RECENT CASES

CARRIERS—SLEEPING CAR COMPANIES—PASSENGERS' ARTICLES—LOSS—CONTRIBUTORY NEGLIGENCE—PULLMAN V. VANDERHOVEN, 107 S. W. 147 (TEX.)—*Held,* that where a sleeping car company's porter was charged with misappropriating a passenger's diamond ring, which it was claimed he found in the berth, it was no defense to the sleeping car company's liability therefor that the passenger was negligent in losing it.

A sleeping car company is neither a common carrier nor an innkeeper and consequently is not an insurer of the goods and effects of its passengers, but is a bailee for hire and as such must exercise reasonable care to protect the passenger's goods. *Blum v. Southern Palace Car Co.,* Fed. Cases 1574; *Lewis v. N. Y. Sleeping Car Co.,* 143 Mass 267, 273. By the contract which exists between the passenger and the company, it becomes the duty of the company to exercise reasonable care and to keep a watch on the car and its occupants while the relation lasts. *Pullman Car Co. v. Martin,* 95 Ga. 314. Where it becomes the duty of a principal by the terms of a contract to do certain things and he employs an agent to do those things, the principal is absolutely liable for any breach by the agent. *Wood, Master and Servant,* 321; *Pullman Palace Car Co. v. Garvin,* 93 Tenn. 53. And so if the porter, who is employed to perform the duties imposed on the sleeping car company, fails to perform them and steals the property of a passenger, the company is liable. *Root v. N. Y. C. and S. Car Co.,* 28 Mo. App. 199; *Pullman Palace Car Co. v. Matthews,* 74 Tex. 654. As the court in the principal case says, there is "no principle of law which would exonerate one from taking and appropriating another's property because the owner was negligent in losing it."

CARRIERS—STREET CARS—INJURY TO PASSENGER—DANGEROUS PLACE—FELDHEIM V. BROOKLYN, Q. C. & S. R. Co., 107 N. Y. SUPPL. 413.—*Held,* that where plaintiff was injured while riding on the rear bumper of a crowded car, he assumed the risk incident to that position, although his fare was accepted.

In *Bard v. Penn. Traction Co.,* 176 Pa. St. 97, plaintiff was riding on the bumper, but the ground of absolving defendant from liability seemed to rest on the fact that conductor did not know he was there. Where it was the custom of passengers to ride on the footboards of a stage sleigh when the seats were full, the defendant

was held accountable. *Spooner v. Brooklyn City R. R. Co.*, 54 N. Y. 230. To the same effect is *Clark v. Eighth Ave. R. R. Co.*, 36 N. Y. 135. But it has been held that the riding upon the platform of a passenger car upon a railroad is such negligence on the part of the passenger as will bar his recovery for injuries sustained by being thrown from the platform in rounding a curve. *Goodwin v. Boston & Maine R. R.*, 84 Me. 203. Here too it was an excursion train where tickets had been sold in advance, and all the seats had been taken. *Worthington v. Central Vt. R. R. Co.*, 64 Vt. 107, is in harmony with this last holding, but by way of *dictum* it was indicated that it would have been different if the passenger was forced to be on the platform by some circumstance. Whether acceptance of fare is such acquiescence as to overbalance all these objections, *Solomon v. Manhattan R. R. Co.*, 103 N. Y. 437, would seem to be in point, when it says: "Where a passenger attempted to alight from a moving train it is not enough to rebut presumption of his negligence by proof that trainmen acquiesced in his action." But it has been held that the mere stopping of a crowded car to take on a passanger is evidence of gross negligence when seats are not attainable. *The Topeka City R'way Co. v. Higgs*, 38 Kan. 375.

CONTRACTS—ADDITIONAL CONSIDERATION FOR COMPLETING EXECUTORY CONTRACT—LINZ V. SCHUCK, 67 ATL. (MD.) 286.—*Held*, that the occurrence of substantial and unforeseen difficulties in the construction of a cellar casting upon the contractor an additional burden not contemplated by the contract makes his promise to complete the work a sufficient consideration for the promise of the owner to pay him additional consideration, even though the contract was absolute on its face.

