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EXPRESS COMPANIES AS COMMON CARRIERS.

It is the purpose of this article to request the attention of the legal profession to the law of common carriers in its relation to express-men, and particularly, to the carrying by them of moneys, bullion, bank-bills, government securities, jewelry, and all small parcels of great value.

In the cases mentioned, it is believed that sound reasons exist why the strict rule of the common law, which regards carriers as insurers, should not be applied to express-men.

At the time when the principles of the civil law were fully adopted into the common law, by the judgment of the King's Bench in the case of *Coggs* v. *Bernard*, 1 Smith L. C. 82, the business of carriers was almost exclusively limited to the conveyance of bulky commodities of comparatively small value, over comparatively short routes, and was generally conducted by the principals themselves, and their immediate agents and servants. Such a thing as the transportation of small packages of great value over distances of thousands of miles, on land and on water, through the necessary agency of persons not appointed by the carrier nor responsible to him for the faithful discharge of their duties, and in conveyances not owned nor controlled by the carrier, and which, from their nature, could not be owned or controlled by him, was then wholly unknown and unanticipated.

In the present condition of the business of express-men in the United States, prosecuted as it is, over a variety of routes of great

extent, it is practically impossible that any one such company could own or manage all the appliances, or could employ, as immediate servants or agents, all the persons necessary for the prompt and safe execution of its very onerous responsibilities. Such companies are compelled, by the magnitude and nature of their employment, to make use of railroad cars, steamers, vessels, and other vehicles, owned and conducted by strangers, and for the insufficiencies and defects of which they are clearly not morally responsible. They are, at the same time, obliged to intrust themselves, as well as the property committed to their care, to the custody and action of men whom they do not appoint or employ, over whom they have no command or power of restraint, and whom they cannot discharge from service for acts of carelessness or negligence however gross, or however disastrous may be the consequences. Take, for instance, the express company of Wells, Fargo & Co. It cannot be deemed an extravagant assertion, to affirm that the united capital of the great city of New York, vast as that capital is, would not be equal to the value of the various railroads with their running material and fixtures, the ocean, lake, and river steamers, and other means of conveyance, which the company employs in the transaction of its almost limitless business. No company, corporation, or combination of men, less than the government itself, could own and manage this diversified and extended apparatus.

These companies therefore do not own the means of conveyance over their routes, nor have the power to select or appoint any of the numerous employees to whose experience, capacity, and fidelity all these different modes of conveyance are necessarily confided. The principal part of the business of express companies consists in the transportation of small packages of great value, for which they charge but a moderate compensation. They are in fact a modern invention, and their system of operations is, in many respects, essentially different from the *modus operandi* of ordinary common carriers.

It is confidently insisted not only that the foregoing considerations would justify material modifications of the law of common carriers when applied to express companies, but also that such modifications are demanded on clearly apparent grounds of public utility.

The change which has been wrought in the business of common

carriers by the introduction of railroads as a mode of transportation, is alluded to by PARKE, B., in *Carr* v. *The Lancashire and Yorkshire Railway Co.*, 14 Eng. L. & Eq. Rep. 340, in the following terms: "Prior to the establishment of railways, the courts were in the habit of construing contracts between individuals and carriers much to the disadvantage of the latter. Before railways were in use the articles conveyed were of a different description from what they now are. Sheep and other live animals are now carried upon railways, and horses which were used to draw articles are now themselves the object of conveyance. *Contracts, therefore, are now made with reference to the new state of things;* and it is very reasonable that carriers should be allowed to make agreements for the purpose of protecting themselves against the new risks to which they are in modern times exposed. . . . . It is therefore reasonable that carriers should protect themselves against loss by making special contracts." If these remarks are applicable to railroads as common carriers, much more forcibly, it would seem, do they apply to the business of express-men, as it is conducted over the magnificent distances of our own country, and under the disabilities which have been mentioned.

Whether these considerations do or do not afford sufficient warrant for a modification of the harsh rules of the common law in relation to carriers, they certainly do render it not inappropriate for the courts, to allow "free space and ample verge" in the making of special stipulations by express-men in respect to the extent of their liability, and to interpret such stipulations by the same liberal rules of construction that are applied to all other contracts. These considerations also afford ample reasons to require of courts that they should give full scope to the intention of the parties, when such intention is clearly expressed in the contract, without invoking fanciful notions of public policy for the purpose of controlling and annulling the plain stipulations of the contract, and without resorting to a strained construction of it, for the purpose of interpolating the doctrine of principal and agent or master and servant between express-men and the subordinate agents or servants of the railroads or steamer which they use.

