lowell R., 104 Mass. 122; 18 Wend. (N. Y.) 176; Morse *v.* Brainerd, 41 Vt. 550; 68 Iowa, 363. But cf. 33 Conn. 166; 100 Mass. 26, and cases cited; 91 Ga. 389.

Allowing, therefore, for the differences of presumption and circumstantial proof, the rule of a connecting carrier's liability appears to be according to the fundamental rules already stated, *ante*, 490.

making the limits of one's own undertaking specific.[1] And railways and steamships not uncommonly, in these days, issue their tickets, way-bills, receipts, or other documents for transportation over continuous lines, so expressed as clearly to indicate whether the receiving carrier engages to send the goods through, and thus hold himself responsible as carrier for the entire distance, with a duty of final delivery at the point of destination, or so that each successive carrier shall be responsible only for losses occurring on his own route, and before compliance with the duty of delivering to the next carrier in order. For independent connecting carriers may provide for a distinct and independent responsibility, each for his own line.[2]

500. To speak generally of the stipulations of connecting carriers, by way of specially modifying the usual risks or bailment performance, these take effect upon the usual conditions applicable to common carriers who seek to modify their legal duties in corresponding respects. Thus, the stipulation itself must conform to public policy;[3] and it must be suitably and

[1] § 603; Fowles *v.* Great Western R., 7 Ex. 699; 23 N. Y. Supr. 278; 36 Ill. 181; United States Express Co. *v.* Haines, 67 Ill. 127; 20 Wis. 122; Berg *v.* Atchison R., 30 Kan. 561; 89 N. C. 311. Even though a through rate of freight be given, the express disclaimer of through liability in the bill of lading is not negatived thereby. McEacheran *v.* Michigan R., 101 Mich. 264.

[2] *Ib.* See 28 Ohio St. 358. No carrier can be compelled to give a bill of lading making him responsible for goods beyond his own route. 73 Ala. 306.

[3] § 604; c. 5.

The special stipulation for a continuous carriage that the company in whose possession the goods are at the time of loss or damage shall alone be liable, is reasonable and valid. 89 N. C. 311. But the carrier cannot stipulate with another not to receive goods destined to a point beyond his own line. (Ky. 1889), 54 S. W. 193.

Though a carrier should stipulate against responsibility for damage beyond his own line, his failure, without sufficient excuse, to send by the line or route or in the cars promised, renders him still liable for damage or delay; for this is a deviation from the terms of the bailment. Galveston R. *v.* Allison, 59 Tex. 193; Levy *v.* Louisville R., 35 La. An. 615; Georgia R. *v.* Cole, 68 Ga. 623. If a carrier contracts to send through by

seasonably brought to the customer's knowledge and must directly or indirectly gain his assent.[1] Where the freight contract is for through transportation, though not otherwise, each connecting carrier, as a rule, will be entitled to the benefits and exemptions of the contract made by the shipper and the first carrier.[2] But one receiving goods as a connecting carrier cannot, as such, claim the benefit of an express limitation of risks for which the first carrier stipulated with the consignor on his own behalf and for his own advantage and protection only.[3] For one of several connecting carriers may limit the risks of transportation while the goods are in his own custody alone.[4] And where the connecting carrier makes a new and different contract on his own behalf, the former contract is not presumed to inure to his benefit.[5]

501. An intermediate carrier in a continuous line, who has made no contract with the customer and is not in actual default, cannot be held liable to consignor or consignee, for the negligence, extortion, or misconduct of other carriers, whatever may be his own liability to the contracting carrier.[6]

502. The fair presumption, in case of a loss or injury discovered when arrival was due over connecting roads, is that the loss occurred through the fault of the last carrier. Were this otherwise, the owner of property who is compelled to sue the company occasioning the loss could seldom establish his case

a certain line by a given time, he is liable for losses caused by delays over a connecting road. 66 Cal. 92. And see 191 Ill. 57 (negligent misdirection).

[1] See c. 5. Insufficient special notice printed on back of receipt. 16 Wall. (U. S.) 318. Bill of lading binds by inference where no objection is made. 89 N. C. 311; 89 Ala. 376.

[2] Merchants' Despatch Co. *v.* Bolles, 80 Ill. 473; 50 Ark. 397; Whitworth *v.* Erie R., 87 N. Y. 413 (exemption for loss by "accidental fire"); Conn. (1902); Railroad Co. *v.* Androscoggin Mills, 22 Wall. (U. S.) 594.

[3] 47 Iowa, 262; Taylor *v.* Little Rock R., 39 Ark. 168; 120 Ind. 73.

[4] 55 Mich. 218. See 91 Ala. 340; 94 Ga. 471.

[5] Browning *v.* Goodrich Co., 78 Wis. 391.

[6] Hill *v.* Burlington R., 60 Iowa, 196. Unless, perhaps, some partnership or mutual agency relation can be shown to charge him more closely. See § 605.

in proof.[1] This presumption, however, best avails under that American rule, elsewhere stated,[2] which protects the receiving carrier; thereby compelling the customer, under any other theory, to search far and wide through different States, it may be, for the company through whose delinquency the mischief was in fact occasioned. Under the English presumption so onerous a necessity is avoided by the rule which places the responsibility once and for all upon the receiving carrier;[3] and there are States which, pursuing that same rule (or possibly without doing so), deny to the customer any right to hold the last carrier liable, or any carrier later than the first and contracting one; unless, at all events, he can allege and prove that such carrier was actually the delinquent one, or else can establish such community of interest in the transportation as to constitute a partnership or mutual agency of these companies towards the public.[4]

503. The liability of connecting carriers toward one another deserves notice. Where the receiving carrier, or any other carrier who did not in fact cause the loss, is made responsible to the customer for the loss or injury suffered, his remedy over against the connecting carrier or carriers depends mainly upon the private arrangement which exists between them. Usually some full and explicit contract will be found to de-

[1] § 606; Laughlin *v.* Chicago R., 28 Wis. 204; Memphis R. *v.* Holloway, 9 Baxt. (Tenn.) 188; Leo *v.* St. Paul R., 30 Minn. 438; 32 Vt. 665; Smith *v.* New York Central R., 43 Barb. 225; affirmed on appeal, 41 N. Y. 620; 53 Ala. 19; 78 Tex. 372.

[2] *Ante*, 493.

[3] *Ante*, 492.

[4] 21 S. C. 35; Atchison R. *v.* Roach, 35 Kan. 740; Chicago R. *v.* Fahey, 52 Ill. 81. And see Marquette R. *v.* Kirkwood, 45 Mich. 51.

Some local statutes undertake to define which company in a connecting line of railways shall be held liable for a loss occurring on the transit. 56 Ga. 498; 81 Ga. 522.

The company which is sued for loss may by the agent of a connecting road, with the aid of entries in the books of such road, prove delivery thereto in good order. 66 Ga. 39. Usually each carrier receipts for the goods in succession; and such receipt as "in good order and condition" should, if given by the final carrier, raise a strong presumption that he was liable for loss or injury. See 67 Miss. 35.

termine this liability of carriers *inter sese*, whether by way of partnership or mutual agency or on the basis of a less intimate arrangement. On general principle, however, the first carrier or principal transporter who is held answerable to the public may in such a case sue, on his own behalf, the connecting carrier through whose delinquency or default a loss occurred, just as other principals may their own subordinates: but he cannot hold connecting carriers who are blameless answerable thus merely because of the connection.[1]

504. When the risk of a connecting carrier commences is our next point of inquiry. The fundamental doctrine of bailment delivery here applies: and we may state generally that this carrier's liability as such commences when the goods are delivered to him or his authorized agent for immediate transportation and accepted accordingly; or, to come closer to the point, that the succeeding carrier's risk attaches upon his receipt and acceptance of goods from his predecessor to transport the same without awaiting further orders. What favors the idea of an acceptance as for immediate transportation more especially in this instance is, that the consignor or owner, unless notified, is necessarily debarred from handling the goods for himself, but must leave the connecting carriers to arrange the transfer of delivery with one another, trusting that some carrier's risk is attached throughout the journey without intermission. Any mode of acceptance, even though it were a deposit without notice, to which the carrier who receives has agreed or bound himself, fixes his liability. And it would appear, that the receiving carrier's lesser risk as warehouseman goes rather to the disadvantage of his predecessor than the shipper of the goods; since it would be unfair to permit the customer to be sacrificed between the continuous parties who are performing their public vocation together without his intervention.[2] Custom at different times and in

[1] § 697; 70 Ill. 217; Smith *v.* Foran, 43 Conn. 244; 24 How. (U. S.) 247.

[2] § 608; 24 Conn. 354; 33 ib. 166; Pratt *v.* Railway Co., 90 U. S. 43; Alabama R. *v.* Mount Vernon Co., 84 Ala. 173.

But what shall constitute for fixing liability as between these carriers

different sections of the country may of course vary. Delivery by one of the connecting carriers, not for storage, however, but solely for transportation onward, there being nothing to wait for, will render the new carrier, whenever he accepts the goods, instantly liable to the full extent of his public capacity;[1] and if the liability of the succeeding carrier attaches, the liability of his predecessor is discharged,[2] subject to the presumptions and special undertakings already set forth.

505. As to termination of connecting carrier's risk, if the later receiving carrier in a continuous transportation be not liable, then his predecessor should be. For delivering sufficiently and discharging one's own carriage risk in such cases, the general rule adopted by the courts of this country makes it the duty of such a carrier, in the absence of any special contract to the contrary, to carry to the end of his line, and then deliver to the next carrier in the route beyond,[3] agreeably to the presumption that he has undertaken as forwarder, to be so far responsible but not farther. And the opinion which

a deposit with the new carrier for the purpose of transportation onward, without further orders, it is sometimes difficult upon the peculiar facts to decide. § **608**. Cf. Judson *v.* Western R., 4 Allen (Mass.), 520; *contra* Michaels *v.* New York R., 30 N. Y. 564.

[1] Pratt *v.* Railway Co., 90 U. S. 43; Cincinnati R. *v.* Spratt, 2 Duv. (Ky.) 4; Converse *v.* Norwich Trans. Co., 33 Conn. 166; Rogers *v.* Wheeler, 52 N. Y. 262; 59 N. Y. 34, 611.

[2] 90 U. S. 43; O'Neil *v.* N. Y. Central R., 60 N. Y. 138.

"Boycotting" is not an excuse for refusing to accept goods from a boycotted road. 34 Fed. 244, 481.

[3] § **609**; Railroad Co. *v.* Manuf. Co., 16 Wall. (U. S.) 318; Condon *v.* Marquette R., 55 Mich. 218; 34 N. Y. 497; Mills *v.* Michigan Central R., 45 N. Y. 622; Conkey *v.* Milwaukee R., 31 Wis. 619; Rawson *v.* Holland, 59 N. Y. 611; Lawrence *v.* Winona R., 15 Minn. 390; Merchants' Despatch Co. *v.* Bolles, 80 Ill. 473. The doctrine of Massachusetts and other States (referred to *ante*, 411), which permits railways to terminate the carriage liability by unloading and storing the goods, may be thought in conflict with the statement of the text. But it does not follow that the same doctrine applies to connecting carriers and a consignee. See Gray, C. J., in Rice *v.* Hart, 118 Mass. 201, 208. Cf. 13 Gray (Mass.), 481, 487; 4 Allen (Mass.), 520, 523.

best supports the common-law policy pronounces the carrier in such a case so far bound to deliver or attempt delivering to the connecting carrier, that he cannot discharge himself of his carriage responsibility by merely storing the goods in his depot at the end of his own route,[1] especially if negligent in notifying. But there are circumstances under which the intermediate carrier should be held liable as warehouseman only; as where he has given notice, and afforded the next carrier reasonable opportunity to take the goods away, and, on the latter's failure to do so, or refusal to accept, has stored and plainly renounced the relation of carrier towards them;[2] and, perhaps, too, in the case of a break in the line of transit, referable to act of God or other legal excuse, which renders it impossible for the goods to be promptly forwarded; provided the carrier clearly manifests the intent to absolve himself and acts with becoming discretion.[3]

[1] "If there be a necessity for storage it will be considered a mere accessory to the transportation, and not as changing the nature of the bailment. It is very clear that the simple deposit of the goods by the carrier in his depot, unaccompanied by any act indicating an intention to renounce the obligation of a carrier, will not change or modify even his liability. It may be, that circumstances may arise after the goods have reached the depot which would justify the carrier in warehousing them, but if he had reasonable grounds to anticipate the occurrence of these adverse circumstances when he received the goods, he cannot, by storing them, change his relation towards them." 16 Wall. (U. S.) 318, 325. And see 34 N. Y. 497; 47 Iowa, 262; 14 Blatchf. (U. S.) 9 (railway receipt held no special contract modifying these terms); Condon *v.* Marquette R., 55 Mich. 218 (confirming strongly this doctrine). And see 56 Conn. 137; 67 Ark. 402.

As to what constitutes delivery over by a railroad carrier at a steamship's pier there are some close cases. 183 U. S. 621, 632; 180 Mass. 252.

[2] § 609; 20 N. Y. 259; McDonald *v.* Western R., 34 N. Y. 497; 119 Fed. (U. S.) 808.

[3] Conkey *v.* Milwaukee R., 31 Wis. 619. But cf. Mills *v.* Michigan Central R., 45 N. Y. 622 (opportunity to receive essential); Condon *v.* Marquette R., 55 Mich. 218. And see 81 Minn. 247 (unreasonable delay by previous carrier); Chicago R. *v.* Bosworth, 179 U. S. 442 (culpable loss of a connecting carrier's cars); 24 How. (U. S.) 247, as to the remedy of one carrier against another under such circumstances; 88 Ala.

506. His own reasonable or stipulated recompense is justly due to each carrier in a connecting line; besides which, a liberal standard of reimbursement avails as to back freight or charges upon the goods. Were carriers to transport in succession without any through arrangement, each might demand his pay in advance or else hold the goods by his lien at his own journey's end; and the owner, in consequence, would have to employ some one at each terminus to settle charges and put the goods on their course.[1] Hence the present business usage, founded on general convenience and necessity, for each succeeding carrier to pay his predecessor's charges in turn, as the owner's agent, and perform his own transportation. In this capacity of agent the connecting carrier ought not to advance for plainly erroneous and extortionate back charges, nor make such charges himself.[2] Nor should he pay the preceding carrier in reckless disregard of loss or injury which is brought to his notice. But as to any intermediate damage done the goods, it is sufficient that such a party acts in good faith and with the diligence to be expected of an ordinarily prudent man, were he present and acting for himself; and, receiving goods in apparent good order, as described in the previous bill of lading, or else using reasonable exertions to ascertain how they became damaged, he does not forfeit his lien and right of compensation for his charges and those of his predecessors which he has advanced, provided his own transportation were performed with due diligence and despatch.[3] As he is not obliged to open a package and test the nature, condition, or quality of its contents, but may trust to appearances, it happens not unfrequently that a connecting carrier is justified in

413. Neglect of duty to place goods in fit condition for a connecting carrier may sometimes charge a carrier. 116 Fed. (U. S) 235.

[1] § **610**. One of several connecting carriers need not pay back charges unless he chooses, even though it is customary to do so. 22 Fed. (U. S.) 32, 404. Unless such refusal is based upon an unlawful discrimination. *Ib.* Pre-payment under code may be required. 104 N. C. 658.

[2] 37 Barb. 236. Cf. 13 R. I. 578.

[3] Knight *v.* Providence R., 13 R. I. 572; Bissel *v.* Price, 16 Ill. 408, 414; 3 Blatchf. (U. S.) 279; 11 Ohio, 303.

paying preceding charges where he could not have recovered for his own.[1]

507. A guaranty of through rates is sometimes given by the receiving or contracting carrier, for his customer's convenience, and by way of indemnity against unusual, uncertain, or extortionate charges on the route.[2] Where the first of several connecting railway companies, while stipulating against responsibility beyond his own line, makes a guaranty that the cost of transportation to a distant point beyond his own route shall not exceed a certain sum less than the usual aggregate of charges, and this without any knowledge or notice of the guaranty by any of the connecting roads, and without their authority to give it, each succeeding company after the first may charge and pay preceding charges at the usual rates; and the last carrier or the final warehouseman will have a lien on the goods for the total amount accordingly; for the shipper's remedy in such case must be against the first carrier on the guaranty.[3]

508. Notice is proper and often imperative for the due protection of others concerned, where a connecting carrier defaults or refuses compliance with the contracting carrier's engagement. Thus, if a connecting carrier to whom the goods are consigned refuses to receive them, the preceding carrier should promptly notify his own bailor and predecessor, and

[1] Knight *v.* Providence R., *supra*. Where, through the error of some intermediate carrier, the goods are sent to a place off the route, and the owner requests another carrier to bring them thence to their destination, this latter carrier acquires a lien for his own freight and the back charges which he has to pay before he can get the goods. Vaughan *v.* Providence R., 13 R. I. 578. And see § **610**.

[2] § **610**; Vaughan *v.* Providence R., 13 R. I. 578; Tardos *v.* Chicago R., 35 La. An. 15.

[3] § **610**; Schneider *v.* Evans, 25 Wis. 241; 106 N. C. 207; 25 S. C. 249. Whether, if the other carriers had known of such guaranty, the legal result would have been different, *quære*. See also Wells *v.* Thomas, 27 Mo. 17.

The value of an article lost by a prior carrier cannot be recouped in a suit by the last carrier against the consignee. Lowenburg *v.* Jones, 56 Miss. 688.

the receiving and contracting carrier should with reasonable despatch notify his customer;[1] and particularly should the customer receive due notice of some prospective inability of which the first carrier becomes cognizant in good season.[2] And a carrier whose contract expressly limits his responsibility to safe carriage over his own road and delivery to the connecting carrier, and to a guaranty of the through rate, is entitled to notice if the later carrier refuses to recognize such rate.[3] Notice by the customer of some prior extortion or default charges the carrier who conducts himself afterwards in disregard thereof.[4] A carrier who receives under special instructions of importance should transmit such instructions with the goods.[5] And a carrier who receives goods from another carrier, knowing that a through contract has been made and the price of transportation paid in advance, can assert no lien on the goods for transporting over his own line.[6] In general, good faith and a reasonable diligence and discretion should be manifest here as in single transportation.[7]

[1] § 611; 10 Mo. App. 134.

[2] Notice to the first carrier that the connecting line, owing to a blockade of freight, cannot receive and transport the goods, will not relieve the first from liability for damages caused by the delay, if he fails to notify the shipper. Petersen *v.* Case, 21 Fed. (U. S.) 885.

[3] In the absence of such notice, no damages can be demanded beyond the difference between the rate agreed upon and the rate demanded; his guaranty being strictly construed. Tardos *v.* Chicago R., 35 La. An. 15.

[4] Knight *v.* Providence R., 13 R. I. 572 (notice of damage and refusal to take where goods are sent to a consignee by instalments).

[5] North *v.* Transportation Co., 146 Mass. 315.

[6] 3 McCr. (U. S.) 250.

[7] 89 Mo. App. 653; 135 Ala. 315.

CHAPTER X.

INTER-STATE COMMERCE LEGISLATION.

509. To speak of the origin and purpose of our national legislation concerning inter-State and foreign commerce. Our State legislatures, soon after the civil war, began to establish railroad commissions and to regulate such carrier business. But when the Supreme Court of the United States decided presently that all such State regulation must be confined to a carrier business strictly local, and could not extend to a continuous transportation which railway companies conducted beyond such boundaries to some other State, territory, or foreign country, without infringing upon the constitutional sovereignty of the United States over all inter-State and foreign commerce,[1] Congress promptly intervened with a national statute of corresponding tenor.

510. The "Inter-State Commerce Act of 1887," so called, established accordingly for our whole Union, by way of first experiment, a uniform regulation of the common inland carriage of persons and property wholly by railroad or partly by railroad and partly by water, wherever a continuous transportation, inter-State or foreign, was contemplated.[2]

511. The general purpose of this comprehensive Federal enactment was, though experimental and initiative, to promote and facilitate railway commerce by the adoption of regulations; to make charges for transportation just and reasonable; and to forbid undue and unreasonable preferences or discriminations. Congress had in view the whole field of United States commerce (except commerce wholly within a State):

[1] Wabash R. *v.* Illinois, 118 U. S. 557 (1886). And see Debs, *Re*, 158 U. S. 564.

[2] § 611 a; Act Feb. 4, 1887, c. 104, 24 Stat. 379; 145 U. S. 263.

as well that between the States and territories as that going to or coming from foreign countries.[1]

512. The Inter-State Commerce Commission, created under this act of 1887 as a board of five persons who are paid highly honorable salaries and hold by a plan of rotation for six years each, exercises the general supervision of railroads as provided by Congress, with or without intervention and assistance from the United States courts, as the case may require, but with somewhat restricted powers.[2]

513. Inquisition by this Commission, with process of subpœna for its proper ascertainment of the facts in a given case, is strengthened by later legislation.[3] Circuit courts of the United States use their process in aid of inquiries before the Commission, upon judicial principles, and with due reservation to every individual of his constitutional rights; but any judgment rendered in court is not simply ancillary to the Commission, but of full and independent judicial effect.[4]

514. The principle upon which discrimination and preference among patrons are forbidden in inter-State and foreign carriage of goods by this new legislation is substantially the same as previously applied by England and various American States in legislation.[5] It is not all discriminations or preferences that fall within the statute inhibition; but only such as are unjust or unreasonable.[6] Rebates or drawbacks by way of preference violate the language and spirit of the enact-

[1] § 611 a; Texas R. *v.* Commission, 162 U. S. 197, 212, 233.