This case is undoubtedly an exception to the general rule that if the rghts of a contractor are fixed by the contract, as here, any promise to pay him extra for doing what the contract binds him to do is without consideration, *Nelson v. Pickwick Ass. Co.*, 30 Ill. App. 333; *Ritenon v. Mathews*, 42 Ind. 7. And it is immaterial that the additional sum is necessary for the contractor to complete the building without loss. *Willingham Sash & Door Co. v. Drew*, 117 Ga. 850. The opposite rule, however, prevails, where there was ambiguity in the original contract. *Wear Bros. v. Schmelzer*, 92 Mo. App. 314. Various courts, recognizing the equities of particular cases, rather than the weight of authority, have assigned several grounds for the doctrine that there is consideration for additional compensation. Thus, there is consideration in gaining specific performance from the contractor, rather than rely-

ing on an action for damages. *Coyner v. Lynde,* 10 Ind. 282; *Holmes v. Doane,* 9 Cush. 135. A new verbal agreement, which at inception would have no binding force, when acted upon is binding. *Thurston v. Ludwig,* 6 Ohio St. 1. Also a mutual agreement to rescind while an existing contract is still executory is binding. *Thomason v. Dill,* 30 Ala. 454; *Thomas v. Barnes,* 156 Mass. 581. In like manner, a waiver may make the new contract binding, where one party, as in above case, may waive the performance of a contract by the other and assume some new and additional obligation as consideration of performance by the other. *Johnson v. Sellers,* 33 Ala. 265. See Comment, *supra.*

CONTRACTS—VALIDITY—OUSTING COURTS OF JURISDICTION—GITLER V. RUSSIAN CO., 108 N. Y. SUPP. 793. The plaintiffs agreed upon a valuable consideration, to bring no action on a judgment in their favor against the defendants in any courts other than those of Russia. *Held,* that this contract was not void as ousting courts of jurisdiction.

Contracts ousting courts of jurisdiction over future controversies are universally held invalid as interferences with the course of justice. *Chamberlain v. Railroad,* 54 Conn. 472. The reason for this holding seems obsolete. One court, though feeling bound to the rule by the doctrine of *stare decisis,* indicated that were the question *res nova* its decision would have been different. *Delaware, etc., Canal Co. v. Penna. Coal Co.,* 50 N. Y. 250. And consequently, the application of this rule has been narrowed in later decisions. See *Mittenthal v. Mascagni,* 183 Mass. 19. The great weight of authority, however, still declares invalid contracts limiting the jurisdiction over future controversies to particular courts. *Doyle v. Ins. Co.,* 94 U. S. 535; *Reichard v. Ins. Co.,* 31 Mo. 518. These contracts are clearly distinguished from contracts limiting one's right to sue, as in the main case, on a cause of action already determined. The latter may be void on other grounds of public policy. *Kilbourn v. Field,* 78 Pa. St. 194. But as attempts at ouster of jurisdiction they are never invalid. *Montgomery v. Ins. Co.,* 108 Wis. 146; *Railroad v. Harris,* 126 Ind. 7. The main case reverses *Gitler v. Russian Co.,* 106 N. Y. Supp. 886. See 17 YALE LAW JOURNAL, 474.

DEATH—CAUSE—EVIDENCE—LOUISVILLE & N. R. Co. v. SIMRALL'S ADM'R., 104 S. W. 1011 (KY.). Notwithstanding injuries to his hip and head which the intestate had received in an accident he continued to perform his regular duties as station agent for six

months; thereafter contracted typhoid fever or pneumonia; later became insane, failed steadily, and died four years after receiving the injuries. *Held,* his death was the reasonable result of the accident, the defendant offering proof of no other theory. Barker, J., *dissenting.*

A proximate cause has been defined as the "prominent efficient" cause. *Ellvson v. International, etc., R. Co.,* 33 Tex. Civ. App. 1; *Donaldson v. New York, N. H., etc., R. Co.,* 188 Mass. 484. And no "casual or unexpected causes" should intervene as necessary factors between the proximate cause and its result. *Scheffer v. Railroad Co.,* 105 U. S. 249. So when the plaintiff was ejected from a train and as a consequence suffered from exposure it was decided that his death a month later from typhoid fever was not attributable to the wrongful ejection. *Randall v. New Orleans, etc., R. Co.,* 45 La. Ann. 778. And where an injury to a person's knee so reduced his vitality that he was unable to resist the tuberculosis germs that attacked his lungs, such injury was not considered the proximate cause of death from consumption. *Weber v. Third Ave. R. Co.,* 42 N. Y. Supp. 789. But in harmony with the case at hand there are two New York decisions, which rule that there is a strong presumption that causes of a death, which are not made to appear at the trial, do not exist. *Looram v. Third Ave. R. Co.,* 6 N. Y. Supp. 504; *Sauter v. N. Y. Central, etc., R. Co.,* 66 N. Y. 50.