The foregoing remarks involve the question that we shall now proceed more particularly to discuss, viz.: Does the relation of principal and agent, or of master and servant, subsist between express-men and the persons who run the cars or navigate the

steamers used by them in the ordinary prosecution of their business? Where a special contract has been entered into between an express company and its customer, under which the company would not be liable, *except for the negligence of their agents and servants*, do the employees of such railroads and steamers become, in law, the agents or servants of the company?

We have been unable to find any case in which this point has been directly presented and decided, and in the absence of authority we maintain the negative.

The main ground on which the law of principal and agent or master and servant rests, is wanting in the case under consideration. How can the doctrine of *respondeat snperior* apply, when there is no *superior* and no *inferior* in the sense in which these legal terms are used?

The reason why the principal or the master is held responsible for the acts of his agent or servant, is, because the law throws the blame of the choice and appointment of an incompetent, unskilful, or negligent agent or servant on him who has made the selection and appointment, and who has the power of removal. In general, the negligence or carelessness of the agent or servant is deemed the negligence or carelessness of the principal or master. Because the latter employs and may dismiss at discretion, and in order to make him more cautious in the selection of his instruments, the law applies the doctrine of *respondeat superior*. But express-men have no control over the subordinate agencies through whose instrumentality their business is carried on. They do not appoint or direct; they cannot remove masters, mates, engineers, or men of the vessels or steamers on which they transport the goods intrusted to them. And the same remark equally holds good respecting conductors, engineers, brakemen, guards, &c., on railroads. Neither the relation of principal and agent, therefore, nor of master and servant, in any just or legal sense, subsists between express-men and such employees, and the former ought not, on the mere presumption or assumption of such relation, to be held responsible for the results of the carelessness, negligence, or even fraud or intentional wrong, of the latter. Where the reason of the rule ceases, the rule ought also to cease.

To make the position which we insist upon, and its applicability to what we shall hereafter advance, more apparent, we will suppose that through the negligence of the engineer of a steamer on which

an express company had sent a package in charge of its messenger, both the package and messenger were lost. The company, if responsible for such loss, must be so on one of two grounds—

1st. Because they were common carriers not only as to their general business, but as to the particular package lost, and as such, were insurers except as against the acts of God and of public enemies:

2d. If a special contract existed between the company and its customer which excluded the liability of insurers, that the relation of simple bailee for hire, as that of principal and agent or of master and servant, existed between the company and the engineer, through whose fault the loss occurred. For, it is manifest that if the company, though carriers, generally had, by special agreement between themselves and their customer in the particular instance, been exempted from the extraordinary liability of insurers, and reduced to the character of ordinary bailees for hire, then if liable on any ground it must be because they occupied the position of principal or master to the engineer as their agent or servant, and thus became liable for the results of his carelessness or negligence, according to the maxim "*qui facit per alium facit per se.*"

The rules by which, in general, the responsibility of common carriers is tested, are well understood and need not be here repeated *in extenso*. WOODRUFF, J., in *Mercantile Mutual Ins. Co.* v. *Chase*, 1 E. D. Smith 131, gives the following as a precise statement of the common-law duties and responsibilities of a common carrier, and of the reasons therefor:—

1st. The law makes it his duty to undertake the charge of transportation.

2d. He is legally responsible for losses, from whatever cause arising, the acts of God and the public enemy alone excepted.

3d. Regarding him as an insurer, the law allows him to demand a premium proportioned to the hazard of his employment.

The reasons for the extraordinary responsibility imposed by the law, are uniformly stated to be the security of those whose exigencies compel them to employ the carrier, the danger of collusion and fraud on his part, and the difficulty which the owner must, in general, find in proving neglect or misfeasance. In support of this summary he cites *Coggs* v. *Bernard* (Lord HOLT), 2 Ld. Raym. 909; *Same* v. *Colton* (Lord HOLT), 1 Id. 546, 655, 1 Salk. 143; *Riley* v. *Howe* (C. J. BEST), 5 Bing. Rep. 217.