[2] § 611 b; 43 Fed. (U. S.) 37, cited with approval in 162 U. S. 197; 74 Fed. (U. S.) 715. And see 162 U. S. 197, 204; 145 U. S. 264. This commission cannot fix rates in advance. 162 U. S. 184; 74 Fed. (U. S.) 784; 101 Fed. 779.

[3] § 611 c. See, as to immunity of witness, 161 U. S. 711; 194 U. S. 25.

[4] See 154 U. S. 447; 74 Fed. (U. S.) 784; 56 Fed. (U. S.) 925.

[5] § 611 c. "Unjust and unreasonable" charge, discrimination, preference, or advantage, forbidden. Act 1887. And see Act March 2, 1889, c. 382; *ante*, 293, 299.

[6] 162 U. S. 197 (fair modification). The fair difference between wholesale and retail cannot here be ignored. 145 U. S. 263. For a carrier to protect himself against a physical disadvantage he is under in relation to rivals, is not *per se* an unlawful discrimination. Rebates or

ment here as elsewhere. But such rebate or unlawful discrimination does not vitiate and make void a bill of lading or exempt the carrier from his liabilities under the contract of carriage.[1]

515. "**Pooling earnings,**" **as it is called,** so as to reduce competition among railways transporting between the same points, was deemed against good policy, and hence in a national sense forbidden. Railroad companies have since contended that unrestrained competition in their carriage business is an injury, rather than a benefit, whether to themselves or their customers.[2]

516. **The "long and short haul" prohibition** constitutes another important restriction, under the act of 1887, upon a contemporary mode of reducing railroad competition. Carriers competing for traffic between distant points so sharply as to reduce their through rates, would sometimes make up for such sacrifice by fixing rates equivalent or proportionally much higher to intermediate points on their respective routes, to which such competition could not extend.[3]

drawbacks are a violation. 74 Fed. (U. S.) 803. And see 74 Fed. 784; 58 Fed. 858. As to affording equal facilities, see 63 Fed. (U. S.) 775; 11 C. C. A. 417 (connecting carriers). And see as to equal express facilities, *ante*, 299.

[1] 151 U. S. 368.

[2] See act of 1887, § 5; § **611 d.** *Quære*, whether joint traffic contracts of any kind between railway carriers have now a legal validity. 166 U. S. 290 (act 1897); Northern Securities Co., 194 U. S. 48.

[3] See act of 1887, § 4. § **611 e**; 190 U. S. 273 (competition at a given point); 31 Fed. (U. S.) 315. As to sanctioning an apparent evasion of the prohibition by leasing intermediate trackage rights, see 56 Fed. (U. S. C. C.) 925; Chicago R. *v.* Osborne, 10 U. S. App. 430. And see 63 Fed. (U. S.) 903; 190 U. S. 274; 52 Fed. (U. S.) 917.

For inter-State or foreign transportation of animals, etc., the regulations imposed by act of Congress are paramount to all provisions by local statute. Reid *v.* Colorado, 187 U. S. 137.

PART VII.

CARRIERS OF PASSENGERS.

CHAPTER I.

MATTERS PRELIMINARY TO THE JOURNEY.

517. The carriage of passengers is no bailment in the legal sense, nor, indeed, is the carriage of human beings; though formerly the principle of distinction appears not to have been clearly apprehended.[1] But indirectly, and with incidental reference to the passenger's baggage, there is unquestionably a bailment; and a bailment subject, as we shall sufficiently show, to the general law of common carriers, and the assumption of an extraordinary risk on the part of the public transporter.[2] It is only in an age comparatively modern that the public transportation of persons from place to place, on hire, has in England and America called for the intervention of courts and the unfolding of legal principles.[3] While the carrier of passengers is so often in our law a common carrier and a bailee besides, he is directly entitled to consideration in any work on bailments, because in so many respects the service of carrying human beings closely corresponds to that of carrying goods and chattels, in legal principle; and the decisions furnish legal analogies of much advantage to the

[1] While negro slaves were "chattels" by local law, local decisions were sometimes thus classified; but by our definition only personal property can be the subject of bailment. *Ante*, 1; § 612.

[2] See c. 4, *post*.

[3] White *v.* Boulton, Peake, 81, tried in 1791, before Lord Kenyon, appears to be the first recorded case at our law, where a person sued to recover damages done him as a passenger. § 612.

student of bailment law, while in the points of unlikeness the very contrast is impressive.[1]

518. Matters preliminary to the journey may be discussed separately under the following heads: (1) Who are Carriers of Passengers. (2) Who are Passengers. (3) Obligation to receive for carriage. (4) Passage tickets and fares. (5) Right of action against the carrier for his inexcusable refusal or failure to receive. (6) Legislation concerning fares and the carrier's obligation to receive.[2]

519. (1) **Who are carriers of passengers.** This relation, like that of freight carrier, may be either public or private, though the law deals chiefly with the former class; applying to its members the general style of carriers of passengers. The carrier of passengers, that is, our public carrier, may be (1) a carrier by land, or (2) a carrier by water; but the practical difference between these two classes, in respect of the carrier's rights and obligations, is rather one of detail than principle; and this difference we shall take occasion to notice as we proceed.[3] One is not forced into the position of carrier

[1] § 612.

[2] § 613.

[3] § 614; *ante*, 276–282; Lemon *v.* Chanslor, 68 Mo. 340 (hackmen). The proprietors of stage-coaches, hacks, passenger wagons, cabs, and omnibuses, who hold themselves out to the public for the general conveyance, under their own drivers, of persons from place to place, are familiar instances of public carriers of passengers by land. To this class belong also railway companies, the most extensive carriers of passengers, as well as of freight, known to modern times; and these sometimes perform their vocation as horse or electric railways, though most commonly hitherto propelled by steam, when on a large scale, the means of locomotion entering as an essential element into the character of the public vocation itself. § 614, *ante*, 278. Among the recognized public carriers of passengers by water are ships and vessels, particularly packet ships, steamships, steamboats, ferries, and, to some extent, the humbler boatmen or bargemen; and this, as the case may be, whether the propelling means offered be steam, as used for side-wheel craft and what are called propellers, or sails, or, for short distances, oars and human exertion. *Ante*, 280. It is obvious, from this list, that the public carrier of passengers, whether by land or sea, is not necessarily a carrier of passengers only, apart from freight, nor of passengers having baggage.

for passengers by permitting persons to travel free occasionally in connection with some private pursuit of freight transportation.[1]

519 a. **The responsible public transporter** is to be here considered, as in the case of a common carrier of goods;[2] though under certain qualifications. Where, for instance, through-passage tickets are sold over the routes of connecting carriers, the principles which we discussed with reference to the carriage of goods come into operation. Doubtless the carrier company which sells the ticket may by contract, express or implied, bind itself to be responsible for the entire route. But, as the better authorities appear to view the rule, the sale of the through ticket, and receipt of the through-passage fare, is not conclusive on this point, and less so, indeed, as concerns the person of a passenger than his baggage or general freight, or even, as to the right on his part to be carried through. Hence the assumption of a partnership or mutual agency as to the passenger's own safe carriage, free from personal injury, or that the selling carrier sets himself forth as a principal, employing agents for that purpose, is less admissible, with respect to the passenger's personal carriage, than the theory that the carrier selling the ticket acts, in this respect only, as the agent of connecting carriers.[3] The special undertaking on this point should be gathered in any case from the circumstances; and the safer course, in selling through tickets, is to have them printed so as to show clearly

[1] See 74 Fed. (U. S.) 517. Louisiana constitution (*ib.*), which declares all railways common carriers.

[2] § 615; *ante*, 283. While a sleeping-car company is not strictly liable on the footing of an innkeeper or common carrier, a passenger may generally assume a sleeping-car to be under the management of the company running the train, and may recover for injuries accordingly. Penn. Co. *v.* Roy, 102 U. S. 451; Thorpe *v.* N. Y. Central R., 76 N. Y. 402; Cleveland R. *v.* Walrath, 38 Ohio St. 461.

[3] § 615; Blake *v.* Great Western R., 7 H. & N. 987; Knight *v.* Portland R., 56 Me. 234; Nashville R. *v.* Sprayberry, 9 Heisk. (Tenn.) 852; Sprague *v.* Smith, 29 Vt. 421; Ellsworth *v.* Tartt, 26 Ala. 733; Foulkes *v.* Metropolitan R., 4 C. P. D. 267; 5 C. P. D. 157; Hartan *v.* Eastern R., 111 Mass. 44.

whether or not the first carrier intends that each carrier shall be liable, concerning the passenger's safety, for his own route alone.[1]

520. Carriers of passengers may have a close connection with reference to the use of the same depots, stations, or tracks. And here the inclination is to require each carrier to look after the safety and comfort of his own passengers, consistently with his public undertaking to do so. Thus, in the case of railroad companies using a common passenger depot and common tracks of approach and departure, though these should belong, in fact, to one of the companies alone, the depot and tracks, when used in common at the point of connection, may be considered the depot and track of each relatively to its own operations and business; and the one company must protect its own passengers, who are not themselves at fault, against injury from the trains of the other company; though for negligence, exclusively of the other company, while its

[1] § 615; Burke *v.* South Eastern R., 5 C. P. D. 1. But such expressions are not always found serviceable. Railroad Co. *v.* Harris, 12 Wall. (U. S.) 65 (where, however, there was a unity of ownership, despite the expression of the ticket coupons).

As to breach of contract in failing to have the passenger transported through with his baggage, see *post*, c. 4 (as to baggage); Van Buskirk *v.* Roberts, 31 N. Y. 661; 17 N. Y. 306; 28 N. Y. 217; 70 Ga. 533; 4 Sneed. (Tenn.) 203. And see § 616, and cases cited, where the subject is discussed.

As to actions for injury to life or limb because of the negligence or misconduct of a connecting carrier and those in his employ, our law manifests reluctance to holding the carrier responsible whose connection with the injury consists only in selling the through ticket, and who neither caused the injury nor was conveying the passenger when the injury was sustained. Two strong considerations concur: (1) That the circumstances of receiving a bodily injury render it quite natural to supply evidence establishing blame on the carrier's part at that time and at that place performing the service. (2) That inflicting bodily injury may be fairly regarded as tortious, rather than a breach of contract; and, on a familiar principle, even the agents or servants of another are suable on their tortious acts, as being outside the scope of a conferred authority. See on this latter point, Foulkes *v.* Metropolitan R., 4 C. P. D. 267; L. R. 2 Q. B. 442; 7 H. & N. 987. § 616. See further, Chesapeake R. *v.* Howard, 178 U. S. 153 (leased road).

own passenger was out of his proper place, the responsibility would be different.[1] And the general rule appears to be that, if the carrier plainly undertakes to carry his passenger to a certain point, he undertakes that the intermediate means employed for that purpose, such as a ferry-boat to cross a stream, or tracks of another road used to run upon, shall be in due order, and just as fit for transportation as though they were his own for the time being.[2] There is, however, some seeming discrepancy in the authorities in this respect.[3]

521. In general, an ordinary passenger, who pays, without deduction, the regular fare, shall not readily be assumed to have consented that the carrier's liability shall be shifted upon others, or that the responsibilities shall be other than the law prescribes.[4] But where one railway company receives upon its track the cars of another company, places them under the control of its agents and servants, and draws them by its locomotive, over its own road, to their place of destination, it is held to have assumed toward the passengers thus accepted the relation of common carrier of passengers, with the liabilities incidental to that relation.[5] And the practical effect is to render the carrier, whose negligence or misconduct causes the mischief, liable to the passenger, whatever be his remedy as concerns the company with which he contracted for a through transportation.[6]

[1] § 617; Central R. *v.* Perry, 58 Ga. 461. And see Foulkes *v.* Metropolitan R., 4 C. P. D. 267.

[2] 7 H. & N. 987; Thomas *v.* Rhymney R., L. R. 5 Q. B. 226; L. R. 6 Q. B. 266; McLean *v.* Burbank, 11 Minn. 277; L. R. 5 C. P. 437; Railroad Co. *v.* Barron, 5 Wall. (U. S.) 90.

[3] See as to collision, wholly because of the fault of one of the carriers using common tracks, etc., Wright *v.* Midland R., L. R. 8 Ex. 137; L. R. 5 Q. B. 226; L. R. 6 Q. B. 266; Sprague *v.* Smith, 29 Vt. 421; 3 McCr (U. S.) 208.

[4] § 618. See White *v.* Fitchburg R., 136 Mass. 321 (passenger allowed to sue for the carelessness of the brakeman of another company).

[5] Schopman *v.* Boston & Worcester R., 9 Cush. (Mass.) 24.

[6] *Ib.* And see 115 N. C. 631.

Construction train does not properly receive as a public carrier, nor impose such obligation upon either the contractors or the company.

522. These perplexing questions may be best solved, perhaps, by reference to that fundamental principle so often applied in the bailment of goods, which recognizes the creation of an agency for purposes incidental to performing the transportation, whether by virtue of special contract or one's public undertaking; but limits such agency to fulfilling those requirements which constitute a due performance of the principal transporter's obligation, and, beyond making the principal broadly answerable for his servant's or subordinate's performance of the duty intrusted to him, refuses to recognize an agency as extending to the commission of positive wrong. Here is a principle, frequently recognized, though, it must be confessed, not applied without producing some confusion; and yet, if it produce less confusion than before, it is worth marking.[1]

523. (2) **Who are passengers.** The direct obligations of a passenger carrier attach with peculiar reference to passengers, notwithstanding a duty, doubtless, resting upon every such party, on grounds of general humanity and respect for the rights of others, to so perform the transportation service as not wantonly or carelessly to be an aggressor towards third persons, whether such third persons be on or off the vehicle. A passenger, in the legal sense, is no trespasser upon the carrier, but one who has rightfully taken a place in a public conveyance, or has been otherwise accepted, for the purpose of being transported from one place to another.[2] One may become a passenger in the sense of having a right to be carried; whereas

12 Wall. (U. S.) 369; 18 Kan. 34. But cf. Peters *v.* Rylands, 20 Penn. St. 497; Feital *v.* Middlesex R., 109 Mass. 398; L. R. 5 H. L. 45.

Ultra vires or a void lease cannot be set up in avoidance of an obligation voluntarily assumed. § 618. Nor that one's tracks were located by the public authority, (Md.) 5 Atl. 346. The receiver in charge of an insolvent railroad may be sued in his representative character when the passenger is injured. Little *v.* Dusenberry, 46 N. J. L. 614; 108 U. S. 188. It does not necessarily follow that because the injured passenger may seek redress against one company, he cannot at his election hold the other responsible, instead.

[1] § 619.

[2] Bouv. Dict. "Passenger."

the right to recover for personal injuries received may suggest the word in another and perhaps a more generous sense.[1]

524. It may be important to determine whether one is a "passenger" or a mere trespasser, or, once more, a servant or employé of the passenger carrier. A person on a vehicle or train travelling as passengers usually travel may be presumed a passenger.[2] One who is employed on hire or for his perquisites, to perform certain duties in connection with the transportation, may be pronounced a servant of the carrier; but where one pays the carrier, instead, for his travel and the privilege of transacting a business of his own on the conveyance, such as selling popped-corn, books, or papers, or keeping a bar or restaurant for the convenience of general travellers, even though he is to perform certain convenient functions besides, as part of the consideration, like serving iced water, or taking charge of express matter, he is rather to be held a passenger allowed to exercise special privileges under a special contract.[3] A minor child may be a passenger.[4] Express agents or mail agents may be transported free, or upon special terms of favor; so may a seller of newspapers or refreshments;[5] and so, too, may season-ticket passengers, and the holders generally of free passes; and yet these are properly denominated passengers, particularly in the sense of having a right to be carried.[6] But where one steals a free ride, or,

[1] § 620.

[2] Louisville R. *v.* Thompson, 107 Ind. 442; § 620.

[3] Commonwealth *v.* Vermont R., 108 Mass. 7; Yeomans *v.* Contra Costa Steam Nav. Co., 44 Cal. 71.

[4] (Mo.) 2 S. W. 315; (Mass.) 8 N. E. 875.

[5] Griswold *v.* N. Y. R., 53 Conn. 371; 92 Va. 34.

[6] Hammond *v.* North-Eastern R., 6 S. C. 130; Steamboat New World *v.* King, 16 How. (U. S.) 469; Great Northern R. *v.* Harrison, 10 Ex. 376. Cf. c. 2; 565, *post*. A drover travelling on a railway in charge of animals, on a free pass, is in effect a passenger for hire. Little Rock R. *v.* Miles, 40 Ark. 298; Maslin *v.* Baltimore R., 14 W. Va. 180; 160 Ill. 40. But cf. 17 Fed. (U. S.) 671; 64 Wis. 447; 7 Atl. 731. And as to one not *bona fide* travelling thus, see Gardner *v.* New Haven R., 51 Conn. 143. A route or mail-agent in the employ of the United States is a "passen-

without the knowledge and consent of the carrier or his proper agent, goes on board with the intent of travelling without payment, or fraudulently uses another person's pass, or passes by mistake for one entitled to go free when he was not such, he is not a passenger, but rather a trespasser.[1] Even if the conductor or other employé of the carrier allows him to travel free or takes a perquisite for the ride, he should not be concluded a passenger, especially if riding where passengers have no right to be, or paying to one not entitled to collect fares.[2]

525. **The character of the conveyance** or of the part of the vehicle occupied, may affect such an issue, especially in the case of railway-carrier companies, which habitually run freight trains and passenger trains separately. Where a railway once admits a practice of conveying passengers for hire on its freight trains, especially if some fair sort of accommodation like a caboose is afforded them, or the train is a mixed one, the company may incur the relation towards an individual who in good faith takes passage in such a car, intending to pay the fare and is duly accepted; notwithstanding the carrier's private orders on the subject.[3] But where the company has not in fact admitted any such practice, and its responsible managers forbid it, one who rides free in a caboose on a freight train, afforded for employés only, or in some other unauthorized and unsafe place for passengers, cannot claim that the passenger

ger" while travelling in pursuance of duty. 96 Penn. St. 256, construing local statute; 95 N. Y. 562; 79 Tex. 371.

As to whether one injured was a passenger or servant, see 64 Tex. 549.

[1] Union Pacific R. *v.* Nichols, 8 Kan. 505; Planz *v.* Boston R., 157 Mass. 377; 45 Minn. 268. And see Toledo R. *v.* Beggs, 85 Ill. 80; Muehlhausen *v.* St. Louis R., 91 Mo. 332.

[2] Rucker *v.* Missouri Pacific R., 61 Tex. 499; Higgins *v.* Cherokee R., 73 Ga. 149; 153 Mass. 188; 61 Minn. 296; 66 Kan. 438. As to the duty owing by a carrier to one who goes aboard simply to help an infirm person to her place, see 55 Ark. 428. Assistance thus rendered by a carrier's employé might dispense with that of such third party. *Ib.* See 118 Ga. 227.

[3] § **621**; 41 Or. 151; Lucas *v.* Milwaukee R., 33 Wis. 41. Acceptance of passenger on a freight train, 59 Ind. 317; 64 Tex. 529. Or on a construction train, 35 Kan. 185. Or a hand car, 64 Tex. 141.

relation existed, even though the conductor of the train or some other employé invited him to ride.[1] The case becomes more complex when the instance is that of one lawfully a passenger, who passes to a place in the vehicle or on the train where passengers are never presumably permitted to ride, and the more so when the agent in charge of the carriage gave no sanction to his act; as, for instance, if a steamship passenger should, without due permission, climb into the rigging, or one by railway ride upon the locomotive, and there receive an injury. And whether such a party be regarded as not a passenger *pro hac vice*, and not rather (since the logic of the case permits it) a negligent contributor to his own injury, it would appear that, to a considerable extent, the carrier could fairly set up such act in his own exoneration.[2] But on the more favorable showing that the party was merely in a part of the vehicle or on a car of the train where his ticket did not properly allow him to remain, and yet suitable enough for his safe conveyance, one could claim to be a full passenger, the more so if the conductor knowingly permitted him to stay there;[3] though not, even here, so as to free the case wholly from the same consideration of contributory negligence; while such a ride without the carrier's due permission and knowledge must always obstruct his right of action to recover for injuries which would not have occurred had he been in his proper place.[4]

[1] Lygo *v.* Newbold, 9 Ex. 302; Eaton *v.* Delaware R., 57 N. Y. 382; 111 Fed. (U. S.) 123; Higgins *v.* Cherokee R., 73 Ga. 149; Powers *v.* Boston & Maine R., 153 Mass. 188; Perkins *v.* Chicago R., 60 Miss. 726. See 156 Mass. 525 (circus train).

[2] See § **621**; 22 Barb. (N. Y.) 91; Chicago R. *v.* Michie, 83 Ill. 427; Higgins *v.* Hannibal R., 36 Mo. 418; 40 Ark. 298; Rucker *v.* Missouri Pacific R., 61 Tex. 499. One who rides on an engine with due permission is not debarred from suing for his personal injury. 17 Fed. (U. S.) 671. But a station agent is not the proper person to give permission to ride on top of a car, those in charge of the train knowing nothing about it. 40 Ark. 298.

[3] Dunn *v.* Grand Trunk R., 58 Me. 187; Creed *v.* Penn. R., 86 Penn. St. 139. See next chapter.

[4] Kentucky Central R. *v.* Thomas, 79 Ky. 160; 78 N. Y. S. 729.