EXPLOSIVES—INJURIES FROM BLASTING—LIABILITY—WYNNE v. BAILEY, 107 N. Y. SUPP. 545.—*Held,* that a contractor is not liable for injury to a stone wall along a street, and to a lawn and hedge adjacent thereto, due to blasting necessary in grading the street, unless the blasting was negligently performed.

A different rule obtains in New Jersey. *McAndrews v. Collerd,* 42 N. J. L., 189. The language of the court there was, "where one engaged in blasting injures the adjoining property of another, he is liable without reference to his exercise of care and skill in doing the work." Even in New York this rule is not uniformly recognized. *Tinsman v. B. D. R. R. Co.,* 2 Dutcher 148, held that "the proposition that a corporation authorized to construct public highways . . . are vested with the immunity that pertains to the sovereign and are exempt from liability to damages for injuries done to individuals in the exercise of that power, cannot be sustained upon grounds of reason and justice." Where death is caused by the voluntary explosion of a blast by a dredging company no amount of care and skill in exploding the blast, not even the highest, will excuse the company from responsibility. *Munro v. Pac. Coast*

Dredging Co., 84 Cal. 515. As stated by Bigelow, *J.*, in *Mellen v. Western Railroad*, 4 Gray (Mass.) 301, "great latitude of discretion is to be allowed to those who are entrusted by law with the erection and maintenance of great public works." But this is no excuse for carelessness, negligence, or wanton disregard of the rights of individuals. *Hunter v. Farren*, 127 Mass. 481. Here the negligent blasting did no more than interfere with plaintiff's business by frightening away of employes, and they were allowed to recover for such interruption.

INJUNCTION—GROUNDS—PICKETING OF COMPLAINANTS' PREMISES—BARNES V. CHICAGO TYPOGRAPHICAL UNION, 83 N. E. 940 (ILL.).—*Held*, that the very fact of the defendants establishing a picket line about the complainants' premises, irrespective of whether physical violence was resorted to, was itself an act of intimidation and unwarrantable interference with the complainants' rights, entitling them to protection against the annoyance. Scott and Farmer, JJ., *dissenting*.

It is his right to a "probable expectancy" that his labor market will not be disturbed unlawfully which entitles an employer to an injunction against the picketing of his premises. *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759. But by the great weight of authority this right of the employer's is violated by picketing, not as a matter of law, but only when in fact the picketing amounts to coercion. *Foster v. Retail Clerks', etc., Ass'n.*, 39 Misc. (N. Y.) 48. Thus picketing, if accompanied by force, threats, or intimidation, will be enjoined. *Murdock v. Walker*, 152 Pa. St. 595. And the injunction will be refused if not accompanied by such. *Karges Furniture Co. v. Woodworkers' Union*, 165 Ind. 421. The aggressiveness, however, with which picketing has come to be conducted has led some courts to hold, as in the present case, that it is intimidating *per se*, and therefore can be enjoined as a matter of law. See *Otis Steel Co. v. Union*, 110 Fed. 698; *Vegelahn v. Guntner*, 167 Mass. 92. This minority holding is not so much a conflict with the main body of authority as it is a recognition of changed industrial conditions, under which picketing must needs be intimidating. *Franklin Union v. People*, 220 Ill. 355.

LOGS AND LOGGING—SALE OF GROWING TIMBER—REMOVAL OF TIMBER—ST. LOUIS CYPRESS CO. V. THIBODAUX, 45 SOUTH. 742 (LA.). Under a contract giving the purchaser of trees a right to cut and remove the same for a definite period of time, *held*, that if the mere cutting of trees can be construed in any case as entitling the purchaser to remove the same after the expiration of the time limit, such cutting must be done seasonably, and with a *bona fide*

intention to remove the timber so cut within the period designated. Monroe, J., *dissenting.*

Subject to the limitations imposed on all transfers of real property, standing timber may be bought and sold by contract. 1 *Washburn on Real Property,* 3. And so some courts have held that if the number of trees sold is specific, the buyer gets title to all those trees, even though the contract of sale limits the time for removal of the timber, and only part has been removed within the time limit. *Hoit v. Stratton Mills,* 54 N. H. 109. But by the weight of authority, when there is a sale of timber with a definite time given for removal, the transaction is a conditional sale; and the buyer will own only that timber which he has removed before the time expires. *Kellam v. McKinstry,* 69 N. Y. 264; *Weber v. Proctor,* 89 Me. 404. The word "removed" as used in this connection has received a very liberal interpretation. Thus if timber has been hauled to other parts of the same premises, or has been cut up into railroad ties, it has been sufficiently "removed" to become the absolute property of the buyer. *Watson v. Gross,* 112 Mo. App. 615; *Johnson v. Truitt,* 122 Ga. 327. In fact the great majority of courts hold that it is enough if the timber is simply cut within the time limit. *Macomber v. Railroad,* 108 Mich. 491; *Hicks v. Smith,* 77 Wis. 146. *Contra*: *Kemble v. Dresser,* 42 Mass. 271.