As regards the last reason given, the difficulty of proving neglect or misfeasance, the express-man and his customer stand on the same ground. The other reasons—the security of customers and the danger of collusion and fraud—do not seem to have any force. The astutest ingenuity cannot point out in what respect the security of those who employ express-men will be increased, or the danger of fraud and collusion be decreased, by making the latter liable for the negligence of the agents or servants of the various lines of transportation over which they carry on their business. It is unreasonable to suppose that an agent or servant will be more attentive, careful, or diligent, because he imagines that some stranger unknown to him, by whom he has not been appointed, and who has no power to remove him or hold him responsible for the consequences of his default, may be made accountable for his negligence. There is some ground for supposing that this consideration might have an influence on the persons directly employed by express-men, but it cannot extend beyond them.

Let us state the ordinary form under which the express company of Wells, Fargo & Co. transact their business. It is in substance as follows:—

"Value $10,000. April 20th 1863.

"Received of John Doe, Dust and Bullion Package, value ten thousand dollars. Address John Doe, which we agree to forward to New York and deliver to address.

"In no event to be liable beyond our route as herein receipted.

"*It is further agreed and is part of the consideration of this contract that Wells, Fargo & Co. are not to be responsible except as forwarders*, nor for any loss or damage arising from the dangers of railroad, ocean, or river navigation, fire, &c., *unless specially insured by them, and so specified in this receipt.*

"For the proprietors,

"Richard Roe, Agent.

"Charges Col. $50."

Under this contract the following state of facts occurs. The ordinary price for carriage, but not the extra sum required for insurance, is paid; the package is delivered into the custody of the proper agent of the company, and by him duly sent forward on the way to its place of destination, in charge of the usual mes

senger of the company. The steamer by which the conveyance is to be made, and which constitutes the only mode of conveyance between the two points, is compelled on account of the shallowness of the water to lie at anchor some three miles from the shore; and the intermediate distance is usually accomplished by means of steam-tug. The messenger having this package as well as others in charge, goes on board the steam-tug, in order to proceed to the steamer. Through the negligence of the engineer of the tug, an explosion occurs, and the messenger, with numerous other passengers, is thereby killed, and the package is lost. The owner, thereupon, prosecutes Wells, Fargo & Co. to recover the value of the bullion.

Can he maintain his action?

The supposed instrument is to be regarded as an agreement, signed by both parties. Like all other agreements, it must be construed in the light of the accompanying facts and circumstances, and if possible in such a manner as to give effect to every clause. Thus interpreted, what is the legal meaning of the contract?

Wells, Fargo & Co., the defendants, are engaged in the regular and ordinary business of an express company. They receive, forward, carry, and deliver, by sea and by land, treasure, goods, and packages of all kinds, for hire. This service is performed under the personal superintendence of their own messengers, in steamers, boats, and other vessels, railroad cars, and other vehicles owned by other parties and ordinarily used by the public as the common modes of transportation. The company has no interest in these conveyances or control over them; it has no voice in their management or power over those having them in charge. Notwithstanding these disabilities, both parties to the agreement know that the company, in their character of common carriers, will be liable for all injuries that may happen to the property which they have undertaken to transport, except such as may be occasioned by the act of God or the public enemies. Both parties also know that accidents sometimes occur, resulting from the carelessness or negligence of engineers and other employees engaged in the navigation of steamers and vessels, and in the running of cars on railroads. In the light of these well-known facts, what do the parties express by their agreement? The company says to its customer, "We will take charge of your treasure, send it on to its place of destination under the personal charge of our own messenger, by

the usual modes of conveyance which we employ in all other cases, and which are used by the public in general for travelling and for the transportation of goods. We will hold ourselves responsible for the competency and integrity of our messenger and of all other persons in our own immediate service; but, as we are compelled to use agencies over which we have no control, which are managed by employees whom we do not select and cannot direct or discharge, and of whose qualifications we have no other or better means of knowledge than yourself, we will not be responsible for losses which may result from accidents to those agencies, or from the carelessness or negligence of those employees, unless you pay, in addition to our ordinary charges for transportation, such further sum by way of insurance as we charge to all other customers for assuming the extraordinary liability against all risks except the acts of God and the public enemies. Should you enter into this agreement, therefore, you will hold us responsible only for losses occurring under such circumstances of default as would make that class of bailees liable, who are known in the law and among business men as 'forwarders.' And this limitation of our common-law liability is hereby understood, and accepted by you, as a part of the consideration for which we take charge of your treasure."