526. One who has his ticket, and is present to take the car or other vehicle at the starting-place, is a passenger, though he may not have actually entered the vehicle; for the passenger status takes effect from the time when the carrier has accepted the party, so to speak, for present transportation.[1] More than this, it is held that there may be an acceptance of a party as passenger before even the vehicle is entered, the ticket bought or the fare paid.[2] One may be an accepted passenger while *bona fide* waiting for the vehicle or entering or leaving it;[3] or a paying passenger without necessarily paying in advance;[4] but he is not a passenger before he offers himself for carriage.[5]

527. (3) **With respect to one's obligation to receive for carriage,** the carrier of passengers is bound, according to his means and methods, as held out to the public, to receive all fit persons who may choose to apply and are ready and willing to pay for the transportation; the ground of this obligation being, not a mere private contract, at one's own choice, but the fact that the passenger carrier sets up, like an innkeeper or common carrier of goods, to exercise a common public employment for compensation.[6] To the means, the methods, and the requirement of a recompense, apply quite closely the rules, with their qualifications, which were set forth under the head of Common Carriers.[7]

[1] See § **621**; Central R. *v.* Perry, 58 Ga. 461; Packet Co. *v.* Clough, 20 Wall. (U. S.) 528.

[2] Brien *v.* Bennett, 8 C. & P. 224 (omnibus-driver, pulling up at signal of a person in the street). This principle is not readily extended to street railways. Creamer *v.* West End R., 156 Mass. 320; Donovan *v.* Hartford R., 65 Conn. 201. But see Gordon *v.* West End R., 175 Mass. 181 (one who hails to get on board).

[3] 136 Mass. 552; 137 Mass. 210; 98 N. Y. 494; 32 Minn. 1.

[4] Nashville R. *v.* Messino, 1 Sneed (Tenn.), 220.

[5] Webster *v.* Fitchburg R., 161 Mass. 298. Wherever passengers are usually allowed to board the train, one may become a full passenger by entering there. 148 Mass. 348.

[6] § **622**; 3 Brod. & B. 54; 2 Sumner (U. S.), 221. See Bennett *v.* Peninsular Co., 6 C. B. 775.

[7] *Ante,* 291. Even a sleeping-car company has no right to discrimi-

528. But the obligation to receive has qualifications, as our statement indicates, and analogous, indeed, to those observed in treating of common carriers of goods. The carrier of passengers may stop receiving when his vehicle is full, nor need he accept passengers to travel by other modes of conveyance or other vehicles, or upon different journeys, with different stopping-places and at different times, from what he holds himself out as ready to furnish or perform.[1] One whose vocation extends to both passengers and freight, like a railway carrier, is not bound to carry freight on passenger vehicles or by passenger trains, nor passengers on freight vehicles or by freight trains ; but he may regulate fairly for himself how the double duty shall be performed.[2] We have observed, however, that a carrier may waive his rights in these and kindred respects; and where, as is now so usual, passage-tickets are sold or given out in advance without any express proviso as to there being room, the undertaking assumed on the carrier's part is to furnish room to all who present tickets; this principle applying generally to the unqualified reception of passage-fares by the carrier or his proper agent, though manifestly most appropriate to railway travelling, where cars are so constantly attached to each train, not by advance computation, but according to the number of persons who may present themselves at the time advertised.[3] A passenger who has thus paid his fare is entitled to due accommodation, especially when he is to go a long distance; if accommodation can be made, the carrier's servants are bound to provide it for him

nate in selling its vacant berths. Nevin *v.* Pullman Car Co., 106 Ill. 222. Must serve the public alike. 3 Brod. & B. 54; 4 Esp. 260 ; Tarbell *v.* Central R., 34 Cal. 616 ; Bennett *v.* Dutton, 10 N. H. 481 (monopoly arrangement with another carrier no excuse).

[1] § **623** ; *ante*, 295.

[2] Arnold *v.* Illinois Central R., 83 Ill. 273, 280. No compulsion to run on Sundays. 42 Wis. 23. Though he may waive his right in this respect considerably. 109 Mass. 398; 59 N. Y. 126.

[3] See 8 E. L. & Eq. 362 ; 16 Jur. 196. A carrier by ferry-boat, who provides the number of seats demanded by the average travel, is not remiss in duty if persons are sometimes without seats. Burton *v.* Ferry Co., 114 U. S. 474.

on request;[1] and if he finds the ordinary cars of his train full, he cannot be treated as a trespasser when he goes into a drawing-room car, ladies' car, or other higher-priced or special conveyance, under the same management, for the particular transportation, there to remain until there is a vacant seat for him in the ordinary cars.[2] The contract embodied in the sale of a ticket may of course limit one's right of accommodation to some particular trip or train.[3]

529. Only persons who are suitable, however, need be accepted; a qualification in the carrier's favor which must be very guardedly observed, partly with a view to his personal advantage, but more for making the journey reasonably convenient, comfortable, and decent for the public. For instance, transportation and admission to the carrier's premises may be refused to one who seeks to avail himself of such opportunity so as to injure the carrier's own business by soliciting patronage for a rival line;[4] for while the carrier may not subject his passengers to an oppressive monopoly, it appears well conceded that he has the right to keep to himself the legitimate advantages of his position, such as establishing an exclusive agency for the delivery of the passengers' baggage contained on board the car or vessel, giving some other carrier the monopoly of his connecting patronage, or furnishing a refreshment table, as a convenience to those he transports, and a source of special profit to himself.[5] Again, the carrier is not obliged to accept one who is openly at the time or even habitually drunk, gross in his behavior or obscene in his language, lewd, noisy,

[1] As where other passengers were using more seats than they were entitled to. 69 Miss. 421.

[2] Thorpe *v.* N. Y. Central R., 76 N. Y. 402; Davis *v.* Kansas City R., 53 Mo. 317; Bass *v.* Chicago R., 36 Wis. 450. But he is not justified in exposing himself carelessly to danger, where he has no seat. Camden R. *v.* Hoosey, 99 Penn. St. 492. Yet the carrier who permits his cars to be overcrowded so that passengers ride on the platform, etc., is bound to additional care and precaution. 205 Pa. 271. See 183 Mass. 96.

[3] § 623.

[4] Jencks *v.* Coleman, 2 Sumn. (U. S.) 221, 224; Barney *v.* Oyster Bay Steamboat Co., 67 N. Y. 301; 11 Blatchf. (U. S.) 233.

[5] *Ib.*; § 623.

or quarrelsome, so as to become a public annoyance to the other patrons;[1] though discrimination among persons for merely habitual and not actual and present misbehavior of this sort must of course involve a perilous responsibility in these days, when travelling has become so universal. Nor is the carrier obliged to receive as passengers notorious thieves, pickpockets, gamblers, or other criminals, nor fugitives from justice, nor persons infected with contagious diseases; since respect for the laws, and the vital interests of the carrier himself and the general passengers, besides, demand the exclusion — and where life and health would be imperilled, the imperative exclusion — of all such persons.[2] Yet, in all instances like these, acceptance of the fare from any one is so far a waiver of the carrier's right to refuse admission that the carrier ought carefully to refuse selling tickets to such persons, and to exclude them if they attempt to enter the vehicle without tickets; he should at least refund readily whatever may have been paid for passage on their behalf; and if, inadvertently, such a person is admitted without some previous notice that his transportation is forbidden, the carrier incurs the risk of a suit where he ejects him afterwards, especially if no previous offer be made to refund whatever fare the party may have paid, and the ground of ejection is simply that of habitual, and not present offence.[3]

530. The passenger-carrier may make reasonable rules and regulations in connection with the transportation. Thus, on a railway a special "ladies' car" may be designated for women who travel alone or with their male relatives or friends;[4] and

[1] 2 Sumn. (U. S.) 221, 224, 225; 33 Kan. 543.

[2] See 4 Dill. (U. S.) 321. As to fugitives from justice, see Pearson *v.* Duane, 4 Wall. (U. S.) 605, — a case of exceptional circumstances.

[3] Putnam *v.* Broadway R., 55 N. Y. 108; 4 Dill. (U. S.) 321; 70 N. H. 607. As to permitting one to take a man on board, as an officer who has him under arrest, see 87 Mo. 422. "Non-union" workmen are not to be excluded from travelling upon any suggestion that they are unpopular. Chicago R. *v.* Pillsbury, 123 Ill. 9.

[4] Men, unaccompanied by women, must respect such rules. § **624**; Peck *v.* New York Central R., 70 N. Y. 587; 55 N. Y. 108; Bass *v.* Chi-

saloons, drawing-rooms, and staterooms on a steamer or other passenger vessel may doubtless be set apart for a similar purpose.[1] As to the right of excluding persons of color from certain car or vehicles, or confining them to a particular car or a particular quarter when travelling, judicial opinion in this country has fluctuated somewhat with the vicissitudes of public opinion regarding the interesting question of negro rights; nor inconsistently so, since the reasonableness of a carrier's regulations at any period or place ought not to be tested regardless of social prejudice and prevailing manners among the local travelling public.[2]

531. (4) **Next, as to passage tickets and fares.** As a further qualification of the passenger carrier's obligation to receive for carriage is that right which the law concedes to all who exercise a public calling, of requiring due recompense; and while, on the one hand, such a carrier can demand no extortionate or unreasonable reward from any one such as might amount to a practical exclusion or hindrance from travel, he may unquestionably require to be paid his reasonable charges,

cago R., 36 Wis. 450; Chicago R. *v.* Williams, 55 Ill. 185. *A fortiori*, if the man was sent politely to another car. 94 N. C. 318.

[1] States differ in this respect, both as regards custom and the rule of legislation. Cf. 5 Mich. 520; 34 Cal. 594; 55 Ill. 185; 55 Penn. St. 209; 27 La. An. 1; 88 N. C. 536. A second-class car for women and children should not be a smoking car. 114 Ga. 159.

[2] To speak more generally, distinctions in the means of transportation furnished, on considerations not of sex but of social caste, appear more openly admissible in England and European countries than in America, where such distinctions are averse to the spirit of our institutions; and yet of late years, particularly in railway travel, there has been a growing disposition manifested to run special drawing-room car trains, and furnish such special quarters and special facilities as practically to adopt and establish in the United States the foreign fashion of travelling by first-class and second-class cars. And such distinctions avail very fairly in long journeys, lasting night and day, as on an ocean steamship. A gradation of passage rates justifies a gradation of accommodation; reserved seats or places may be especially charged for; but every public carrier of passengers should afford reasonable and safe facilities for all who pay their fares and travel. The carrier has no right to provide for the comfort of one sex, or of the higher-price passengers, to the neglect of the other sex,

and paid, too, in advance.[1] A party who has once paid his passage-fare, and can produce his proper ticket, is not, as a rule, to be treated differently from other passengers of the same class, nor refused admission to the cars or vehicle; but if good cause really exist for his immediate exclusion, which the carrier ought, in justice to himself, and out of regard to the other passengers, to insist upon, the fare must, at all events, be tendered back or refunded; and damages against the carrier for his breach of contract to carry, after the usual mode, to the journey's end ought, under such circumstances, to be heavy where the exclusion is without justice and good reason,[2] especially if the party while not actually misbehaving is excluded in a contemptuous, insulting, and scandalous manner.[3]

or of those who pay the ordinary rates. § **624**; *ante*, 528. And, whatever the carrier's regulations, they must be neither unreasonable nor unreasonably enforced. Jennings *v.* Great Northern R., L. R. 1 Q. B. 7.

[1] § **625**; 1 Esp. 27; 11 Neb. 117.

As compared with the modern practice among common carriers of goods, there are three aspects in which that among common carriers of passengers appears strikingly different: (1) The passenger carrier usually receives his recompense from the patron or customer in advance, occasionally on the way, and only very seldom at the termination of the transit; and that greatest of inland transporters, the railway carrier, commonly discriminates thus between travelling patrons and the consignors of freight. (2) The passenger carrier has little to do with variable tariffs of rates; but commonly grades his accommodations and facilities, on a well-considered scale of prices; he discounts, too, his rates to season-ticket holders or purchasers by the quantity, or on a round trip, while allowing others to travel on terms of marked favor, or even free. (3) The almost universal use of passage-tickets by railways, which are issued before the journey, and serve on the way as the voucher of the passenger's right to be in the vehicle, virtually concedes that the bearer's fare has been already paid, and that, whoever such party may be, he is accepted as a passenger, with the usual rights and subject to the usual rules.

[2] See Chicago R. *v.* Williams, 54 Ill. 185; 4 Dill. (U. S.) 321; Pearson *v.* Duane, 4 Wall. (U. S.) 605; 176 Mass. 275.

[3] § **625**; Coppin *v.* Braithwaite, 8 Jur. 875, Ex. And see next chapter, as to ejecting passengers.

532. As to the rates of carriage, the carrier of passengers when unrestrained by statute, may charge whatever he pleases, provided the charge be not extortionate, oppressive, or unreasonable; nor, as it would appear, is the charge made to one passenger conclusive of what should be made to another, since the common law requires, not that all should be charged alike, but that none should be charged unreasonably high.[1] But public policy tends to the view that the grant of anything like a monopoly of carriage facilities to individuals or a class ought to be discountenanced; and while equality of rates for the same facilities must always appear reasonable, inequality is evidence of unreasonableness.[2]

533. Further than this, the modern ticket system is fundamentally one of special contract, and subject to the special-contract rules we have elsewhere detailed, in most leading respects; though some cases prefer to treat the ticket as a mere token or voucher, showing that one has paid his fare and is entitled to a passage as indicated;[3] and certainly it is not evidence of a contract in any such sense as to comprehend and conclude the actual terms of passage, and merge all other parol or written arrangements in point.[4] As construed in the light of custom

[1] § **626**; *ante*, 293.

[2] *Ib.*

[3] Elmore *v.* Sands, 54 N. Y. 512, 515, and cases cited.

[4] Van Buskirk *v.* Roberts, 31 N. Y. 661; 17 N. Y. 306.

It is seldom, if ever, that a mere ticket professes to contain all the essential terms of the understanding between passenger and carrier; though it may establish this understanding in various particulars, including the qualifications in respect of baggage liability. The full agreement as to passage is derived largely from schedules which give the time-tables, etc., and general rules, so far as these are brought before the public, and may fulfil the requirement of usage or a special contract with the party himself; or from special statements made by the carrier or by his proper agents, whether by way of extension or waiver of the usual conditions. "As either party may prove terms of the contract, not expressed upon the ticket, so either party may prove the acceptance, or rejection, or waiver of any terms thereon indorsed. The ticket is not a written contract signed by the parties. It is, at most, evidence of some existing contract for a passage between two places named, and that the holder has paid the fare demanded." Burnham *v.* Grand Trunk R., 63 Me. 298, 301.

the language of the usual passenger-ticket, however briefly expressed, indicates the terminus of the particular journey, and imports a promise on the carrier's part to take the passenger, or presumably the bearer (the ticket being transferable), through with the usual despatch and facilities, and by the usual means, subject to the usual qualifications permitted by law, from the starting-place to the point of destination. Custom among carriers or legislation may come in aid or control of the terms of this character to expand or expound them.[1] One who buys his ticket relying upon its terms and upon the published schedule, as he has a right to do, accepts, in fact, the benefits of the carrier's public offer, and can claim all the reasonable advantages of such special contract.[2] As to disavantages, the passenger in general may be held bound by his knowledge and assent to the special or customary terms, so far as reasonable facilities and means of conveyance are concerned.[3] A ticket with special stipulations is in the nature of an express contract so far as such stipulations are reasonable and conform to good policy, provided at all events the passenger knew seasonably or ought to have known seasonably that they were expressed.[4]

534. Differing rates import, in general, differing facilities; and the passenger who agrees to go at the lesser fare may have to accept the lesser conveniences. Ordinary rates of fare imply

[1] § 627. It is not unusual for the carrier's posters, advertisements, or circulars to indicate to the public the schedule of fares, as well the time-tables, besides other points of information of material interest to travellers.

[2] 5 E. & B. 860; Sears *v.* Eastern R., 14 Allen (Mass.), 433, 436; Hobbs *v.* London R., L. R. 10 Q. B. 111; Le Blanche *v.* London R., 1 C. P. D. 286; 8 E. L. & Eq. 362.

[3] See next chapter; Todd *v.* Old Colony R., 3 Allen (Mass.), 18; Steamboat New World *v.* King, 16 How. (U. S.) 469; 5 Ind. 339; 108 Mass. 7; 1 Allen (Mass.), 267 (even though he did not read his ticket); State *v.* Goold, 53 Me. 279; 22 Barb. 130. And see Richardson *v.* Rowntree, (1894) App. 217. But as to such qualifications with reference to baggage liability, or with immunity from damage to life and limb, see *post*.

[4] § 627.

that the passenger shall be carried with the ordinary facilities in the choice of vehicle, time of starting, rapidity of journey, means of conveyance, and choice of seats.[1] Adults and children, who may be charged differently, are ordinarily accepted together upon such an understanding; though it seems not unreasonable on street-cars, or for short distances, to prescribe lesser facilities as to seats, for children who pay the lesser rates, than for grown people.[2] Season-ticket holders, or those who purchase tickets by the quantity or round-trip tickets, or in mileage books, may be presumed entitled to the usual facilities; though special conditions are sometimes found to accompany such reduction of rates, and these so far as reasonable and consistent are binding.[3] In England and European countries are cars of the first class, second class, and so on; the inferior car being furnished less luxuriously for the lesser fare; a custom which, though little prevalent in American railway travelling, so far as the gradation is directly concerned, finds an indirect following in the recent establishment of "palace" and "drawing-room" cars, where special rates are demanded. Moreover, in our modern palace and drawing-room cars are the railway distinctions of luxury and specially reserved seats:[4] in travel by water, too, staterooms are graded or made a special charge in like manner as compared with berths. The natural and reasonable admission of all such distinctions as these is to establish a special contract, express or implied, between the carrier and his patrons, whereby the party paying the higher rates travels with more seclusion and comfort, and perhaps may be privileged to go on special limited trains, or at unusual times. And there may

[1] See Davis *v.* Kansas City R., 53 Mo. 317; § 628.

[2] Austin *v.* Great Western R., L. R. 2 Q. B. 442. An adult passenger may be treated as responsible for the fare of a child under his charge, and tender of pay for himself is not enough. Philadelphia R. *v.* Hoeflich, 62 Md. 300.

[3] See 1 B. & S. 977; 105 Penn. St. 142; Ripley *v.* New Jersey R., 31 N. J. 388. As to a condition contained in a season-ticket, see Cooper *v.* London R., 4 Ex. D. 88.

[4] See Pullman Palace Car Co. *v.* Reed, 75 Ill. 125; 73 Ill. 360; 55 Ark. 134.

be, in corresponding manner, special limited tickets, issued at reduced rates, for particular trips only, or a continuous passage; and by such terms the purchaser is bound.[1] But terms of the special undertaking, not well established already by usage or legislation, must be brought home to the passenger by ticket or otherwise; and where limited railway tickets are intended to restrict the holders to particular times or trains, the restriction ought to be brought seasonably to the particular passenger's attention, in order to bind him to such qualifications.[2] General advertisements do not vary the plainly expressed terms of the ticket itself.[3] In the absence of terms rendering a ticket unassignable it passes by delivery.[4] And one, at all events, who buys a general ticket for full fare is not bound by any printed limitations not just in themselves and seasonably brought to his notice.[5]

[1] A reduced-rate ticket, limited in time on its face, cannot be used after the time expires. 62 Mo. 95. But a ticket whose use expires on a certain day is good if one begins his journey before midnight on that day. Auerbach *v.* N. Y. Central R., 89 N. Y. 281; 68 Ga. 219; 11 Mo. App. 463; 66 Cal. 191. See 43 Ark. 529 (limited ticket expiring on Sunday).

A reduced-rate ticket may be limited so as to be used only by a particular individual or individuals; and this is often the case with season or mileage tickets, which are so expressed as not to be transferable at pleasure, or even so as to be forfeited if transferred. Limited tickets sometimes require the buyer to be identified and have the ticket stamped for the return passage. See 17 Fed. R. 880; 23 Fed. R. 326; 73 Ga. 356; 158 Penn. St. 302; 42 La. An. 880; 104 Tenn. 194. All such limitations, if intended, should be expressed; but when expressed they are usually deemed just and reasonable.

[2] Maroney *v.* Old Colony R., 106 Mass. 153. A round-trip ticket follows this rule; for round-trip tickets are presumed to be good until used, in absence of a special stipulation to the contrary in the ticket or actual notice to the buyer at the time of the purchase. Pennsylvania R. *v.* Spicker, 105 Penn. St. 142.

Conditions on a ticket, as to fare, travel, etc., which are plainly expressed and in view of the rates charged are not unreasonable, bind the passenger; he cannot say that he did not read the ticket. 73 Ga. 356; 11 Phila. 597; 158 Penn. St. 302; 1 Allen, 267.

[3] 61 Miss. 194.

[4] Spencer *v.* Lovejoy, 96 Ga. 657; 3 McCr. (U. S.) 249; 45 Minn. 53.

[5] Norman *v.* Southern R. (S. C. 1903). It is rather, in the free or

535. The special restrictions of passenger carriage by a ticket must if reasonable be respected; and restrictions are all the more reasonable, if reduced rate or other special consideration appears.[1] Limitations, in point of time or trips, upon the use of passenger-tickets, if plainly expressed, are commonly sustained by the courts as reasonable; more especially where the tickets themselves are issued on especially favorable terms of fare, as in the case of excursion or round-trip, commutation and season tickets or mileage books;[2] though such limitations should never be unjust nor so narrow as to deny, practically, the full right of passage they profess to confer, nor be construed in the sense that the

reduced-rate tickets, that the passenger is bound to notice what restrictions, if any, they contain. See 101 Tenn. 194.

[1] § 629. The holder of a mileage book cannot dictate from what part of the book the conductor shall detach coupons. 88 Me. 578. Nor insist upon detaching the coupons. 82 Va. 250. Nor present detached coupons without the book. 146 Mass. 107.

"Good for this trip only." 4 Zab. (N. J.) 435; 11 Ohio St. 457; Johnson *v.* Concord R., 46 N. H. 213; 11 Met. 121; Elmore *v.* Sands, 54 N. Y. 512; Dietrich *v.* Penn. R., 71 Penn. St. 432.