NEGLIGENCE—DANGEROUS—APPLIANCES — STEAM BOILERS.—STATLER V. RAY MFG. CO., 109 N. Y. SUPP. 172. Where the defendant manufactured and sold a steam boiler for use in a public building and the boiler thereafter exploded by reason of the defendant's negligent construction, and the plaintiff was injured, *held,* that the plaintiff, though sustaining no contractual relation with the defendant manufacturer, was entitled to recover against it, though there was no claim of fraud or deceit in the sale of the boiler. McLennan, P. J., and Kruse, J., *dissenting.*

In general the manufacturer of goods is liable for their negligent construction to no one other than those to whom he sells the goods. *Curtin v. Somerset,* 140 Pa. St. 70. The rule is based on a want of privity of contract. *Marvin Safe Co. v. Ward,* 46 N. J. L. 19. But there are two exceptions to this rule. One is that when a maker of an article knows it to be defective and likely to cause injury, yet sells it fraudulently, he is liable in tort to any third party injured thereby. *Lewis v. Terry,* 111 Cal. 39. And, secondly, if the goods themselves are imminently dangerous, it is clear that their maker owes a public duty to use reasonable care in their production and sale. See *McCafferty v. Mossberg & G. Mfg. Co.,* 23 R. I. 381. In the application of this rule there is some conflict. The

following goods are held within the rule: Poisonous drugs (*Norton v. Sewall,* 106 Mass. 143); naphtha (*Standard Oil Co. v. Wakefield,* 102 Va. 824); but not petroleum (*Standard Oil Co. v. Murphy,* 119 Fed. 572). There is a direct conflict as to whether steam appliances for generating power are within this rule, the main case being opposed by *Losee v. Clute,* 51 N. Y. 494; and by one other, *Heizer v. K. & D. Mfg. Co.,* 110 Mo. 605.

NEGLIGENCE—RES IPSA LOQUITUR—INJURY TO PERSON NEAR RAILROAD TRACK.—EATON V. N. Y. CENT. & H. R. R. Co., 109 N. Y. SUPP. 419. Plaintiff while at a railroad depot on business was injured. He testified that he stood on the platform six or eight feet from a passing freight train and that something extending from a car struck him. The railroad company claimed that plaintiff was struck by a part of the engine, while attempting to cross the tracks and did not offer any explanation of any swinging object extending from train. *Held,* if plaintiff was injured as he stood on the platform by something projecting from the train, jury might apply the rule of *res ipsa loquitur.* McLennan, P. J., and Kruse, J., *dissenting.*

The general rule is that before the doctrine of *res ipsa loquitur* can be applied and the burden of proof thrown on the carrier, it must first be shown that the injury complained of resulted from the breaking of machinery, collision, derailment of cars, or something improper in the conduct of the carrier's business. *Thomas v. Philadelphia, etc., R. R. Co.,* 148 Pa. St. 180; *Hawkins v. Front St. Cable Ry. Co.,* 3 Wash. 592. Thus, where the accident causing the injury is connected with apparatus wholly under the control of the carrier (*Miller v. Ocean S. S. Co.,* 118 N. Y. 199), as the falling of a gangway (*Eagle Packet Co. v. Defries,* 94 Ill. 598), or the breaking of a paddle wheel (*Yerkes v. Keokuk N. L. Packet Co.,* 7 Mo. App. 265); it is well settled that there is a presumption of negligence on part of the carrier. On the other hand, it is equally well settled that the mere breaking of a passenger's leg (*Penn. R. Co. v. McKinney,* 124 Pa. 462), or a rock falling upon a passenger while the train is going through a cut (*Fleming v. Pittsburgh, etc., Ry. Co.,* 158 Pa. St. 130), raises no such presumption, and in such cases negligence must be proved by the plaintiff. *Baltimore & O. R. Co. v. State, Savington,* 71 Md. 599. Between these cases, there are those, like the principal case, on the border-line. Thus, it has been held, that the mere fact that cinders fell from defendant's locomotive and injured plaintiff's eye raised no presumption of negligence. *Searles v. Manhattan R. Co.,* 101 N. Y. 661. But *contra, Lowery v. Manhattan R. R. Co.,* 99 N. Y. 158.