The terms used in the agreement as quoted are apt and proper to express this meaning. The customer assents and delivers his package of bullion to the agent of the company, but he does not pay the additional price for insurance. Is not this agreement fair between the parties? Is it not such an agreement as they are competent to make? Will the law compel the customer to pay the additional price for insurance, or else forego the opportunity of sending his bullion to market? Will the law compel the company to take charge of the treasure and assume all risks for a less compensation than they charge in all other cases, and which is but a reasonable compensation for the extraordinary hazard? No man can answer these questions otherwise than in the negative, unless his mind has become contracted and dwarfed by the study of the illiberal and retrograde opinions advanced by some judges on this subject, but which, in truth, receive no support from the principles or analogies of the law. We do not deny that the law requires common carriers to carry goods over their routes, on the tender of a reasonable reward; but we look in vain through the books for any rule by which that reasonable reward is to be ascer-

tained. The law provides no formula for fixing the price in any given case, and it must necessarily be left to the carrier himself. In no case can he demand a larger sum than his usual price for undertaking a particular service or for subjecting himself to a particular risk, nor will the law compel him to undertake such service or incur such risk, for a less reward than his ordinary charge in similar cases. The amount of the reward must, in every instance, be graduated by these considerations.

There are some points in the law of common carriers which we shall assume to be settled. It is now held in both the English and American courts, that carriers may by express agreements avoid their extraordinary common-law liability as insurers. See authorities cited, particularly *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. (U. S.) 344; *Davidson* v. *Graham*, 2 Ohio State Rep. (Warden) 133; Angell on Carriers, § 225; Story on Bailments, § 570; Edwards on Bailments, pp. 483, 575; Pierce's American Railroad Law 422; Redfield on Railways 277, note; *Austin* v. *The Manchester, Sheffield, and Lincolnshire Railway*, 5 Eng. L. & Eq. 329; *Welsh* v. *The Pittsburgh, &c., Railroad Co.*, 10 Ohio State Rep. 72.

It is equally well settled that the receipt of which we have given the form, constitutes an *agreement* between the express company and its customer, and has the same binding effect as if it had been signed by both parties. Whatever doubt may heretofore have existed on this point, none is entertained at present.

The question then arises, What is the true interpretation of this agreement? Does it have the effect of limiting, to any extent, the liability of the company? It declares that "it is part of the *consideration* of this contract, that Wells, Fargo & Co. are not to be responsible *except as forwarders.*"

The word *forwarders* is a term as well understood among men of business, and has as definite a meaning in law, as the term common carriers. A forwarder is one, who, for a compensation, takes charge of goods intrusted or directed to him, and forwards them, on their way to their place of destination, by the ordinary means of conveyance, according to instructions: *Place* v. *Union Express Co.*, 2 Hilton 25; *Platt* v. *Hibbard*, 7 Cow. 499; *Oakley* v. *Kellogg*, 8 Id. 223; *Brown* v. *Denison*, 2 Wend. 593.

Now there is no room for a difference of opinion upon the

extent of the liability assumed by the company in the agreement under consideration. Both parties unquestionably understood that the company undertook no greater responsibility than that assumed by *forwarders* in the ordinary course of their business, and this limitation of liability is declared to be a part of the consideration under which the company dispensed with the payment of a portion of the price usually charged. In general the liability of a forwarder ceases when the goods have been delivered by him according to directions, or to the proper line of conveyance to the place of their destination. He is not responsible for the negligence or carelessness of persons into whose custody the goods may come in their transit between himself and the owner.

Like all other bailees for hire, he is liable for the acts of himself, and of his servants and agents. If in addition to the fulfilment of his duties as a forwarder, he should send a person in charge of the goods, such person would be his agent. Under the agreement stated the liability of the company must be either that of the common carriers, or that of the forwarders. To determine this alternative, what is the legal test? Clearly it is ordinary diligence of the party and his servants or agents. Thus, the question is raised, whether the engineer in the case supposed can be considered the agent or servant of the company. For, if the company is liable at all under the contract, it is evident that such liability must attach, either because the contract is not sufficiently broad to cover the negligence of the engineer, as a servant of the company, or because the law, on grounds of public policy, will not permit a common carrier to stipulate for immunity from the carelessness and negligence of his servant. Each hypothesis proceeding on the assumption that the engineer was the servant of the company. If this assumption cannot be maintained the liability ceases.