Coupon tickets over various roads. 1 Allen (Mass.), 267; 40 Vt. 88.

In general, however, a fare-ticket sold upon no special limited contract, and for the ordinary accommodations in the vehicle, without selection of place, is good for a continuous passage until used. 24 Barb. (N. Y.) 514.

A ticket entitles one to travel between the stations named, but no farther. 41 L. T. 415. So, if a railway ticket reads "Portland to Boston," this, it is held, does not allow one to travel from Boston to Portland, but only, according to its tenor, from Portland to Boston. Keeley *v.* Boston & Maine R., 67 Me. 163. And see 106 Mass. 160. *Semble*, otherwise, if the ticket read, as is not uncommon, "Portland & Boston." A "drover's pass" ticket for use on freight trains with stock cannot be used on a passenger train. Thorp *v.* Concord R., 61 Vt. 378.

[2] Hill *v.* Syracuse R., 63 N. Y. 101; Lillis *v.* St. Louis R., 64 Mo. 464; Powell *v.* Pittsburg R., 25 Ohio St. 70; McElroy *v.* Railroad, 7 Phil. 206. And see Thompson's valuable note, 24 Am. Reports, 22.

Where the carrier controls both a direct and a circuitous route between two points, it may more naturally be assumed that a restriction confines the passenger upon a through ticket to the direct route rather than to the circuitous one. See Bennett *v.* New York Central R., 69 N. Y. 594.

carrier may profit by his own default of duty, to his patron's detriment.[1]

536. Reasonable rules, therefore, as to passage fare may be imposed by the carrier in his interests or those of the general public; though not unreasonable rules. Thus, he may issue tickets which do not permit the passenger to stop over at pleasure.[2] So may the carrier charge an additional rate where tickets are not purchased before the passenger goes on board the train or vehicle;[3] for it is not only a convenience in keeping his accounts, but a great safeguard against fraud, that the fare be taken by the carrier's agents specially appointed for that purpose; though this presupposes, in consistency, that the passenger is allowed such opportunity to purchase beforehand.[4] Passengers may have to show their tickets when going

[1] Little Rock R. *v.* Dean, 43 Ark. 529. But see 41 Ohio St. 276.

A round-trip ticket which expressly requires to be stamped and signed by ticket agent at place of destination before it can be received on return passage must be reasonably complied with. Boylan *v.* Hot Springs R., 132 U. S. 146.

[2] § 630; State *v.* Campbell, 32 N. J. 309; Cheney *v.* Boston & Maine R., 11 Met. (Mass.) 121; Breen *v.* Texas R., 50 Tex. 43; McClure *v.* Philadelphia R, 34 Md. 532; Oil Creek R. *v.* Clark, 72 Penn. St. 231. Ticket limited in passage to a day may or may not be reasonable 105 La. 398.

[3] Hilliard *v.* Goold, 34 N. H. 230; 18 Ill. 460; Cleveland R. *v.* Bartram, 11 Ohio St. 457; State *v.* Chovin, 7 Iowa, 204; Swan *v.* Manchester R., 132 Mass. 116; 39 Minn. 6.

[4] See St. Louis & Alton R. *v.* South, 43 Ill. 176; Nellis *v.* New York R., 30 N. Y. 505; 18 Ill. 460; Crocker *v.* New London R., 24 Conn. 249; Jeffersonville R. *v.* Rogers, 28 Ind. 1; 134 Ind. 100. But see 24 Conn. 249; 53 Me. 279. The rule of discount only where tickets are bought at the station is a reasonable one, and may be enforced on the train. Cincinnati R. *v.* Skillman, 39 Ohio St. 444. And the general rule appears to be, in this connection, that the ticket-seller is not bound to keep his office open after the advertised time for the train or vehicle to leave. Swan *v.* Manchester R., 132 Mass. 116. But local statute sometimes affects this point. And see 108 Ga. 496; 67 Ill. 312 (unreasonable requirement); 82 Tex. 527. A passenger who finds the ticket-office closed when he seasonably presents himself to purchase, cannot be required by the conductor to pay an unreasonable extra sum for his passage. 26 W. Va. 800. The practice on many roads is for the conductor to charge extra and give a drawback ticket presentable at any ticket-office.

So too where a round-trip ticket must be stamped for return passage, the carrier should have his agent seasonably on hand. 114 Ga. 140.

aboard.[1] But all regulations concerning fare must be not only reasonable of themselves, but interpreted in a reasonable manner as between carrier and passenger. The passenger ought not to be left without voucher at all for his ticket taken up, where there is still a long journey.[2] Nor should the rule that the passenger produce his ticket whenever required be enforced regardless of common-sense and the conduct of the carrier and his servants rendering such production impossible.[3] Nor ought a traveller, when asked to produce his

[1] As in passing through the gate to the track at a railway station. 44 Minn. 433. Where the gateman excludes one with a proper ticket, the carrier is liable. 71 Md. 135.

The passenger, too, may be required to exhibit his ticket whenever called upon by the carrier, or by his proper representative, such as clerk, driver, or conductor. 31 N. J. 388; 27 Md. 277; 15 N. Y. 455; 97 Mich. 439; 36 Conn. 287; 57 N. J. L. 703; for this is taking a suitable precaution against imposition. So, too, is the rule a reasonable one which compels the passenger to surrender his ticket on the way, and take a conductor's check or voucher. 22 Barb. (N. Y.) 130; Beebe *v.* Ayres, 28 Barb. 575. Or the restriction upon through coupon-tickets over connecting roads, that the passenger must not stop over, unless the journey be unreasonably long and fatiguing if one may not break it. 43 Ark. 529. See 535. Or that the coupons shall be worthless if detached. 114 Mass. 44. See Jerome *v.* Smith, 48 Vt. 230. Tickets for continuous passage do not import a right to stop over and then resume the journey. 42 N. J. L. 449; 39 Ohio St. 375. But some States recognize a general right of stop-over on separate coupons, unless a special stipulation is made to the contrary. 72 Me. 388; 96 Ga. 637. Stop-over formalities are not usually known to a passenger, who may rely upon information given him by the ticket-seller or the course of the conductor who permitted the stop, if the ticket states nothing. See New York R. *v.* Winter, 143 U. S. 60.

One who buys a limited ticket is bound not to take advantage of an opportunity to evade its terms. 88 N. C. 526. If it entitles one to ride only on a certain through train which does not stop at an intermediate station, the passenger who is carried beyond may have to pay fare for the additional distance. 11 Lea (Tenn.), 533. One who signs a limited ticket admits full knowledge of its stated terms, and due assent. 11 P. 526; 62 S. C. 1.

[2] § **630**; 20 N. H. 250; 53 Md. 201. But cf. 20 N. Y. 126.

[3] See Baltimore & Ohio R. *v.* Blocher, 27 Md. 277; Dearden *v.* Townsend, L. R. 1 Q. B. 10; Jennings *v.* Great Northern R., L. R. 1 Q. B. 7 (train divided so as to separate a party travelling together); 64 Md. 63; 3 S. C. 580.

ticket, be denied a reasonable time to find it; and this, particularly when the conductor or other agent demanding it knows that the passenger is no trespasser.[1] In short, the reasonableness of all such regulations and their interpretation is usually a question of law for the court to determine.[2]

537. If the passenger claims to have lost his ticket, and this is a transferable one such as the finder might ride with, he must, if required, pay his fare over; and so, too, where the driver or conductor cannot, by dispensing with such repayment, relieve himself from pecuniary accountability to the principal who employs him.[3] But in other cases of loss, our courts incline to indulge the passenger, on the ground that the carrier has once received the actual consideration of the passage, and ought not to demand more if evidence be adduced of the fact.[4]

[1] Maples *v.* New York R., 38 Conn. 557. Indulgence should be shown to the old, decrepit, or inexperienced who are ignorant of travelling, if their conduct indicates good faith. 14 Lea (Tenn.), 128. And see 91 N. C. 506.

[2] See § **630**; Jennings *v.* Great Northern R., L. R. 1 Q. B. 7; Vedder *v.* Fellows, 20 N. Y. 126. Special representations to restrict a ticket are not good if made after its sale or after the travel begun on the faith of it. 109 Iowa, 136.

[3] § **631**; Jerome *v.* Smith, 48 Vt. 230; Townsend *v.* New York Central R., 56 N. Y. 295; (1896) 1 Q. B. 256; 116 Ga. 53.

[4] Pullman Palace Car Co. *v.* Reed, 75 Ill. 125 (ticket for berth in a sleeping car); Maples *v.* New York R., 38 Conn. 557.

If the passenger, when his fare is demanded, produces a ticket having a hole punched in it, or otherwise defaced in such a manner as commonly indicates that it has been used and cancelled, or shows a pass restricted by its terms to some other person, the presumption arises that he is trying to evade his just fare, and unless he explains himself, or tenders promptly what is owing, he may be treated as an intruder. Terre Haute R. *v.* Vanatta, 21 Ill. 188; 28 Barb. (N. Y.) 275. For the English rule, see L. R. 1 Q. B. 10; Austin *v.* Great Western R., L. R. 2 Q. B. 442. Offering a counterfeit bill for fare is no payment or tender of fare, and it should be refused. 54 Miss. 503. And the same may be affirmed of one who attempts to use the detached coupon or return portion of a ticket plainly issued, as its terms indicate, so as not to have been transferable to him. Langdon *v.* Howells, 4 Q. B. D. 337. But a reasonable explanation, and compliance with the demand of a regular fare, ought to

538. Enforcement of fares by the conductor or other directing agent of the carrier on the journey is expected after the customary rules. And, as between the conductor and passenger on a railway train, the passenger's ticket, or the conductor's own substituted check, or some regular pass, must usually be deemed positive evidence of the passenger's right to travel at the time and place, and must be produced whenever reasonably called for; in the absence of which a conductor is not to blame if he collect fare.[1] A conductor has no right to accept a regular fare tendered him, and then exclude the passenger for not paying the additional sum charged those who fail to procure tickets before they go on board;[2] nor ought he to insist upon taking up the ticket tendered him by a passenger from whom he exacts a full fare, because of such ticket's invalidity.[3] But he may rightfully demand the regular fare from any passenger who presents an invalid ticket, and may refuse to recognize such ticket altogether. And of course he may collect full fare, where no ticket at all has been purchased.[4]

539. An aggrieved passenger who has purchased a regular ticket is strongly favored in respect of his accommodations. But, whatever his course, he must abide consistently by it.[5] A passenger may decline to leave the train or vehicle, if rightly on board, notwithstanding the conductor or directing agent of the journey refuses to recognize his ticket.[6]

shut out controversy on such points. And as to torn or defaced tickets, the fault of the passenger is material to their rightful non-acceptance, where they were genuine. § 632; Rouser *v.* North R., 97 Mich. 565; 125 Ind. 229.

[1] § 633; Frederick *v.* Marquette R., 37 Mich. 342. See Burnham *v.* Grand Trunk R., 63 Me. 298 (waiver); Sherman *v.* Chicago R., 40 Iowa, 45 (effect of conductor's permission).

[2] Du Laurans *v.* St. Paul R., 15 Minn. 49; § 633.

[3] Vankirk *v.* Pennsylvania R., 76 Penn. St. 66; 14 Neb. 110.

[4] § 633. As to the right of ejectment for non-payment of fare, see next chapter.

[5] § 634. As to his right to refuse payment of his fare for want of a seat, cf. 53 Mo. 317; 45 Ark. 368.

[6] Hufford *v.* Grand Rapids R., 53 Mich. 118.

540. The regular ticket-seller of a railway or other carrier binds the company, generally speaking, by his representations to the purchaser which are not plainly contradicted by other obvious proof of the carrier's intention; and a traveller may rely with more confidence upon his assurance concerning fares and tickets, and the contract obligations they import, than that of any conductor or agent on board.[1] If such authorized agent sells a ticket as good when it is not, and the conductor refuses to honor it, the carrier may be held liable;[2] and more than this, it has been ruled, where a passenger who buys a railroad ticket of the authorized agent, believing in good faith that it is genuine and issued rightfully, tells the conductor of the train so, the latter is bound to take such facts as true.[3]

541. (5) **Next, to consider one's right of action against the carrier** for his inexcusable refusal or failure to receive. The carrier's inexcusable refusal to carry or admit to the premises of transportation may be actionable, even though unaccompanied by personal violence; for the party excluded need not wait to be maltreated, nor try to force his way into the vehicle, in order to avail himself of the carrier's breach of contract or of public duty.[4] Similar considerations apply to

[1] § 635; Murdock *v.* Boston & Albany R., 137 Mass. 293; 24 Hun (N. Y.), 51; 91 Ga. 513. See Petrie *v.* Penn. R., 42 N. J. L. 449 (permission of a first conductor).

[2] *Ib.*

So may railway passengers rely, until differently informed, upon what ticket agents or train agents tell them as to the stoppage of trains; not, however, in disregard of other reasonable means of information. Lake Shore R. *v.* Pierce, 47 Mich. 277. As to sales of railroad tickets by unauthorized agents, see 100 Penn. St. 259; 53 Tex. 561. As to tickets sold contrary to terms therein expressed, see 117 Mass. 554; 50 Tex. 43; 34 Md. 532; 10 N. Y. Supr. 241.

[3] And the ejection of a passenger under such circumstances is visited upon the company in damages as for an assault. Hufford *v.* Grand Rapids R., 53 Mich. 118.

[4] § 636. See Marshall *v.* Matson, 15 L. T. N. S. 514, per Bramwell, B. (inducement of passenger to desist). Such refusal would have been inexcusable. See chapter 3, *post;* Commonwealth *v.* Power, 7 Met. (Mass.) 596; Harris *v.* Stevens, 31 Vt. 79.

the case of a passenger's exclusion from the vehicle after he has entered it.[1]

542. **If, from any cause, the transportation is prevented** for which one has paid his passage-money in advance, he may, at all events, recover the money back as for a failure of the consideration which induced such payment.[2] Should the conductor on a railroad, through some mistake or default imputable to the carrier and his agents and not to the passenger, fail to honor a ticket which was duly bought and is duly presented, an action as for breach of contract will lie; or for tort with corresponding damages, if the passenger was put off the train, besides, or treated with other indignity.[3] But whether the passenger thus aggrieved sues in contract or tortwise, the full measure of his damages is the amount of fare demanded to carry him to his destination, where his own misbehavior invited his expulsion.[4] A breach of contract to transport on the carrier's part fairly entitles the passenger to go to his destination by the best available means and then recover damages sufficient to make him whole.[5]

543. (6) **To speak of legislation concerning fares and the carrier's obligation to receive.** Legislation may be found to regulate the matter of reasonable fares, as well as the number of persons to be taken in a particular vehicle for carriage, so as not to overcrowd;[6] and our license and inspection laws

[1] See next chapter.

[2] Brown *v.* Harris, 2 Gray (Mass.), 359; Cope *v.* Dodd, 13 Penn. St. 33; 112 Ill. 295; 3 McCr. (U. S.) 249 (refusal of ticket over connecting road); 4 Sawyer (U. S.), 114. A passenger who has secured a berth to which he is denied access without good excuse may claim special damages for his discomfort in passing the night elsewhere. 176 Mass. 275.

[3] Palmer *v.* Railroad, 3 S. C. 580. In Philadelphia R. *v.* Rice, 64 Md. 63, the passenger bought a round-trip ticket, and the first conductor by mistake punched the return coupon, and then rectified his error by an expedient which the returning conductor would not recognize. And see 88 Ind. 381.

[4] 15 Fed. (U. S.) 57.

[5] See § 636; Abb. Adm. 80. And see next chapter.

[6] Goins *v.* Western R., 68 Ga. 190; 68 S. W. 743. Exemplary damages are rarely given unless open misconduct is shown, wilful, wanton, and offensive.

with especial regard to water carriage usually aim, under penalties, to secure this as one of their most desirable objects.[1] Reasonable facilities for transportation are likewise demanded under various statutes;[2] independently of which the carrier who finds himself with more persons on hand entitled to transportation, who have already bought their tickets, than he can safely accommodate on the vehicle provided, ought at once to provide another for accommodating the overplus, or else stand to the damage he occasions by not transporting as he agreed to do.[3]

[1] See § 637; English Acts 2 & 3 Will. IV. c. 120; 2 & 3 Vict. c. 66, § 2; U. S. Rev. Sts. §§ 4252–4289. Statutes are fouud requiring railways to furnish suitable cars, etc. 61 Wis. 596.

[2] Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31.

[3] § 637. And see *ib.* as to various local acts with respect to the fares, the right of penal action, etc.

Fraudulent evasion of fare by a passenger is sometimes made punishable by statute. L. R. 1 Q. B. 10. Where many purchase tickets together it is fair for the carrier to allow reduced rates. 145 U. S. 263.

CHAPTER II.

DUTIES AND RIGHTS INCIDENTAL TO THE JOURNEY.

544. I. **Let us consider the passenger carrier's general duties** with reference to the journey before considering his liability for injuring or killing a passenger he carries. The general duties of the passenger carrier with reference to the journey comprehend the entire period from the acceptance of a particular passenger for transportation to safely bestowing him at the journey's end; and an injury to his person, such as should call for judicial intervention, may have reference to the carrier's breach of obligation at any intermediate point or at one of the termini. Legal negligence by the carrier may consist either in the omission of a duty or the active commission of a fault.[1]

545. **The carrier ought to have a suitable depot or place for receiving passengers** according to the usual custom of his profession; and in providing means, both of ingress to the car or vehicle, and egress therefrom, such as platforms, planks, gangways, and drops, there must be nothing improper, unusual, or carelessly constructed or adapted, whereby a passenger, using ordinary circumspection, is likely to be endangered.[2] The usual conveniences for entering and alighting

[1] § **638.**

[2] § **639**; 19 C. B. N. S. 183; Foulkes *v.* Metropolitan R., 4 C. P. D. 267; L. R. 5 C. P. 437; 11 Allen (Mass.), 312; 37 La. An. 648, 694; Joy *v.* Winnisimmet Co., 114 Mass. 63; Haselton *v.* Portsmouth R., 71 N. H. 589. See L. R. 1 C. P. 300. Cf.: as to injuries done by a workman who is making repairs in the depot, L. R. 4 Q. B. 693. As to insufficient lights, cf. 60 Miss. 442; 34 La. An. 777. See also 165 Mass. 346. As to accumulation of ice and snow on car platforms during a storm, see 111 N. Y. 488. To allow a hole to remain long in the railway platform is negligence. 80 Ky. 82. And a railway permitting

must be in place and kept in reasonably safe and good condition while used.[1] And in regulating the entrance and exit of trains or vehicles, and the departure and admission of passengers generally, such rules of precaution must be observed by the carrier as great prudence and a due regard for human safety may suggest.[2]

546. Reasonable regulations concerning such depot or place for receiving may be prescribed and enforced as against the general public; and this, whether we regard the passenger carrier in such capacity or as the owner of the premises. Hackmen, inn porters, newspaper vendors, and others whose pursuit is disconnected with the duty which the carrier owes to his patrons, must comply with his rules of admission upon the premises, so as to annoy neither the carrier nor his passengers.[3] As to the passengers themselves, it may be both prudent and right to keep them in waiting-rooms excluded from the platform until the car or vehicle is ready to receive them. Into any railway station house, while it is kept open, the public have a general license to enter; but they must not

mail-bags to be thrown on a platform while the train is running at full speed is liable to one who is injured while waiting as passenger for his own train. Snow *v.* Fitchburg R., 136 Mass. 552; Carpenter *v.* Boston & Albany R., 97 N. Y. 494. As to keeping the depot warm in cold weather, etc., see 70 Ark. 136. See also c. 3, *post*, as to suitable modes of egress for a departing passenger.

Damage remotely connected with the carrier's own breach of duty, as where one while in a railway depot is bitten by a dog who happens to run in there, is not readily visited upon the carrier. Smith *v.* Great Eastern R., L. R. 2 C. P. 4.

[1] 18 C. B. N. S. 225. But cf. 9 Fost. (N. H.) 9. And see, as to passenger carriers by water, Packet Co. *v.* Clough, 20 Wall. (U. S.) 528; 27 La. An. 377. As to street-car companies, see 153 Penn. St. 152.

As to carelessly shutting the entrance gate on an elevated road, see 53 N. Y. Super. 91, 260. And see as to assisting passengers on board, 43 Iowa, 276.

[2] See 16 C. B. 179; Central R. *v.* Perry, 58 Ga. 461; Wheelock *v.* Boston & Albany R., 105 Mass. 203; McDonald *v.* Chicago R., 26 Iowa, 124; Knight *v.* Portland R., 56 Me. 234; Chicago R. *v.* Dewey, 26 Ill. 255. The carrier's duties in these respects are found chiefly asserted in the instance of railways. *Ib.*

[3] 7 Met. (Mass.) 596; 120 Fed. (U. S.) 215; 116 Fed. 907; § **639.**

misconduct: and, moreover, this is a license revocable as to any and all persons who have no legitimate business there, growing out of the operation of the road. A person thus present must, upon request made by the company's agent in charge of the depot, explain satisfactorily his purpose in remaining, or else leave the premises at once, and a rule forbidding persons to lie down or sleep there is not unreasonable.[1] A passenger carrier is not bound to receive his patrons into the depot unreasonably long before the journey is to commence, nor to permit even these to stay without first procuring the requisite tickets, if the means of procuring them be at hand.[2] Persons unworthy of acceptance as passengers, and all riotous, turbulent, and disorderly characters, ought to be kept out of such premises altogether.[3]

547. The passenger carrier is moreover bound to have all means and appliances highly suitable to the transportation. Seaworthiness or roadworthiness is here implied, as it would appear, to the extent of providing vehicles of suitable kind and condition, with all the skill, diligence, and foresight consistent with the nature and extent of the business.[4] Similar considerations apply to the other means connected with conveyance, as, for instance, to the horses and harness employed for travelling by hack or stage-coach;[5] or to the road-beds,

[1] Barker *v.* Midland R., 18 C. B. 46; Harris *v.* Stevens, 31 Vt. 79; Commonwealth *v.* Power, 7 Met. (Mass.) 601.

[2] *Ib.* And see 12 Met. (Mass.) 482.

[3] See 7 Met. (Mass.) 596, per Shaw, C. J.; Hall *v.* Power, 12 Met. 482. But caution must be used against accepting one as a passenger and then treating him as a trespasser. The station and means of ingress should be reasonably guarded against undue crowds and vicious and annoying persons; but an extra police, against unexpected dangers and annoyances, cannot be insisted on. See 77 Ala. 591; 6 L. R. Ir. 199; 115 Ga. 836 (tramps with loaded pistols). As to accommodations for a licensee who comes to meet one arriving or aid one who departs, see 65 S. C. 299.

[4] § 640; L. R. 2 Q. B. 412; L. R. 4 Q. B. 379; L. R. 8 Ex. 137, 146; Hyman *v.* Nye, 6 Q. B. D. 685.

[5] 1 C. & P. 414; 2 Camp. 79; Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181; 4 Gill (Md.), 406; 9 Met. (Mass.) 1; 11 Gratt. (Va.) 697; Fair-

switches, tracks, and other equipments of a modern railway; [1] or to the rigging, small boats, smoke-stacks, and other usual articles and apparatus found upon steamboats or other vessels which carry passengers; or to the engines, fuel, water, and machinery for steam locomotion.[2] Since there is no absolute warranty on his part against defects, the carrier of passengers cannot be blamed for an injury caused, without his actual fault, as by the breaking of an axle, a switch, or a rail, through some latent defect.[3]

548. But the existence of a latent defect presupposes that the carrier has faithfully performed his duty of inspection.[4] Official inspectors are provided for vessels, upon whose certificate the carrier ought to be allowed to place some reliance, irrespective of examination by his own agents. In railway travelling an intermediate inspection of the cars is often made at way-stations; but such examination is necessarily hasty, if the train is to proceed on due time, and in justice it can hardly be a minute one; [5] other more general modes of

child *v.* California Stage Co., 13 Cal. 599. And see Simson *v.* London Omnibus Co., L. R. 8 C. P. 390 (kicking horse not properly secured).

[1] 1 Moore P. C. N. S. 101; Readhead *v.* Midland R., L. R. 2 Q. B. 412; L. R. 4 Q. B. 379; Taylor *v.* Grand Trunk R., 48 N. H. 304; McElroy *v.* Nashua & Lowell R., 4 Cush. (Mass.) 400.

[2] Simmons *v.* New Bedford Steamboat Co., 97 Mass. 361; 48 N. Y. 209; Carroll *v.* Staten Island R., 58 N. Y. 126.

[3] Readhead *v.* Midland R., L. R. 2 Q. B. 412; L. R. 4 Q. B. 379; Ingalls *v.* Bills, 9 Met. (Mass.) 1; McPadden *v.* New York Central R., 44 N. Y. 478. Cf. 26 N. Y. 102; 3 Kern. (N. Y.) 9. See also Ladd *v.* New Bedford R., 119 Mass. 412 (a broken switch); Taylor *v.* Grand Trunk R., 48 N. H. 304 (a broken rail); Pittsburgh R. *v.* Williams, 74 Ind. 462.

The passenger carrier is not liable for injury caused by some stranger, without fault on his own part, 34 N. Y. 9. Nor, of course, where the immediate cause was act of God, etc. McPadden *v.* New York Central R., 44 N. Y. 278; Frink *v.* Potter, 17 Ill. 406; Ellet *v.* St. Louis R., 76 Mo. 518 Otherwise, where the carrier failed in his standard of duty, and thus was the immediate cause of loss. 76 Mo. 518; 107 Ind. 442.

[4] See § **641**.

[5] See Richardson *v.* Great Eastern R., 1 C. P. D. 342, reversing s. c. L. R. 10 C. P. 486.

careful inspection, however, as to tracks, bridges, road-beds, and rolling stock should be scrupulously observed.[1]

549. As to the carrier's duty of adopting new inventions and improvements, every new and possible preventive against accident need not be taken.[2] But for using defective carriages and appliances the passenger carrier is held responsible, irrespective of their manufacture or ownership; and, as a rule, he must discard whatever is insecure or ill-adapted to the times, and, so far as the general duty of extreme care on his part requires, keep pace with science and modern improvements.[3] Nor can the want of pecuniary means justify the carrier's negligence in this respect; for when he cannot afford to transport passengers after the standard the law demands for their safety, he should rather cease transporting them altogether.[4]

550. Suitable provision, too, should be made for the safety and comfort of the passengers in course of their transportation. Many of the considerations which were adduced with respect to the conveyance of goods will here apply.[5] That the passenger should be provided with a place is a rule duly enforced, as we have shown, though with more especial reference to those who carry a long distance.[6] The carrier is not freed from responsibility for exercising due care towards one who occupies an unusual but not ordinarily an unsafe place;[7] while, as to unsafe places, the carrier should not knowingly permit the passenger to ride there at all.[8] In loading the car, vessel, or other vehicle, the passenger carrier must dispose

[1] Louisville R. *v.* Snider, 117 Ind. 435.

[2] Le Barron *v.* East Boston Ferry Co., 11 Allen (Mass.), 312 (ferry "drop"); Meier *v.* Penn. R., 64 Penn. St. 225.

[3] *Ib.*; Hegeman *v.* Western R., 3 Kern. (N. Y.) 9; 56 Ind. 511; 27 Fed. (U. S.) 724.

[4] See Taylor *v.* Grand Trunk R., 48 N. H. 304; 181 Mass. 387.

[5] *Ante*, 320.

[6] *Ante*, 528.

[7] Keith *v.* Pinkham, 43 Me. 501.

[8] The passenger's own carelessness might defeat his action against the carrier, as will presently be seen. See § **642.**

his passengers so as to promote their reasonable comfort and safety; and under no circumstances is he permitted to overload either with passengers or their baggage, for this invites danger.[1] Where a long continuous transportation is by land, accommodation for regular meals and refreshment should be provided the passengers.[2] In water transportation, where the means of stopping are not convenient, passengers ought, on any transit of length, to have the means of procuring meals on board.[3] Accommodations for sleeping, too, should, in this latter case, be provided; and one who travels by night on a steamer without paying specially for a stateroom may properly expect a berth.[4]

551. Order should be maintained on board with the utmost vigilance and care, and the passengers should be guarded against such violence, from whatsoever source arising, as might reasonably be anticipated or expected in view of the number and character of the persons on board and all the other attendant circumstances of the transportation.[5] Disorderly scuffles, scandalous and immoral conduct, fights, brawls, personal insult and annoyance, and all wanton disregard of reasonable rules of transportation which are designed to promote the general comfort and security, must be firmly repressed by the carrier and his servants, who should not be wanting in

[1] § 643; 2 Esp. 533; Farish *v.* Reigle, 11 Gratt. (Va.) 697; Derwort *v.* Loomer, 21 Conn. 246; 161 Ill. 190; 149 N. Y. 336. Statutes which specially regulate and limit the number of passengers to be taken on board a vessel cannot be disregarded with impunity; U. S. Rev. Sts. §§ 4252–4289. Local custom may affect the rule somewhat, as, *e. g.*, in allowing street cars to become crowded.

[2] Peniston *v.* Chicago R., 34 La. An. 777.

[3] Ellis *v.* Narragansett Steamship Co., 111 Mass. 146; 106 Mass. 180. But these accommodations are subject to reasonable rules; and, as for meals, officers of the vessel may have their own table apart from passengers. Ellis *v.* Narragansett Steamship Co., 111 Mass. 146. The master of a vessel has no right to put a passenger on short allowance by way of some petty discipline. Abb. Adm. (U. S.) 242.

[4] 3 Sawyer (U. S.), 397.

[5] § 643; 6 Blatchf. (U. S.) 158; s. c. 34 Conn. 554; Norwich Trans. Co. *v.* Flint, 13 Wall. (U. S.) 3 (as in receiving a company of soldiers on board a steamship). Cf. 5 Rich. (S. C.) 17; 133 N. C. 59.

great vigilance and care to prevent disturbance.[1] And, that the carrier's servants need not be over-timorous in enforcing the rules of decency and good order, it is but fair to hold that a person who is so far intoxicated that, by act or speech, he is becoming decidedly offensive or annoying to other persons, may be expelled from the car or vehicle, even before he has actually assaulted or insulted any one; provided this be done with as much humanity and consideration as the circumstances permit.[2] Misbehavior, indeed, or insanity, or loathsome disease, may be manifested in an impersonal manner, so as to annoy, discommode, or endanger the safety of other passengers, without being directed against a particular individual.[3] But in general, the carrier's liability for disorderly outbreaks or other dangerous exposure of an unusual kind depends greatly upon his efforts and his means of anticipating and guarding against the consequences.[4]

552. If the carrier was overpowered by a crowd, too great and coming too suddenly for the usual precautions to suffice against them, he should not be responsible for his inability to repress disturbance and violence among them; since no passenger carrier is bound to provide a police force against unexpected emergencies. But a lack of vigilance in admitting such persons, or of prudence and courage in dealing with them,

[1] New Orleans R *v.* Burke, 53 Miss. 200; 3 Sawyer (U. S.), 311; 22 Fed. (U. S.) 413; 23 Fed. 637. Where the conductor does his full duty, though not with entire success, the carrier is exculpated. 90 Md. 248.

[2] See 11 Allen (Mass.), 304 (journey upon a street railway). And see Murphy *v.* Union R., 118 Mass. 228; Railroad *v* Valleley, 32 Ohio St. 345; 87 Me. 387; Putnam *v.* Broadway R., 55 N. Y. 108. Any conductor may disarm and confine a passenger who is dangerous while in delirium tremens. 22 Fed. (U. S.) 413. Or may have him expelled and handed over to the public authorities. Atchison R. *v.* Webber, 33 Kan. 543.

If a passenger on shipboard proves to have small-pox or other infectious disease, it is right for the captain to isolate him, having due regard to the patient's comfort and welfare. 10 Ben (U. S.) 512.

[3] § **643**; Pearson *v.* Duane, 4 Wall. (U. S.) 605. One regularly received as a passenger should not be expelled merely for previous misbehavior. See *ante*, 529.

[4] Felton *v.* Chicago R., 29 N. W. 618; 90 Md. 248.

ought not to be manifested on his part to the detriment and danger of other passengers. And where the conductor goes elsewhere, shirking his duty and leaving such persons to riot and annoy, the carrier cannot expect to stand exonerated.[1] Nor is a carrier justified in disregarding dangers against which he was amply warned, and in failing to protect his patrons accordingly. The conductor of a railway train or captain of a steamboat should be the conservator of order and good morals; and the appeal of an aggrieved passenger for protection against the violence or annoyance of others on board ought not to go unheeded.[2]

553. Good treatment by the carrier's own servants is required by the law. It is not only good treatment from fellow-passengers and from strangers coming upon the car, vessel, or vehicle that each passenger is entitled to, but he should be well treated by the passenger carrier himself and all whom such carrier employs in and about the vehicle in the course of the journey. If the general doctrine of master and servant may be said to apply here, it applies with a very strong bias against the master, even where the servant's acts appear to be aggressive, wanton, malicious, and, so to speak, such as one's strict contract of service or agency does not readily imply.[3] Such is the general construction of the courts, so long as the offensive words and acts of a conductor, brakeman, porter, steward, waiter, or other such servant complained of, were said or committed in the usual line of duty; while, for instance, scrutinizing tickets and determining the right to travel, excluding

[1] Pittsburg R. *v.* Hinds, 53 Penn. St. 512. See Weeks *v.* New York Central R., 72 N. Y. 50; (Ga.) 7 Rep. 460.

[2] § **644**; New Orleans R. *v.* Burke, 53 Miss. 200; Pittsburg R. *v.* Pillow, 76 Penn. St. 510; Putnam *v.* Broadway R., 55 N. Y. 108. Where a passenger is in danger of assault, the conductor should either try to protect him where he is or have him go where he will be secure. 88 N. C. 536. As to the carrier's duty in carrying "non-union" workmen and others at the peril of having the train mobbed, see Chicago R. *v.* Pillsbury, 123 Ill. 9. As to the duty of utmost care in running one's car through a mob, see 25 R. I. 202.

[3] § **644**; 130 Mich. 453; 130 Ala. 334; 3 Cliff. (U. S.) 416; Gasway *v.* Atlanta R., 58 Ga. 216; 85 Mo. App. 28.

offenders and trespassers, and enforcing, or professing to enforce, the carrier's rules aboard the vehicle; and this, whether the transportation of passengers be by land or water.[1] But at all events, for an injury to the passenger by the carrier's servant under circumstances which absolve the latter from all blame, the carrier cannot be sued in damages.[2] Nor should the passenger by his own misconduct provoke the offence complained of.[3]

554. In general, the carrier's servants ought to be trustworthy, capable, and skilled in the performance of the several duties assigned them. Thus, only careful drivers of reasonable skill and good habits should be employed in journeying by stage-coach, hack, cab, omnibus, or horse railway.[4] Engineers, conductors, switchmen, brakemen, motormen, and all

[1] Moore *v.* Metropolitan R., L. R. 8 Q. B. 36; L. R. 7 C. P. 415; L. R. 8 C. P. 148; 3 Cliff. (U. S.) 416 (transportation by water); Goddard *v.* Grand Trunk R., 57 Me. 202; 62 Me. 83; McKinley *v.* Chicago R, 44 Iowa, 314; Sherley *v.* Billings, 8 Bush (Ky.), 147; 4 Gray (Mass.), 465; Passenger R. *v.* Young, 21 Ohio St. 518; Bryant *v.* Rich, 106 Mass. 180 (aggressors on a steamboat, the steward and table waiters); Jackson *v.* Second Avenue R., 47 N. Y. 274; 120 N. Y. 117; 85 Mo. App. 28; 43 La. An. 34; 86 Ga. 312.

If the carrier knowingly retains a servant who is guilty of misconduct towards the passenger, all the more clearly does he, by his sanction, make the wrongful act his own. 58 Ga. 216; 57 Me. 202.

Yet in some extreme instances of wanton injury by the carrier's servant, the usual doctrine of agency or service has been maintained, that, for wrongful acts committed beyond the scope of employment, the servant is as much a stranger to the carrier not contributing to the wrong as any third person. Little Miami R. *v.* Wetmore, 19 Ohio St. 110; Isaacs *v.* Third Avenue R., 47 N. Y. 122. But, even thus, on ordinary principle, the master, as it seems, must not have contributed to the injury by his own culpable negligence or misconduct. § 644.

Words of provocation alone will not justify such servant's assault upon a passenger; but otherwise with a menace of violence and especially of death. 142 U. S. 18.

[2] New Orleans R. *v.* Jope, 142 U. S. 18.

[3] 42 Fed. (U. S.) 787.

[4] Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181; 23 Ill. 357; 4 Greene (Iowa), 555; Sawyer *v.* Dulany, 30 Tex. 479; 4 Gill (Md.), 406; Farish *v.* Reigle, 11 Gratt. 697.

others employed in railway locomotion, must be competent for their several duties; on board a vessel, the officers and crew must each understand well the duties of his post; and all responsible employés should be temperate and sound-minded while on duty.[1] In general the passenger carrier is bound by the acts of his servants and subordinates in the course of their employment, as for his own, and must answer for their negligent or unskilful performance; and this, whether the the carrier be a person or a corporation.[2]

555. There are certain duties to be observed on the road and in the course of active carriage which no carrier who performs with a just sense of his public obligations can afford to neglect. These vary, of course, with the nature of the journey and the means of transportation.[3] The rules of the road are quite commonly regulated by statute; in America, each party is expected to bear or keep to the right in meeting, while it is known to be the reverse in England; and one who drives must look out not to run down foot passengers who are crossing the highway.[4] These rules yield somewhat to circumstances, and come in aid of that coolness and good judgment which for safe driving are always indispensable.[5]

[1] § 644.

[2] Tebbutt *v.* Bristol R., L. R. 6 Q. B. 73; 1 Stark. 272; Stockton *v.* Frey, 4 Gill (Md.), 406.

One partner in such carriage may likewise, on the usual doctrine of partnership, be held liable for the negligence of another. Many of our earlier cases relate to stage partnerships, which are now somewhat obsolete.

[3] § 645. See as to coachmen, etc., 3 Bing. 321; Wordsworth *v.* Willan, 5 Esp. 273; Farish *v.* Reigle, 11 Gratt. 697; Laing *v.* Colder, 8 Penn. St. 479; 1 McLean (U. S.), 540; Nashville R. *v.* Messino, 1 Sneed (Tenn.), 220; Stokes *v.* Saltonstall, 13 Pet. (U.S.) 181.

[4] Kennard *v.* Burton, 25 Me. 39.

[5] *Ib.* And see § 645; Lovejoy *v.* Dolan, 10 Cush. 495. To leave the horses in the road unfastened and unattended is carelessness in the driver. 66 Tex. 265.

The carriage of passengers by steam or electricity involves the employment of various special precautions against accident. On a railway the tracks must be kept clear and in safe condition; switches must be in good order and properly adjusted; a system of signals must be established, especially at intersecting tracks, which the engineer and those in charge

556. The powerful agency of steam in transportation calls for the employment of engineers skilful and well trained in its

are bound to regard; the progress of approaching trains must be watched, and any disarrangement of time-tables, through obstruction or otherwise, noted, in order that collision may be avoided; signals of danger must be prescribed and used in time of need; the whistle, the bell, the headlights, the brakes, must be in good order and well managed; engineers, firemen, and brakemen, as well as the conductor, must be each at his post; railway crossings must be watched, and their gates or guards suitably constructed; nor must animals or obstructions be run over heedlessly, nor broken tracks or dangerous places be jumped, nor the train be recklessly driven, whereby those on board receive injury. § **645**; Buxton *v.* North-Eastern R., L. R. 3 Q. B. 549; 4 Cush. (Mass.) 400; Tyrrell *v.* Eastern R., 111 Mass. 516; Sullivan *v.* Philadelphia R., 30 Penn. St. 234. In these and various other kindred respects the carrier is bound, according to custom and prevailing modes of business, to exert the utmost practicable care, diligence, and foresight; and it is the same, whether the object be to provide against the negligence and misconduct of the company's servants, or the negligence and misconduct of any stranger. Simmons *v.* New Bedford Steamboat Co., 97 Mass. 368; Pittsburg R. *v.* Hinds, 53 Penn. St. 512; Eaton *v.* Boston & Lowell R., 11 Allen, 500. Where there is special danger the passengers should be duly warned.

Passenger carriers by water must observe the usual rules which admiralty or legislation has promulgated. Thus, in order to lessen the dangers of collision, certain rules of navigation are established, which cannot be transgressed without rendering the offending vessel strictly liable for all disastrous consequences. These rules, which relate chiefly to the use of lights and fog signals in dark and foul weather, and to the method of steering and the precautions needful for observance when approaching other vessels, may be more fully studied in general works on admiralty and shipping. § **646**, and English and American statutes cited; The Galatea, 92 U. S. 439. There is a law of the road, so to speak, on the ocean highway, which sailing-vessels and steamers must observe reciprocally and with reference to others of their own denomination. 8 Wall. (U.S.) 302; The City of Brooklyn, 1 P. D. 276; 23 Wall. 165; The Free State, 91 U. S. 200. Canal-boats, and ferries, too, and boats or small craft, engaged in inland or coasting transportation of freight or passengers, may be found subjected to wholesome requirements of a similar character. See 6 Cow. (N. Y.) 698. In all instances of public carriage by water, the general principles of legal responsibility are those applicable to land carriers, with only such modifications as naturally result from employing a different and peculiar means of transportation. § **646**. And as to the collision of vessels, see 3 Wall. (U. S.) 159; The Atlas, 93 U. S. 302; 14 Wall. (U. S.) 199; The Velasquez, L. R. 1 P. C. 494.

use,—a class of men whose service in driving our modern railway trains demands, in other respects, quite a high order of intelligence, besides steady habits and a courageous disposition. Steam and the use of steam machinery for propelling vessels invite special danger to passengers, which the inspection acts of Congress aim in a measure to avert. Where, because of the carrier's remissness, or his disregard of such legislation, injury occurs, whether it be through the use of improper machinery and boilers, or reckless or unskilful management, so that scalding steam escapes, or the boiler bursts, the carrier should strictly respond;[1] and, in general, carriers who use steam should use the utmost care and diligence to avert personal injury from this cause.[2] Precautions needful for the more important methods of transit are frequently prescribed by statute, and must be followed accordingly, or the carrier will be culpably negligent. But, as it has been well observed, compliance with positive statute regulations does not exempt the carrier from responsibility for neglect to observe all other reasonable precautions.[3]

557. Without unreasonable deviation or delay, the passenger carrier must proceed to the place of destination by the agreed or customary route. Hence, in the place and time of starting, modern railway companies, steamers, and other leading classes of carriers are bound by their published schedules and time-

[1] Carroll *v.* Staten Island R., 58 N. Y. 126; Steamboat New World *v.* King, 16 How. (U. S.) 469.

[2] § 647; 14 How. (U. S.) 482, 486.

[3] Simmons *v.* New Bedford Steamboat Co., 97 Mass. 368, per Gray, J. Thus, the inspection of a boiler and machinery of a passenger steamer, and the certificate of the inspector that they fulfil the requirements imposed by act of Congress, do not, of themselves, impair the common-law right of action by persons injured through the carrier's negligent or unskilful management. Swarthout *v.* New Jersey Steamboat Co., 48 N. Y. 209. Nor does it sufficiently exonerate a railway carrier from liability for injury caused at a railway crossing, that a sign was put up and the bell rung, as an act of legislation required. 2 Cush. (Mass.) 539; 5 Q. B. 747; 13 Ill. 548; 44 Iowa, 236. See 24 Ga. 75. As to the rate of speed, the carrier may usually fix this for himself, provided that the risks of the travelling public be not unduly increased. 106 Ill. 371.

tables;[1] these, and their posters and advertisements generally, being in the nature of a public offer which patrons and passengers are understood to accept.[2] There may likewise be special representations of this character to bind the carrier to an individual passenger as by a special undertaking.[3] The duty applies with reference both to going over the whole route within the prescribed time, and making intermediate stops for the purpose of putting off or taking aboard passengers at specified times and in specified way places.[4] Upon large transporters of passengers, like railway companies, there appears, in fact, to rest a public duty of giving some sort of public notice of the running times; which duty is commensurate with supplying such needful information that travellers of ordinary intelligence may, by reasonable care and caution, conform themselves to its terms.[5]

558. The publication of time-tables indicates, however, no more than a reasonable conformity thereto and reasonable diligence, subject to those possible casualties and mishaps against which ordinary skill and prudence on the carrier's part are unavailing.[6] Nor is the case an unusual one where delay or deviation would be excusable and highly proper: the main concern being to transport at all events with sedulous regard to life and limb; and one disarrangement, excusable of itself, involving many delays,

[1] § **648**; Hobbs *v.* London R., L. R. 10 Q. B. 111; 5 E. & B. 860; Sears *v.* Eastern R., 14 Allen (Mass.), 433; Le Blanche *v.* London R., 1 C. P. D. 286.

[2] Heirn *v.* M'Caughan, 32 Miss. 17.

[3] Hobbs *v.* London R., and other cases *supra.*

[4] L. R. 10 Q. B. 111; 32 Miss. 17; Chicago R. *v.* George, 19 Ill. 510.

[5] See 6 Duer (N. Y.), 523; Barker *v.* New York Central R., 24 N. Y. 599; 8 E. L. & Eq. 362.

[6] § **649**; 1 C. P. D. 286; Gordon *v.* Manchester R., 52 N. H. 97; McClary *v.* Sioux City R., 3 Neb. 44; Savannah R. *v.* Bonaud, 58 Ga. 180. In the matter of running precisely on time, courts incline to be lenient to the carrier, unless disaster appears plainly due to his fault in this respect. 44 Iowa, 284; 45 Iowa, 76; State *v.* Philadelphia R., 47 Md. 76.

particularly where the transportation, as by railway, is upon fixed tracks and attended with peculiar dangers and difficulties.[1]

559. The passenger's right of action for the carrier's failure to start or run the conveyance according to his undertaking involves the recovery of such damages as the plaintiff may have sustained in consequence, so far as the damage be the natural and justly foreseen consequences of the carrier's breach of contract.[2] Under strong circumstances, a passenger suffering by the carrier's unreasonable detention and violation of duty may choose another conveyance, or even, upon notice of his grievance, when a railway passenger, engage a special train to carry him through; but this concession of the law appears to be upon the suggestion that, where the carrier fails to do of his own motion what he was bound to do, the passenger may do it for him at his cost;[3] and the passenger as a rule should simply go by the best available means to his destination. It is certainly more natural and just for the carrier, when a contingency arises where his own vehicle or car is found unable to perform the transit with due despatch and facility, to make his own transfer of the passengers, in order that his contract be performed towards them with as little loss to himself as may consist with justice to their interests; otherwise, at discretion, to proceed himself to the journey's end, with no more delay or deviation than he

[1] Change of time-tables should be publicly announced. Sears *v.* Eastern R., 14 Allen (Mass.), 433. Usage short of this, though pursued by the company several years, cannot justify. *Ib.* See *ante*, 535; § **650**.

A carrier's undertaking to run at a certain time is not usually to be inferred from tickets or the language of a ticket agent, but rather from time-tables and a public schedule. 19 C. B. N. S. 310; Pittsburgh R. *v.* Nuzum, 50 Ind. 141; 19 Ill. 510. Nor is the mere statement, by the carrier or his servant, of the usual time required for running through, an absolute promise to carry the person through in that time. Strohn *v.* Detroit R., 23 Wis. 126.

[2] § **650**; 5 E. & B. 860; Hobbs *v.* London R., L. R. 10 Q. B. 111; 1 H. & N. 408; Sears *v.* Eastern R., 14 Allen (Mass.), 433; Thompson *v.* New Orleans R., 50 Miss. 315.

[3] See Le Blanche *v.* London R., 1 C. P. D. 286.

can reasonably help.[1] A collision or injury occasioned proximately by running in disregard of time-tables renders the carrier liable for his negligence.[2]

560. As concerns changes or way-stations, a passenger carrier ought to have changes of conveyance and the names of way-stations so made known to passengers, by audible announcement or otherwise, and make such reasonable stops, that way passengers may change, or get off and on, according to their respective rights in the premises.[3] But the carrier may prescribe and enforce reasonable rules to protect his interests against permitting passengers to get carelessly on or off, or to stop over.[4] Nor is a railway carrier bound to put off or take on passengers, except at the regular stations.[5]

[1] Williams *v.* Vanderbilt, 28 N. Y. 217.

[2] Chicago R. *v.* George, 19 Ill. 510. The obligations we have considered apply to the carrier who contracts on behalf of himself and connecting carriers to send the passenger through to a given destination; and for damages resulting from the non-performance or negligent performance of connecting carriers as to time, place, methods, and facilities, the passenger who has purchased his ticket under such an agreement may sue accordingly. *Ante*, 518–520; 17 N. Y. 306; 4 Sneed (Tenn.), 203; Van Buskirk *v.* Roberts, 31 N. Y. 661.

It is tortious for a passenger carrier to carry off the passenger's baggage against his assent, while deliberately refusing to carry the passenger himself, according to contract. Holmes *v.* Doane, 3 Gray (Mass.), 328. As for duty of delivering a telegram on board, see 94 Me. 379.

[3] § **651**; Fuller *v.* Naugatuck R., 21 Conn. 558; Penn. Railroad *v.* Kilgore, 32 Penn. St. 292; Southern R. *v.* Kendrick, 40 Miss. 374; Barker *v.* New York Central R., 24 N. Y. 599; Thompson *v.* New Orleans R., 50 Miss. 315; Toledo R. *v.* Baddeley, 54 Ill. 19; 80 Mo. App. 152; 116 Ga. 743. See next chapter.

[4] See Breen *v.* Texas R., 50 Tex. 43. If transfers are made, the carrier undertaking to transport through should pay due regard to supplying whatever transfer checks or tickets may be needful. 70 Ga. 368.

[5] Pittsburgh R. *v.* Nuzum, 50 Ind. 141.

Passengers for more distant points have no right to get off and on the vehicle at intermediate stations; but the universal and convenient practice of permitting this as to coaches, railways, and steamers is not illegal, especially if the stop be a considerable one; and the carrier ought to have his facilities suitable, and give such reasonable notice before starting again, that the passenger, if not actually delinquent, may resume

561. II. **Now, to consider the liability for injuring or killing a passenger.** Our examination of the carrier's duties with reference to the journey indicates that, while the law may not be perfectly explicit, the standard of liability is set very high, — not so high as that of the common carrier of goods, nor yet so low as that of ordinary bailees of goods for hire; but (if resembling any bailee of chattels at all) most nearly analogous to that of a bailee for his sole benefit, who must bestow "great diligence" and is held to answer for what is termed "slight negligence."[1] Carriers of passengers do not warrant the safety of passengers, but they are held to "a very high" or the "highest" or the "utmost" degree of practicable care under the circumstances presented; and to this standard a philanthropic age must adhere.[2] On the whole, the present liability, which is fixed by public policy from considerations of humanity which can neither be wholly established nor wholly restrained by special contract, may be in general defined as follows: The carrier of passengers must use the utmost (or perhaps very great or a very high degree of) forethought, care, and diligence towards the human beings travelling under his charge, consistently with the nature and extent of the business he pursues; and for the injurious consequences of even slight, or, as some cases would say, the slightest, neglect on the part of himself or his servants, he is, in this sense, liable; though not as one whose vocation imports a warrant of absolute safety, or of indemnity against those disasters which the exercise of due forethought, care, and diligence on his part fails to avert.[3] And for the per-

his proper place. State *v.* Grand Trunk R., 58 Me. 176; Keokuk Packet Co. *v.* True, 88 Ill. 608.

[1] *Ante*, 52.

[2] See ruling objected to as too strong in 141 Mass. 31, and 76 Mo. 282; and as not strong enough in 6 Q. B. D. 685. "Strict diligence" is a correct statement. 93 Ala. 514; cf. 130 Ala. 256. Some recent cases say "high" and others "the highest."

[3] This statement, with its limitations, is supported by most of the authorities already cited, *passim*, in the course of this chapter. See, more particularly, 9 Met. (Mass.) 1; Readhead *v.* Midland R., L. R. 2 Q. B.

sonal damage which ensues to the passenger from wanton, malicious, and wrongful misbehavior on the part of the carrier, the carrier must strictly respond, if personally at fault; and generally, too, if the wrong were that of a carrier's servant acting in the course and scope of employment.[1] In all such cases the question is one of proximate and direct cause of injury.

562. Where act of God or of the public enemy proximately occasioned the injury in question,[2] or even accident and misfortune in the lesser sense above implied, and without his own fault, the carrier is certainly absolved from liability. And reason and common justice demonstrate, too, that the carrier is exonerated when the proximate and moving cause of the disaster was the act of the injured passenger himself; since the rule is general that ordinary care is here required, so that no one can charge another in damages for negligently injuring him, where he himself failed to exercise due and reasonable care in the premises.[3] But due and reasonable

412; L. R. 4 Q. B. 379; 14 How. (U. S.) 468; Steamboat New World *v.* King, 16 How. 469; 4 Gill (Md.), 406; 88 Ill. 608; 66 Tex. 265; 97 Mo. 647; 32 W. Va. 370; Koehne *v.* N. Y. R., 165 N. Y. 603; 108 Wis. 319 ("utmost" too strong a word); Norfolk R. *v.* Tanner, 100 Va. 379; Clark *v.* Eighth Avenue R., 36 N. Y. 135; 92 Va. 400.

[1] *Ante*, 553. See 3 Cliff. (U. S.) 416; 58 Ga. 216; 4 McCr. (U. S.) 371. Evidence that one deported himself as conductor or brakeman, etc., may justify the presumption that he was such. (Ark.) 2 S. W. 783.

[2] See § **652**; 37 Mo. 240; McPadden *v.* New York Central R., 44 N. Y. 278; Ellet *v.* St. Louis R., 76 Mo. 518 (sudden effect of a freshet); (Ind.) 8 N. E. 18.

[3] Gee *v.* Metropolitan R., L. R. 8 Q. B. 161; 7 Allen (Mass.), 207; 23 Penn. St. 147; Pittsburg R. *v.* McClurg, 56 Penn. St. 294; Wheelock *v.* Boston & Albany R., 105 Mass. 203; Higgins *v.* Hannibal R., 36 Mo. 418; 95 Ga. 736; 107 La. 370. This is a question of fact. 70 N. H. 607; 165 N. Y. 641; 85 Minn. 357.

The application of this doctrine occasions some very nice distinctions concerning contributory negligence in our later cases. 1. Thus, one who rides upon a train, or in a car, or upon the part of a vehicle, where, as a passenger, he is not duly in place, has been allowed to recover for an injury there sustained; this, however, usually upon a state of facts showing some or all of such circumstances as, that it was a place which,

care on the passenger's part need not be expressly and positively proved; for the law will infer it where there is no

per se, was not dangerous or unusual for passengers, or that the conductor or other person in charge silently or expressly permitted the person to stay, knowing he was there, or that the action of the passenger only remotely occasioned the injury, or that the carrier's negligence was gross as compared with his own. See 20 Minn. 125; 54 N. Y. 230; 86 Penn. St. 139; 58 Me. 187; 33 Wis. 41; 8 Allen (Mass.), 234. But where a party rides upon a caboose solely used for other purposes, or a locomotive, or travels in some other plainly dangerous place, not intended for passengers at all, the inclination is against permitting the injured party to recover; more especially if he is a trespasser and no passenger; or if the company's proper official sanction was never given to riding in such a place; or if the injury be directly traceable to exposing one's self to the peculiar hazards of such a place. 57 N. Y. 382; 8 Kan. 505; 84 Me. 203. But cf. 99 Mo. 263. And see 77 Miss. 338 (improperly riding on top of car). And it seems fair, at least, to expect from the passenger in such cases an exertion of care and diligence commensurate under the circumstances with the special exposure. Where the conductor had no knowledge and gave no consent, it cannot be contended that he ought to have discovered and ordered the passenger out. 79 Ky. 160; 84 Me. 203. Nor is a station agent the proper person to give such authority to ride, apart from those in charge of the train. 40 Ark. 298. Carriers should, however, be especially careful not to knowingly permit young children to ride in dangerous places. 45 Conn. 284. As to distinguishing between paying and non-paying passengers in this respect, see *post*. Generally speaking, a passenger who might ride in a less dangerous place cannot excuse himself for riding where it is far more dangerous, on the plea that he had no seat. 99 Penn. St. 492. And see 30 Fla. 1. Riding upon the platform of a car in a fast-moving train is carelessness. 84 Me. 203. But as to a street-car it might be different. See 177 Mass. 174; 174 N. Y. 522.

2. As to projecting one's head, arm, or body out of a car window, or doing other imprudent acts. It would be a passenger's own fault if he kept his arm thrust clear out of a railway car window; for there is always danger from quickly passing trains and obstructions of various kinds on a railway; the same in a lesser degree might be apprehended in any inland conveyance moving too rapidly for due warning of approaching objects. Injuries thus occasioned are due to the passenger's own negligence. And in some cases the slightest voluntary projection of one's arm, head, or elbow out of the car window is deemed careless so as to defeat the right of recovery. 39 Md. 329; 3 Allen (Mass.), 18; 7 Allen, 207; 56 Penn. St. 294; 5 Bush (Ky.), 1. And see as to upper compartment of a street-car (Md.), 5 Atl. 346. But in others, a slight

appearance of fault, either positive or negative, on his part, in the circumstances under which the injury was received or

projection of this sort is not taken to be conclusive against the passenger. For the duty of the carrier to journey sufficiently clear of all such obstacles, and construct and locate his tracks, buildings, bridges, and cars accordingly, is deemed paramount; so that his failure in these respects would be negligence so proximate or so gross in comparison with that of the passenger as not to defeat the latter's right to recover. See 52 Mo. 253; 51 Ill. 333; 21 Penn. St. 203. But cf. 56 Penn. St. 294. And more so if the arm, etc., does not protrude but merely rests on the sill. 35 W. Va. 389. And it must, of course, be admitted, that an obstruction so close as to crash in the window, or break the car, or otherwise damage one sitting with his elbow, head, and person inside, imputes no carelessness to the passenger, but rather puts the onus upon the carrier.

3. In moving about the vehicle, passing from one car into another, shutting windows or doors, or trying to regulate matters for his own comfort, the passenger might, by his carelessness, exonerate the carrier from liability. L. R. 4 C. P. 739. But on the other hand, if the carrier's fastenings be insecure, and the passenger's act not an unreasonable one, the blame of the accident should fairly rest upon the carrier. L. R. 8 Q. B. 161. And see Louisville R. *v.* Kelly, 92 Ind. 371 (passenger jostled carelessly by a brakeman, while going into a forward car to find a seat as the conductor had directed).

4. Intoxication of the passenger, contributing to his injury, may debar him from recovering against the carrier. But intoxication which does not contribute to the injury will not prevent him from maintaining his action. 115 Mass. 239.

5. Carelessly trying to get off or on a moving train or vehicle is another obstacle to recovery by the injured passenger. 66 Ga. 746; 67 Ga. 306; 88 Ga. 436; 51 Mich. 236; 75 Mo. 185, 475; 102 N. Y. 280; 165 Mass. 522; 87 Me. 466. And in walking on a station platform, along the tracks or the pier, the passenger is bound to ordinary prudence. 20 S. C. 219. Some cases rule strictly against the passenger; while others reasonably assert that attempting to get off or on a moving train is not negligence *per se*. See 119 Ind. 542. Often in such cases the special facts may be material to the issue of contributory negligence. See 162 Mass. 326; 145 N. Y. 508; 153 Ill. 131; 147 U. S. 571; 85 Ala. 600.

6. Intentional fraud, in travelling on a ticket which the passenger had no right to use, is held to debar one from recovering for personal injury sustained, if the carrier was not grossly at fault. 85 Ill. 80. But cf. 107 Ind. 442. As to furnishing surgeons of ordinary skill, etc., where injury occurs, see 18 Fed. (U. S.) 221.

the death caused.[1] And it would appear that, if the carrier substantially cause the disaster by his own fault, a slight aberration or confusion of mind on the part of the passenger at the instant of peril ought not to be turned to the advantage of the real offender, so as to relieve the latter of responsibility for the calamity.[2]

563. As for causing the passenger's death, passenger carriers seem not to have been, at the common law, liable to an action; for the theory of the common law is, that the right to sue for a personal injury is personal to the party receiving it, and that the death of one human being cannot be complained of as an injury to another. Hence, the personal representative, surviving husband or widow, or next of kin, could formerly maintain no such action;[3] nor, even though the local statute permitted actions for personal injury to survive, did this avail where the death was instantaneous, so that the injured party died without a right of personal action.[4] But modern legislation in England and America corrects this hardship by supplying a remedy which proves salutary both for relieving the distressed family and keeping the carrier to the due

[1] Mayo *v.* Boston & Maine R., 104 Mass. 137; 18 N. Y. 422. But see Deyo *v.* New York Central R., 34 N. Y. 9.

[2] § **652.** This doctrine is applied as between colliding vessels. The Carroll, 8 Wall. (U. S.) 302; The Falcon, 19 Wall. 75. Nor is leaping from a stage or other vehicle at the critical moment of danger visited harshly upon a passenger; though to so leap or get on or off the vehicle merely to avoid being carried beyond his stopping-place, or other lesser reason, might not be excusable. 13 Pet. (U. S.) 181; 24 Ga. 356; 17 Ill. 406; 108 Wis. 319; 98 Mass. 194; 9 La. An. 441. Cf. Railroad Co. *v.* Aspell, 23 Penn. St. 147; Nelson *v.* Atlantic R., 68 Mo. 593, and other cases cited *post*, c. III.

And see, as to injury sustained in a sleeping-car, 38 Ohio St. 461.

As to the burden of proof in such suits, see § **653**; L. R. 3 C. P. 216; L. R. 8 C. P. 390; L. R. 4 Q. B. 693; 64 Penn. St. 225; 109 Mass. 398; 76 Penn. St. 510; 95 N. Y. 562; 11 Gratt. (Va.) 697; 19 Ohio St. 110; 76 Mo. 288.

[3] § **654**; 1 Cush. (Mass.) 475; 25 Conn. 265; 6 La. An. 495; 14 B. Mon. (Ky.) 204; 4 Allen (Mass.), 56.

[4] 9 Cush. (Mass.) 108. But if the person lives after the accident, though remaining insensible, the action survives. 11 Allen (Mass.), 34.

performance of his duty. The inclination of these statutes appears to be to set apart the amount of damages recoverable, as a fund for the exclusive benefit of those entitled in case of intestacy, without regard to the will of the deceased;[1] and the amount of damages recoverable is limited usually to a sum fixed, but otherwise liberally awarded at the discretion of the jury.[2]

564. III. **Whether special contract and special circumstances** may diminish the passenger carrier's liability for the personal safety of those he conveys. The point is somewhat novel in its present application; but, upon the whole, there seems a disinclination in the courts, particularly those of America, to permitting the carrier to regulate his momentous responsibility for life and limb at pleasure, however it might be with reducing his common-law liability for general freight or a passenger's baggage. Public policy is less flexible and yielding, where it comes to fixing the terms of human conveyance, than it appeared when only senseless goods and chattels were concerned; nor can it be affirmed, as a general proposition, that the carriage of passengers may, by the most explicit understanding between the public transporter and his customer, be brought down even so slightly as to leave the former analogous, in legal responsibility, to an ordinary bailee for hire. At all events a carrier's special contract of immunity from the consequences of culpable negligence by his servants must be clearly and unequivocally expressed; as well as brought home properly and seasonably to the passenger.[3]

[1] Railroad Co. *v.* Barron, 5 Wall. (U. S.) 90; Chicago R. *v.* Morris, 26 Ill. 400.

[2] 5 Wall. (U. S.) 90; Railway Co. *v.* Whitton, 13 Wall. 270. See South Carolina R. *v.* Nix, 68 Ga. 572. See Leggott *v.* Great Northern R., 1 Q. B. D. 599. As to granting additional damages, cf. further, local statutes on this subject; L. R. 3 Q. B. 555 (accord and satisfaction); 58 Me. 176 (carrier indicted); 107 Mass. 236; 192 U. S. 440.

[3] § **655**; Northern Pacific R. *v.* Adams, 192 U. S. 440 (contract signed in ink by passenger); 125 N. Y. 422. A drover who is injured cannot be concluded by a contract which the owner of animals signs after the accident. 64 Wis. 447. But any one who accepts a strictly free pass is bound

565. But at all events, where nothing special is stipulated to the contrary, one who is lawfully carried, even though he rides free, and who is not a mere trespasser, is entitled to

to read its clearly stated conditions. Boering *v.* Chesapeake R., 193 U. S. 442; 150 Mass. 365.

This issue is chiefly raised in the later decisions respecting "drovers' passes," where persons are taken free, in charge of the animals they wish transported, and upon railway trains which are naturally better adapted for the freight than their living owners. In England it is decided, but in the lower tribunals only, that any person who travels on a drover's pass in charge of animals travels at his own risk of personal safety; this on the supposition that the passenger carrier may, by special contract, divest himself of liability; and in that country even paying passengers have been subjected to like conditions embodied in the tickets they purchase. McCawley *v.* Furness R., L. R. 8 Q. B. 57; L. R. 10 Q. B. 212; Haigh *v.* Packet Co., 52 L. J. 640 (a steamship passenger, assuming all risks). The same rule as to drovers has been announced, too, in this country, and the inference is, that any passenger who travels free on a special understanding, as evinced by his ticket or otherwise, that he assumes all risks of injury to his person, relieves the carrier of liability accordingly; and thus, in fact, has it been decided in New York and various other States. Bissell *v.* New York Central R., 25 N. Y. 442; 49 N. Y. 263 (facts quite exceptional); Kinney *v.* Central R., 32 N. J. 407; 34 N. J. L. 513; 24 N. Y. 181. And see 21 Wis. 80; 51 Conn. 143; Griswold *v.* N. Y. R., 53 Conn. 371; Quimby *v.* Boston & Maine R., 150 Mass. 365; 147 Mass. 255; 86 Me. 261; 157 Ind. 616; 1 Wash. 311.

But the rule, which a broader appreciation of the public welfare seems to favor, is to the contrary; and other States view all these distinctions between free and paying passengers as unsound. See Indianapolis R. *v.* Horst, 93 U. S. 291; Railroad Co. *v.* Lockwood, 17 Wall. (U. S.) 357; 51 Penn. St. 315; Cleveland R. *v.* Curran, 19 Ohio St. 1; 17 Fed. (U. S.) 671; 102 Fed. (U. S.) 17, 850; Ohio R. *v.* Nickless, 71 Ind. 271; 40 Ark. 298; 14 W. Va. 180. These cases relate to "drovers' passes." As to more general cases of gratuitous transportation, see 14 How. (U. S.) 468; 16 How. 469; Pennsylvania R. *v.* Butler, 57 Penn. St. 335; Graham *v.* Pacific R., 66 Mo. 536. And see 30 Ill. 9; 39 Iowa, 246; 57 Penn. St. 335; L. R. 2 Q. B. 442, per Cockburn, C. J.; 41 Ala. 486; 110 Ga. 665; 80 N. Y. S. 941; Gulf R. *v.* McGown, 65 Tex. 640. In Northern Pacific R. *v.* Adams, 192 U. S. 440 (1903), the Supreme Court of the United States at length gives its weighty preponderance in favor of permitting a carrier who gives a free pass to throw the whole risk upon the passenger by special contract. But see Baltimore & Ohio R. *v.* Voight, 176 U. S. 498.

recover damages if injured by the carrier's negligence.[1] And an ordinary passenger, who pays the regular fare without deduction, ought not to be denied his legal rights on any mere inference that he has waived them; while it is certain that no such waiver can be extorted from him as the condition of his carriage.[2] We need hardly repeat, however, that where one rides, without the carrier's knowledge and assent, in unusual and unsafe places, or travels whether by abuse of his own pass or fraudulently on another ticket, so as to evade fare and not be in the just sense a passenger, his right of action, or at least his recovery of damages as for injury by the carrier, is likely to be defeated.[3]

566. IV. **To consider the general right of ejection.** In pursuance of his rights, and his general duty as well, the passen-

[1] § **657**; Packet Co. *v.* Clough, 20 Wall. (U. S.) 528; Wilton *v.* Middlesex R., 107 Mass. 108; Rose *v.* Des Moines Valley R., 39 Iowa. 246; Brennan *v.* Fair Haven R., 45 Conn. 284; 22 Barb. (N. Y.) 91; Blair *v.* Erie R., 66 N. Y. 313; Nashville R. *v.* Messino, 1 Sneed (Tenn.), 220; Exton *v.* Central R., 63 N. J. L. 356; 110 Fed. (U. S.) 670; Russell *v.* Pittsburgh R., 157 Ind. 305; 93 Mo. App. 267; 41 Or. 151.

That which purports to be a free pass may be nevertheless given for consideration; in which respect one might show himself not estopped by the special terms of his ticket. Railway Co. *v.* Stevens, 95 U. S. 655.

[2] See Elliott *v.* Western R., 58 Ga. 454. One travelling for a considerable distance is presumed rightfully on board. (Ind.) 8 N. E. 18. A drover travelling by railway on a free pass may be in effect a passenger for hire. *Ante*, 524. As to government agents or postal clerks, cf. 95 N. Y. 562; 195 Penn. St. 499. As to express messenger, see 176 U. S. 498 (special waiver of all liability for injury); 96 Penn. St. 256; 95 N. Y. 562. Newsboys permitted to go upon a car and sell newspapers are not trespassers; but neither are they passengers and ordinary care towards such is sufficient. Padgitt *v.* Moll, 159 Mo. 143 (street car). See 108 Mass. 7; 41 Cal. 71. An employé, allowed under the carrier's rules to ride free, has the rights of a passenger. 177 Mass. 365; 105 Tenn. 460. See further 64 Tex. 549; 118 Ga. 826.

[3] *Ante*, 524; 77 Miss. 338. Towards trespassers (especially if careless), the carrier is liable only for gross, wilful, wanton, or reckless negligence. Carrico *v.* West Virginia R., 35 W. Va. 389; 114 Fed. (U. S.) 123.

A passenger on a mixed or freight train assumes the special risks —

ger carrier, or his representative, may eject from the car or vehicle persons on board who wrongfully refuse to pay their reasonable fares, or who present void tickets and insist unreasonably upon having them accepted for carriage, or who misbehave and violate wholesome regulations for promoting the general comfort and security of those on board; or who are mere intruders, having no right on board.[1] But, with respect more particularly to those once accepted as passengers, this dangerous discretion must be prudently exercised. Where the issue relates merely to one's proper fare and the passenger is not violent and abusive, the conductor should allow him every opportunity to pay or explain before resorting to harsh measures; nor at any time should the carrier fail in judgment and forbearance or eject for his own revenge and to gratify an ill temper; nor, of course, should he eject when his reason is

e. g. jerks, etc. — by such trains. 25 Ky. L. 38. And a drover travelling on a freight train is entitled to such care only as is consistent with running such trains. 95 Md. 637.

[1] § 658. For the usual circumstances under which such ejection is proper, see *ante*, 531, 551. And see Chicago R. *v.* Flagg, 43 Ill. 364; 11 Allen (Mass.), 304; 50 Tex. 43; O'Brien *v.* Boston & Worcester R., 15 Gray (Mass.), 20. One who is properly expelled for refusing to pay fare does not regain the right to re-enter by tendering it or buying a ticket merely from the place of ejectment. See 32 N. J. 309; 175 N. Y. 281; 15 N. Y. 455; 132 Mass. 116. Cf. 39 Ohio St. 444.

But the better authorities among the latest are averse to needless ejectment for mere non-payment of fare; and hold that where a fractious passenger by rail tenders his fare before actual ejectment, changing his mind at the last moment, or where some one else offers to pay the fare for him, the conductor has no right to refuse it and to eject him. 80 N. Y. 236; 68 Ga. 572; 18 Fed. (U. S.) 155; 62 Tex. 442; Pease *v.* Delaware R., 101 N. Y. 367; 174 Mo. 524. This at all events, where the train was stopped at a regular station, and others were not inconvenienced by some stoppage for the sole purpose of ejectment, and the right to remain was not forfeited by such passenger's own wilful abuse and misbehavior. Cf. 15 Fed. (U. S.) 57 (where the passenger wrangled, and so misbehaved as to invite ejection); 88 Ga. 529; 104 N. C. 312. Some local statutes forbid ejectment on a railway except at regular stations. 29 Vt. 160; 43 Ill. 420; 45 Ark. 524. Cf. 34 Ind. 532. Nor has the carrier the right to accept one's fare or take up his ticket and then eject him for non-payment of proper fare; nor even to eject the passenger, and then return the money

not a good one.[1] And, in general, the carrier or his representative should not needlessly abuse the person ejected, in language or acts; nor subject him to wanton indignity; nor use more force than is needful; nor eject him at such a place or in such a manner as carelessly or wantonly to endanger him in life or limb;[2] nor, of course, eject without good cause. Repeated misbehavior after a warning strengthens the right to eject for such a cause.[3]

or ticket to him; but he should return the money or ticket before ejecting at all. 55 Cal. 570. A passenger may be expelled for refusing to pay the fare of a minor under his charge, though paying his own fare. 62 Md. 300. Even though passage might be refused in an improper place, unnecessary violence is not excusable. 72 Ga. 292. But allowance should be made for any one who appears a *bona fide* passenger with his proper fare, whose age, ignorance, disability, or other good cause prevents a prompt compliance with the conductor's demand, or where one without his ticket has reasonable explanation to make. 14 Lea (Tenn.), 128; 91 N. C. 506; Ind. (1903); 189 Ill. 384.

[1] § **658**. That the carrier may with far more freedom expel those who endanger the safety and comfort of other passengers by outrageous conduct, intoxication, infectious disease, etc., see *ante*, 553, 554; Cobb *v.* Elevated R., 179 Mass. 212. Here expulsion is for the general benefit of those who are travelling, while as to mere non-payment only the carrier and the particular passenger are interested.

[2] Coleman *v.* New York R., 106 Mass. 160; State *v.* Ross, 2 Dutch. 224; Higgins *v.* Watervliet Turnpike Co., 46 N. Y. 23. Ejection while a railway train is in motion would be dangerous; but as to a horse-railroad, such ejection appears not so positively dangerous. Cf. 23 N. Y. 343; 118 Mass. 228; 183 Mass. 271; 67 Ga. 306. But as to proximate cause of injury, see 32 Ohio St. 345.

[3] Robinson *v.* Rockland R., 87 Me. 387.

Where the conductor of a train, captain of a steamboat, or other representative of the passenger carrier, who is charged with enforcing the rules and resorting to this disagreeable extremity, abuses his authority in any such respect, the carrier himself may commonly be held answerable in damages to the person aggrieved; while the servant is liable to criminal prosecution besides. § **658**, and cases cited. A wrongful ejectment may be resisted and wrongful passage-money refused; and the fact that the passenger aggrieved does resist will not prevent him from recovering damages against the carrier. A needless and humiliating arrest, with removal from the car, and false imprisonment besides, renders a carrier still more strongly liable. And wrongful expulsion is good foundation for

a suit against the carrier, even though the passenger leaves as ordered without making physical resistance or compelling violence. § **658**, and cases cited. Arrest of a passenger is by local statute permitted in certain cases, besides ejectment. A brakeman or other employé of the carrier may be shown to be the usual agent for ejecting, so as to bind the carrier. 48 Ark. 177.

CHAPTER III.

TERMINATION OF THE JOURNEY.

567. One's journey may prematurely end, as we have already seen, by his ejection or expulsion from the car, vessel, or other vehicle;[1] or perhaps in some personal accident or misfortune;[2] in either of which events the law and facts must decide whether carrier or passenger should bear the loss.

567 a. But in the natural course, the journey properly terminates, so that the carrier shall discharge himself of responsibility, when the place is reached to which he undertook to make conveyance, and the passenger is properly landed there, unless, indeed, the passenger has chosen to stop short of such destination, and leave the vehicle. Custom and mutual agreement must determine what this place shall be: whether, as in the instance of a hackney coachman, at the passenger's own door; or, again, where the carriage is by omnibus or street-car, at such place on the route as the passenger shall elect; or, once more, to take the case by far the most familiar of all, at the station, depot, or landing-place where the rail-car, steamboat, or other vehicle makes its usual stop to leave passengers.[3] The undertaking may have been to leave the passenger at the end of the carrier's route; or at some way-place; or perhaps to send him through to some point by means of carriers performing in succession; or, once more, so as to leave him to his own choice. But, whatever the undertaking, express or implied, to this in its just intent, the carrier and his passenger remain mutually bound; subject, of course, to mutual waiver and a right for cause to consider the obligation on either side as sooner rescinded.[4] And the common understanding is that

[1] *Ante*, 566. [2] *Ante*, 562–565. [3] §§ **659**, **660**.

[4] § **660**. See 1 Esp. 27. A carrier need not stop except at regular stopping-places, unless expressly contracting to do so or running a busi-

the passenger shall be carried through, not only safely and securely, as to life and limb (under the conditions already dilated upon), but without unreasonable delay and according to the usual or the prescribed means.[1] The passenger relation usually ceases when the passenger has left the carriage;[2] but circumstances connected with the station or landing-place may extend it somewhat farther as to certain kinds of carriage.[3]

568. A fair time and opportunity to alight should be given at the proper station or landing-place for passengers, and to this end the vehicle should come to a full stop and so remain while the landing goes on. To manage such landing so that passengers cannot safely get on or off is negligence.[4] Reasonable arrangements, too, should be made to enable passengers to leave the carrier's premises in safety.[5] In short, for the carrier's failure to use very great precaution and care at the point of disembarking, he may be regarded answerable, either on the general ground of his negligence, or because his contract to carry through safely has not yet been discharged.[6]

ness of suitable character. Plott *v.* Chicago R., 63 Wis. 511. *Aliter*, where reasonable rules or the contract with the passenger obliges the carrier to do so. 66 Tex. 619.

[1] § 660. A railway ought commonly to discharge at the station and not at a point beyond or short of it. 36 Miss. 660; 40 Miss. 374. And see 17 Mo. 290 (steamboat carrier).

[2] Creamer *v.* West End R., 156 Mass. 320; 48 Minn. 378.

[3] See 146 Mass. 241.

[4] § 661; 79 Miss. 431; 80 Mo. App. 152. Carrier not liable in damages for carrying a sick and drowsy passenger past his destination, though the conductor promised as a favor to wake him up and failed to do so. 61 Miss. 8; 71 Ga. 710; 90 Mich. 203. Conductors, with their more responsible duties, cannot be expected to charge their minds with concerns of this sort. *Ib.* See 57 Fed. (U. S.) 481; 111 Ga. 842.

Calling out the station is in effect an invitation to alight, and the passenger should show average heed for himself. 51 Mich. 236.

[5] As to requirement of good platforms or piers, clear tracks, gangway-planks for vessels, lights at night, etc., see 32 Miss. 17; L. R. 5 C. P. 437; 20 Wall. (U. S.) 528; 49 Mich. 370; L. R. 7 H. L. 213; 124 Penn. St. 427; 52 Miss. 202.

[6] L. R. 5 C. P. 437; 88 Ill. 608; 160 Ill. 636; 133 Ala. 518; 51 W. Va. 420; 179 Mass. 52.

569. **So, too, is the passenger bound to use the arrangements thus duly provided** for him, and be ordinarily careful in getting out and away from the station or landing-place, as he cannot hold the carrier liable for an injury otherwise. Thus, a railway passenger is not justified in jumping from the train while it is in motion, even though the carrier was negligent, whether in carrying him past the station or in starting before he had due opportunity to land;[1] and if he alight knowingly on the opposite side of the track instead of at the platform, he risks the consequences;[2] for a departing passenger should in general exercise ordinary prudence both in landing and in leaving the station.[3]

570. **As to the final compensation of a passenger carrier,** it is customary on long routes, as part of our modern system, not to take tickets up until at or near the journey's end; and where, as on a steamboat, the passenger is not asked to produce his ticket at all until the vehicle reaches its landing, he ought to have it ready to surrender before he passes out.[4] If one cannot produce his ticket, as they are thus being collected while passengers leave the vehicle, he has no right to keep others waiting, or divert the attention of the ticket-taker; but the carrier may properly make him step aside and wait long enough for a reasonable inquiry to be made into the circumstances.[5] If the passenger cannot then justify the non-production of his ticket, the amount of his fare may be demanded on the spot.[6] Needless violence towards the passenger would, however, be unjustifiable on the usual principles; and whatever the statute which might justify calling a policeman and handing a cheat over to justice, to be dealt with as a criminal, the carrier cannot imprison a party on his vehicle for

[1] § 663; 68 Mo. 593; Railroad Co. *v.* Aspell, 23 Penn. St. 147; 9 La. An. 441; 6 Gray (Mass.), 64; Straus *v.* Kansas City R., 75 Mo. 185.

[2] 37 Penn. St. 420. See also L. R. 9 Q. B. 66; L. R. 10 Q. B. 271; Siner *v.* Great Western R., L. R. 3 Ex. 150; L. R. 4 Ex. 117.

[3] The adjustment of blame in such cases is often difficult. See 20 S. C. 219; 84 N. Y. 241; 75 Mo. 475; 142 Mass. 251, and cases cited.

[4] § 663. Standish *v.* Narragansett Steamship Co., 111 Mass. 512.

[5] *Ib.* [6] *Ib.*

non-payment of his fare, nor even seize his articles of wearing apparel or personal use for the purpose of compelling satisfaction.[1]

[1] Ramsden *v.* Boston & Albany R., 104 Mass. 117. But doubtless the carrier may detain baggage left in his own custody for the unpaid fare lawfully due him from the owner. See next chapter.

As to the general remedies of a passenger and the rule of damages, see § 664.

There are various recent decisions regarding the carriage by passenger elevators in private buildings. Such elevators are now quite commonly used in the large cities; though usually without the payment of fares, but rather as a general inducement and convenience to tenants and the public. The elevator carrier is essentially a passenger carrier, according to various late decisions. Springer *v.* Ford, 189 Ill. 430; 197 Ill. 327, 334; 205 Ill. 144; 155 Mo. 610; 107 La. 355. But not necessarily so with regard to the owner's liability for bodily injuries occasioned those who ride in the car. See Seaver *v.* Bradley, 179 Mass. 329; Griffen *v.* Manice, 166 N. Y. 188 (only such reasonable care and prudence as are requisite with respect to the rest of the building). But cf. Springer *v.* Schultz, 205 Ill. 144; Burgess *v.* Stowe, Mich. (1903); Becker *v.* Lincoln R., 174 Mo. 246 (should stop at a floor carefully); 155 Mo. 610. See further, Blackwell *v.* O'Gorman Co., 22 R. I. 638. The law on this subject has not yet largely developed.

CHAPTER IV.

TRANSPORTATION OF BAGGAGE.

571. **Baggage transportation presents some unique features** at our common law. No contract is made for carrying such property, as in the case of ordinary freight; but the duty of conveying the passenger's baggage as common carrier is incidental to the differently graded duty of conveying the passenger himself. There is no tariff of rates, no special payment to be demanded of the owner; but one who pays his personal fare to a passenger carrier is entitled (within limits to be presently noticed) to have his baggage taken likewise without extra charge. And yet for baggage, as for the freight which one takes upon direct hire, the responsibility assumed is that of common carrier; while, on the other hand, the relation out of which grows the present indirect bailment, is that of passenger carrier simply. We may say, then, that there is a bailment in respect of baggage, but none, to speak precisely, so far as the passenger himself is concerned.[1]

572. **What, then, is baggage,** we may ask at the outset. By "baggage," in the legal sense, is meant simply such articles of personal necessity, convenience, comfort, and recreation, as travellers, under the circumstances, may well take with them on their journey;[2] or, as the expression goes, "ordinary baggage." The word "luggage" is, perhaps, the more common word used in the mother-country, as synonymous with our

[1] §§ 665, 666; 4 Ex. 367, 372; 15 C. B. N. S. 680. Here, as in case of the innkeeper, we find public policy making, by inference, an extraordinary bailee of the party whose vocation thrives by the patronage of travellers. But there is this striking difference, that the innkeeper's exceptional liability applies to whatever personal property the guest may have brought with him; while here it is limited to what is properly "baggage." *Ib.*

[2] § 667.

American term "baggage."[1] Not only is the kind of property thus carried material, but its quantity, its value, and more especially its suitableness for the purpose of the particular tour, must be taken into consideration.[2] And, while the courts per-

[1] See Brown Law Dict. And see 85 Cal. 329.

[2] §§ **667, 668.**

Trunks, valises, carpet-bags, chests, and the like, with their common travelling contents, may be regarded as ordinary baggage; but wares and samples, though stowed away in such a receptacle, cannot; nor can a sample trunk. 10 C. B. N. S. 154; S. C. 13 C. B. N. S. 818; 25 Wend. (N. Y.) 459; 97 Mass. 83; 41 Miss. 671. Alling *v.* Boston & Albany R., 126 Mass. 121; Pennsylvania Co. *v.* Miller, 35 Ohio St. 541; 17 Fed. (U. S.) 209. One's own shoes and wearing-apparel are appropriately baggage; but not a theatrical wardrobe; and a great quantity of new shoes and stock for shoes, or of cloth, whether wrought into garments or not, is rather to be considered merchandise, and intended for others than for the traveller's personal use and convenience. 4 E. D. Smith (N. Y.), 178; Baltimore Steam Packet Co. *v.* Smith, 23 Md. 402; 10 Cush. (Mass.) 506. But see 42 N. Y. 326. A single watch and articles of personal jewelry have been held part of a traveller's proper baggage; but quite the reverse as to a quantity of watches, jewelry, or plate, apparently designed for sale and traffic or presents; or the jewelry of some one else. 4 Bing. 218; 10 Ohio, 145; 4 E. D. Smith (N. Y.), 181; 6 Ind. 242; McGill *v.* Rowand, 3 Penn. St. 451; 8 Bush (Ky.), 472; 2 Bosw. (N. Y.) 589; Mississippi R. *v.* Kennedy, 41 Miss. 671; 85 Cal. 329.

Not only such goods and chattels as are taken by the traveller as merchandise are found thus excluded from protection as "baggage," but, what may seem harsher, those whose taking, likewise with a view to the journey's end, has solely in view the convenience of the traveller's household, or something else ulterior to the journey itself; things which are unsuitable, in fact, for use by the way, but only for use when the journey is over. Such, for instance, are the packed bedding and bedclothing of one who is seeking out some new home; and his pictures and household furniture in general. Macrow *v.* Great Western R., L. R. 6 Q. B. 612; Connolly *v.* Warren, 106 Mass. 146; 63 Ohio St. 274; 4 Bosw. (N. Y.) 225; and see L. R. 4 Q. B. 366 (child's spring-horse); 113 Ga. 589 (fruit in trunk). And, as the law refuses to gratify a passenger by giving his merchandise and household articles a free trip at the carrier's special risk of dangers, so it disinclines to treat as baggage that which one takes with him for a present to his friend, or to accommodate third parties with whom the carrier is in no privity, and from whom he is to get no profit. 4 Bosw. (N. Y.) 225; 42 N. Y. 326. The decision in Chicago R. *v.* Boyce, 73 Ill. 510, rests probably on this ground.

sistently refuse to enhance the carrier's extraordinary risk for the privilege of those who would abuse their opportunities of having things taken without extra charge which ought to be paid for as freight, they accord willingly to passengers who *bona fide* pay their fares a liberal interpretation of the right to carry on the footing of baggage whatever may in a genuine sense be needful or convenient for one's present journey, though by no means for the journey exclusively.[1]

573. For money which is included bona fide in the passenger's baggage for his travelling expenses and personal use on the journey, not, however, exceeding a reasonable sum, it is now well settled that a passenger carrier is liable;[2] though some earlier cases held otherwise.[3] But money taken by

[1] A set of tools of reasonable worth may thus be included in a carpenter's or mechanic's baggage; § **668**; Porter *v.* Hildebrand, 14 Penn. St. 129; Kansas City R. *v.* Morrison, 34 Kan. 502; professional instruments in that of a surgeon; Hannibal R. *v.* Swift, 12 Wall. (U. S.) 262; a manuscript price-list or catalogue for his own use in that of a travelling agent; Gleason *v.* Goodrich Trans. Co., 32 Wis. 85; Staub *v.* Kendrick, 121 Ind. 226; books needful for prosecuting his studies in that of a student; 6 Blatchf. (U. S.) 64; whatever, in fine, might prove useful and convenient on the way to one of a particular class of travellers, though its chief use be at the journey's end. Even pistols, revolvers, or other weapons, carried for one's defence, and not as merchandise, may be classed as baggage, especially on dangerous routes. Woods *v.* Devin, 13 Ill. 746; 22 Ill. 281. But cf. 13 Md. 126. So, too, as it is held, a sportsman's gun or fishing-tackle carried on a trip for his personal recreation; Parmelee *v.* Fischer, 22 Ill. 212; 4 E. D. Smith (N. Y.), 453; an opera-glass; Toledo, &c. R. *v.* Hammond, 23 Ind. 379; or under fitting circumstances, and, more especially for invalid travellers, even pillows, bedding, or chairs. Ouimit *v.* Henshaw, 35 Vt. 604; Parmelee *v.* Fischer, 22 Ill. 212. The legal distinction is not always clearly traceable, perhaps, for circumstances are allowed their due weight in each case.

[2] § **669**; Merrill *v.* Grinnell, 30 N. Y. 594; Jordan *v.* Fall River R., 5 Cush. (Mass.) 69; 24 Ill. 332; Johnson *v.* Stone, 11 Humph. (Tenn.) 419; Michigan Central R. *v.* Carrow, 73 Ill. 348; Hutchings *v.* Western R., 25 Ga. 61.

[3] 1 E. D. Smith (N. Y.), 95; 9 Humph. (Tenn.) 621; 9 Wend. (N. Y.) 85; 22 Ill. 278; 6 Ind. 242; Yznaga *v.* Steamboat Richmond, 27 La. An. 90; 11 Humph. 419; Whitmore *v.* Steamboat Caroline, 20 Mo. 513; First Nat. Bank *v.* Marietta R., 20 Ohio St. 259; 16 N. Y. Supr. 609; Hickox *v.* Naugatuck R., 31 Conn. 281.

the passenger in large amounts, and greater than he can need as a traveller, especially if it be intended for some ulterior purpose, as to buy at the place of his destination merchandise, household goods, or even clothing, will fail of the law's safe shelter.[1] As a rule, money which is intended purely for trade, business, or investment, or for transportation, and not for the passenger's own use and convenience for the contingencies of the journey, cannot be termed baggage.[2]

574. In determining the value of articles which one may reasonably take as baggage, the rank and station of the traveller are circumstances worth considering. A steerage passenger's clothing, for instance, would not be costly in comparison with that of some wealthy person travelling on a first-class ticket. To the extent that articles taken by any passenger for his personal use when travelling exceed in quantity and value such as passengers of like station and pursuing like journeys commonly take, they are not baggage in the strict sense. But whether

[1] Neither money taken by an attorney for his client to meet the contingencies of a lawsuit, nor title deeds, can be classed with baggage; nor, in general, money which belongs to some stranger instead of the passenger who is travelling with it. Phelps *v.* London R., 19 C. B. N. S. 321; Dunlap *v.* International Steamboat Co., 98 Mass. 371.

[2] 85 Cal. 329.

Against holding the passenger carrier strictly accountable as a common carrier for large sums thus taken, two objections occur: (1) that, for a traveller's personal use and convenience, a moderate amount should suffice; (2) that the traveller is himself to blame if he lets large sums, and property which is exceedingly valuable, go in a closed trunk into the exclusive custody of a bailee, without giving him some means of knowing what great risk he runs. But the concealment of a small sum of money in one's trunk is not such carelessness or misconduct in the passenger as should exonerate the carrier; nor, again, such a concealment of his watch, or of his own jewelry of moderate worth. 10 Ohio, 358; Fairfax *v.* N. Y. Central R., 73 N. Y. 167.

For so great a sum as $11,250, concealed in a passenger's trunk, the carrier is certainly not liable as for baggage. 9 Wend. (N. Y.) 85. Jewelery worth $30,000 should not be checked as ordinary baggage. 73 Ill. 348. But in 5 Cush. (Mass.) 69, the sum of $325 taken in a traveller's trunk on a short journey was recovered. And in 30 N. Y. 594, $800 in coin was considered not an excessive amount for an emigrant passenger to bring over with his baggage. Cf. 22 Ill. 278.

such excess is taken or not is a question of fact for the jury.[1] In all this blending of law and fact, much must practically be left to abide the verdict of a jury. And, in estimating the kind, quantity, and value of the baggage which is allowable to the passenger, it is fair to take into view whence he comes, whither he goes, and what is his occupation and social standing.[2] Moreover, according to the treatment bestowed upon certain articles which the passenger takes with him, both carrier and passenger or either may be estopped to deny that they were "baggage."[3]

575. Now, concerning the nature and extent of that risk which the passenger carrier incurs with respect to his passenger's baggage, Lord Holt twice declared pointedly that the extraordinary responsibility of common carrier would not attach, unless the baggage was specially paid for.[4] And, as the law became well settled in much later times, that for the passenger himself no such extraordinary risk was incurred, jurists began to argue, not without some force, that the carrier's obligation to convey baggage, being but accessory to carrying the passenger, and a matter of personal convenience to him, ought to be the same in degree.[5] But the current of

[1] §§ **670, 671.** See 35 Vt. 603; 3 Penn. St. 451; Fairfax *v.* N. Y. Central R., 73 N. Y. 167; 14 Fla. 523.

[2] Ouimit *v.* Henshaw, 35 Vt. 603; McGill *v.* Rowand, 3 Penn. St. 451; Fairfax *v.* N. Y. Central R., 73 N. Y. 167; Brock *v.* Gale, 14 Fla. 523; Dexter *v.* Syracuse R., 42 N. Y. 326 (railway chargeable for materials for dresses as well as clothing).

In New York Central R. *v.* Fraloff, 100 U. S. 24, the majority of the justices (Justices Field, Miller, and Strong, diss.), in effect, upheld a verdict against a railroad company to recover, as "baggage," laces valued by a lady passenger at $75,000, and by the jury at $10,000. This is, perhaps, the severest visitation of loss upon a passenger carrier which the reports show, in respect of property transported as a mere incident to the hired conveyance of the traveller's person. But the circumstances of the case are quite peculiar. The laces were in no sense to be regarded as "merchandise," but were in actual use as wearing-apparel by a foreign lady of superior rank and wealth; and her trunk was the natural receptacle for such things.

[3] Hoeger *v.* Chicago R., 63 Wis. 100; 576 *post.*

[4] 1 Salk 282; 1 Comyns, 25.

[5] See Pollock, C. B., in 3 H. & C. 139.

modern decisions, English and American, is decidedly to the contrary; and, whether the conveyance be by horse or steam or electric power, by land or by water, it is now firmly settled that, for a passenger's baggage, the carrier of passengers assumes the full risks of a common carrier; in other words that he is to be regarded in this particular as an insurer against all but the exceptional risks, a carrier of goods.[1] The sum paid for the passenger's own fare is the carrier's compensation, then, for this incidental but momentous responsibility; which fare all who travel are presumed to pay, since the carrier has a right to charge it and enforce the collection.[2] Nor matters it, provided the fare be paid, whether the traveller himself furnished the money, or others did so on his behalf.[3]

576. A standard of extraordinary responsibility like this must have been established mainly for the comfort and convenience of the travelling public. Yet the carrier himself goes not unheeded; for, not only is his merely incidental risk kept down to what is reasonable in kind, quantity, and value for his patron's baggage, and his legal right recognized to charge for whatever may be in excess, but he can fix the ordinary tariff of passenger fares high enough to afford him ample indemnity for the liability he so incurs; and it is clear

[1] § 672; 12 C. B. 313; 4 Bing. 218; Macrow *v.* Great Western R., L. R. 6 Q. B. 612, 618; 19 Wend. (N. Y.) 234; 1 Strobh. (S. C.) 468; 6 Ohio, 358; Hannibal R. *v.* Swift, 12 Wall. (U. S.) 262; Merrill *v.* Grinnell, 30 N. Y. 594; Dunlap *v.* International Steamboat Co., 98 Mass. 371; Smith *v.* Boston & Maine R., 44 N. H. 325, 330; N. Y. Central R. *v.* Fraloff, 100 U. S. 24.

[2] McGill *v.* Rowand, 3 Penn. St. 451

[3] 4 E. D. Smith (N. Y.), 453.

For baggage of an unreasonable quantity, a carrier may always demand special compensation from the passenger concerned; but, long before railways were introduced, the practice prevailed, in England and America, of making no charge for baggage unless it exceeded a certain weight. § 672; 1 Comyns, 25. The rule of the text applies to all carriers of passengers who travel customarily with baggage; not naturally to a street-railway or omnibus, whose customers are merely conveyed from street to street. But the character of the business pursued is more material than the nature of the vehicle. See Dibble *v.* Brown, 12 Ga. 217.

that, were the baggage liability diminished, the public would travel less frequently than they do at prevailing rates. By the ticket purchase or otherwise, there should appear an implied contract for baggage without essential error or imposition.[1]

577. Concerning what is not properly baggage, and yet has been accepted as such, the passenger carrier's liability has not been clearly defined by the courts. A passenger carrier may refuse to carry as baggage what is not such; while even as to freight he is protected by the scope of his vocation.[2] Some cases take strong ground against the passenger who knowingly presents for acceptance as baggage what he knows is not baggage;[3] and yet the carrier's own knowledge, or that of his baggage agent on this point, ought to avail something. Any passenger carrier who perceives that an article in his keeping is not properly baggage may silently reserve the right to charge as freight at the end of the journey.[4] But, while the party who offers goods for transportation is bound to the observance of good faith, he may yet throw it upon the carrier to put certain inquiries and to make timely decision whether articles of doubtful kind or value shall go as baggage or not.[5]

[1] § **672**; 67 Conn. 417.

[2] §§ **673**, **686**; 70 Cal. 169.

[3] Dunlap *v.* Steamboat Co., 98 Mass. 371; 10 C. B. N. S. 154 (deceit); Michigan Central R. *v.* Carrow, 73 Ill. 348; Alling *v.* Boston & Albany R., 126 Mass. 121; 63 Wis. 100; 44 N. H. 325. The animus of such cases bears against "sample trunks," such as commercial travellers usually know are forbidden carriage as baggage. See 35 Ohio St. 541; 126 Mass. 121; 29 Minn. 160; 52 Kan. 398; 79 Me. 559 ("a legal fraud," which is rather strong language). Cf. 33 Fed. (U. S.) 412.

The carriage by "baggage express" is the carriage not of strict baggage, but of a trunk and contents. 74 Ill. 116.

[4] §§ **673**, **688**; 14 C. B. N. S. 641. Paying extra, as though for baggage of over-weight, does not entitle merchandise to go through as paid freight. 38 Ill. 219. But an extra payment made in good faith as for freight protects. 127 Ill. 598. The carrier may make inquiry or even more. 85 Va. 217.

[5] § **674**; 8 Ex. 30; 12 Wall. (U. S.) 262, 271; 32 Kan. 55; Belfast R. *v.* Keys, 9 H. L. 556; Minder *v.* Pacific R., 41 Mo. 503; N. Y. Central R. *v.* Fraloff, 100 U. S. 24 (mere silence as to true value); 35 Ohio St. 541; Norfolk R. *v.* Irvine, 85 Va. 217; Perley *v.* N. Y. Central R., 65 N. Y. 374; 67 N. Y. 208; 60 Ark. 433.

Such a rule is reasonable; and hence it seems just to consider in general cases of acceptance as baggage, that the passenger carrier becomes, at all events, bound as a gratuitous bailee to bestow slight diligence and good faith upon such transportation.[1]

578. A further question arises as to hand-baggage, so called, and the passenger carrier's liability for such property. Some courts have asserted too broadly that hand baggage is not to be deemed baggage; and this is erroneous, for unless the passenger clearly secretes and fails to confide such property to the carrier, the latter incurs some sort of a bailment liability over such property. In travel for long distances, or over night, more especially, and to some extent under other circumstances, a passenger must have certain things near his person; and racks are specially provided and regulations made in travelling, which recognize such property as under the carrier's charge. Hence various late decisions, to the extent, at least, of establishing that for negligence or misconduct on the part of the carrier or his agents, such as causes loss or injury to hand-baggage, the carrier himself is liable.[2] Thus is recognized a certain bailment liability; and it seems reasonable to infer that the same exceptional standard as common carrier applies to hand-baggage as to other baggage, only that here there is a mixed custody, as in some other instances, so that the passenger's own contributory carelessness or misconduct becomes material to consider, in case of such loss or injury.[3]

[1] See § **674**; 13 C. B. N. S. 818; 4 Mo. App. 582; 126 Mass. 121; 29 Minn. 160; Humphreys *v.* Perry, 148 U. S. 627.

[2] §§ **680-684**; L. R. 1 Q. B. 51; 16 C. B. 13; Kinsley *v.* Lake Shore R., 125 Mass. 54; 124 N. Y. 53; 16 Lea (Tenn.), 380; 72 Iowa, 228; 69 Tex. 120. Certain sleeping-car cases may be classed with ordinary bailments of the third class, since a sleeping-car company is not a common carrier. See 84 Ind. 471; 143 Mass. 267; 92 Ga. 161; 28 Neb. 239; 93 Tenn. 53; 95 Ga. 314; 95 Ga. 810; 98 Mo. App. 351.

[3] §§ **681, 682, 686**; Bunch *v.* Great Western R., 17 Q. B. D. 215; aff. 13 App. Cas. 31.

For what the passenger takes as hand-baggage and loses or injures by his own want of ordinary care, he alone must suffer, of course. **L. R.**

579. In general, the passenger and his baggage should go together; and the passenger and passenger carrier have reciprocal duties and rights.[1] The passenger should use due care in packing, fastening, and marking, so as to identify what he offers for transportation, and he should be honest.[2] In connection with the bailment the carrier may make reasonable, but not unreasonable, rules and regulations.[3]

580. Special contract or usage may affect the liability for baggage, as in common carriage generally; but such terms must, as in other cases, be consonant with public policy and seasonably brought home to the passenger's knowledge.[4] Legislation, too, is sometimes found on this subject.[5]

6 C. P. 44; 17 Q. B. D. 215; 143 Mass. 243; 183 Mass. 175; 123 U. S. 61. And in some cases it may be said furthermore, that for the money and valuables which the passenger takes exclusively, secretly and unconfidingly on his person, especially if this be of more than "baggage" value, he fails to establish a bailment to the carrier. 7 Hill (N. Y.), 47; 3 C. P. D. 221; Abbott *v.* Bradstreet, 55 Me 530; Weeks *v.* New York R., 72 N. Y. 50; 20 Ohio St. 259; 123 U. S. 61; 29 Minn. 160.

As to the rule of mixed custody in freight, see *ante*, 353, 354 (drover with cattle, driver of team on a ferry, etc.). And see 4 C. B. N. S. 676 (unreasonable to require passengers to pay freight for coats, umbrellas, etc., or else bear all risk).

[1] §§ **675, 679**; Wilson *v.* Grand Trunk R., 56 Me. 60; 73 N. Y. 167. Cf. 11 Rob. (La.) 24. If through the carrier's act passenger and baggage become separated, the carrier bears the risk. *Ib.*; 86 Mo. App. 332.

[2] § **679**.

[3] § **679**; McCormick *v.* Penn. Central R., 80 N. Y. 353; *ib.* 99 N. Y. 65. Reasonable rules, reasonably enforced as to all alike, are requisite, though a rule as between passenger and carrier may be mutually waived. See 94 Ala. 286 (rule reasonable, which excludes dogs from the passenger cars); 66 Tex. 603 (as to guns).

[4] §§ **689, 690**; 10 C. B. N. S. 453; Stewart *v.* London R., 3 H. & C. 135 (cheap excursion trains). The English rule is more lax than the American, save where the Railway and Canal Traffic Act applies. But as to a passenger's knowledge of special conditions, see (1894) App. Cas. 217; 1 Q. B. D. 515. In this country conditions not clearly brought to the paying passenger's notice before the journey begins are not much

[5] § **691**; Acts 17 & 18 Vict. c. 31; 31 & 32 Vict. c. 119; 100 U. S. 24; 125 N. Y. 155 (to be reasonably interpreted).

581. Liability for baggage lasts generally until the passenger has had a reasonable opportunity to receive and take charge of it, after it has reached its destination; and it terminates upon a delivery back or over to the passenger or his substitute, in suitable or excusable condition.[1]

582. The carrier's right of lien as to baggage exists as in other cases of property transportation.[2] And this lien may be extended so as to include the proper charges of storage, where the passenger delays unreasonably to take away the property after its due arrival.[3]

583. The practice in suits for lost or injured baggage is not unlike that in the bailment of common carriage generally.[4]

favored. See § **690**; 16 Penn. St. 67; 2 Ohio St. 131; 23 Fed. (U. S.) 765; 48 N. Y. 212; 143 Mass. 267; 73 N. Y. 329; 32 Penn. St. 208; 38 Kan. 45.

But where special conditions are brought home seasonably to the passenger, on face of a check or ticket, they take effect, and the special conditions most favored as to baggage are such as tend to restrict the weight and value thereof and limit the baggage responsibility accordingly, when nothing special is paid. Such restrictions should be just and reasonable; as, *e. g.*, in considering the length or character of the journey, or whether there is a consideration of reduced rates. See 57 N. Y. 1; 60 Fed. (U. S.) 624 (Cal.); 11 Pac. R. 686.

Special provision that "English law" will apply does not override our own American rule of public policy. 110 Fed. (U. S.) 415.

The usual standard of liability for freight applies to baggage; with exceptions, as by act of God, act of public enemy, act of customer, or act of public authority. § **681**; Part VI, c. 4.

[1] § **692**; 3 Ex. D. 153; 14 Q. B. D. 228; 35 Vt. 605; 34 N. Y. 548; 27 Iowa, 22; 73 Ill. 510; 131 Mass. 297. As to reasonable time or opportunity, the rule differs not essentially from that of common carriers generally. See *ante*, Part VI, c. 6; and see § **692**; 34 N. Y. 548; 35 Vt. 605; 8 Bush (Ky.), 184; 33 Fed. (U. S.) 412; 161 Mass. 67; 93 Ga. 801.

So as to rule of accepting as for present transportation, the rule of Part VI, c. 3, applies. See §§ **677**, **678**; 31 Conn. 281; 17 Q. B. D. 215; 44 Iowa, 548 (receipt for over night); 58 Ga. 216; 3 Mich. 51; 139 Mass. 423; 42 Ark. 200; 74 Mich. 186; 40 Minn. 144.

[2] § **693**; 3 M. & W. 248 (cannot thus detain the passenger or the clothes he wears).

[3] §§ **692**, **693**.

[4] §§ **694**, **695**; 4 C. B. N. S. 307; L. R. 5 Q. B. 241; 35 Me. 55. And

see 58 N. Y. 287 (partnership property); (1895) 2 Q. B. 387 (master and servant). As to proof, the burden is on the passenger, but a check, receipt, way-bill, or other token, charges the carrier presumptively. § 694; 67 N. Y. 11; 45 N. Y. 184; 20 Kan. 669. Cf. 123 N. Y. 363; 106 Fed. (U. S.) 739. As to the rule of damages, see *ante*, 478, 479; 73 N. Y. 167; 27 Iowa, 22; 14 Fla. 523 (worth to the owner for personal use).

Concerning connecting carriers and their liability for baggage, the rules elsewhere noticed apply. *Ante*, Part VI, c. 9. And see § 696, and cases cited; 69 N. H. 648.

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