There are several cases, which conceding that common carriers may by agreement with their customers limit or qualify their strict common-law liability, nevertheless proceed upon the assumption, that no agreement can be made which will shield them from the carelessness or negligence of their agents or servants. See *Sager* v. *The Portsmouth, S., P. & E. Railroad Co.*, 31 Maine 228; *Davidson* v. *Graham*, 2 Ohio 133; *Camden and Amboy Railroad Co.* v. *Baldouf*, 16 Penna. 77; *Pennsylvania Railroad Co.* v. *McCloskey's Adm'r.*, 23 Id. 523. But, even admitting that

common carriers cannot, as a general rule, exempt themselves from responsibility for the defaults of such agents and servants, it by no means follows that an express company cannot agree with its customers that it shall not be held to answer for the negligence of the agents and servants of the various lines of conveyance of which they are obliged to make use.

That the law will not permit a man to protect himself against his own individual fraud, or bad faith, or wrongful acts, may be conceded. Such contracts would probably be *contra bonos mores*. And the doctrine that a common carrier cannot contract against the consequences of his own negligence, is only an application of the general rule. If B. in consideration of five dollars promise A. that if A. strike him he will not take the law, and thereupon A. strike B. the promise is void, and B. may nevertheless have his action of battery against A. for the beating. A case in point is cited by counsel in the Pleader's Guide, p. 77, thus:—

> "I cite one case, and that's decisive;
> A case he little dreams upon;
> Matthew, my Lord, and Ollerton;
> Where one a beating underwent,
> By his own license and consent,
> I mean, my Lord, that famous beating,
> In Comberback two hundred eighteen;
> Court held, and so 'twas understood,
> The license void, the beating good."

—See Comberback R. 218.

We do not suppose that a common carrier can make a valid contract, stipulating either that his servants or agents may commit fraud, or may be guilty of carelessness or negligence. What we do claim, however, is, that express-men, whether they are common carriers or not, may for a consideration lawfully stipulate against responsibility for the negligence or carelessness of the servants and agents of other parties whose lines of conveyance they are compelled to use in the ordinary course of their business. Wherein consists the immorality of such stipulations? Wherein are such agreements inconsistent with the public welfare? It must be remembered that the prohibition attaches to both parties. If the express-man cannot make such contracts, his customer cannot make them. But should the latter be forbidden by law to procure the carriage of his goods at cheaper rates, in consideration of the

waiver by him of a portion of the express-man's severe responsibility? It is too late to interpose fresh legal restraints upon the freedom of trade and commerce. Why, in this advanced era of personal freedom of action, does public policy demand that a particular class of custodians of property should be prohibited from making such terms with their employers as both parties deem mutually advantageous?

In the case of *Dorr* v. *The New Jersey Steam Nav. Co.*, 1 Kern. 485, it was decided that the company was not liable for the loss caused by the burning of their steamboat through the negligence of the persons in charge.

The case states that the fire was not occasioned by *the act of God or the public enemy.* The law therefore imputes it to negligence, and there was no attempt by counsel or the court to place it on any other ground. Notwithstanding, it was held that the carrier might contract, and in that case he did lawfully contract, for exemption from liability for loss occasioned through the negligence of the defendants' agents, who were in charge of the steamboat at the time of the disaster.

In *Wells* v. *The Steam Nav. Co.*, 4 Seld. 381, GARDINER, J., says: "Although the law will not suffer a man to claim immunity by contract, against his own fraud, I know of no reason why this may not be done in reference to fraud or felony committed by those in his employment." And in *Wells* v. *The New York Central Railroad Co.*, 24 N. Y. 181, the court, after quoting the above language of Judge GARDINER, added, "It is not necessary to go so far now; but, *a fortiori*, he may protect himself by contract *against the negligence in any degree of his agents.*"

The case last cited, *Wells* v. *The New York Central Railroad Co.*, 24 N. Y. 181, *Perkins* v. *The Same*, Id. 196, and *Bissell* v. *The Same*, 25 Id. 442, taken together, contain a satisfactory exposition of the law applicable to the point now under discussion. Those cases, it is true, arose out of injuries to the persons of passengers, and not injuries to property; but the law ought not to be less stringent when applied to the former than it is when applied to the latter. In the case of *Wells* v. *The New York Central Railroad Co.* the injury was caused by a collision between the train on which the plaintiff was riding as a passenger, and a freight train left carelessly on the track. The free ticket, under which the plaintiff was carried, contained the stipulation that he

was to assume the risk of accidents, whether resulting from the negligence of the company's agents or otherwise. The court held that the ticket constituted a contract by which the company was exempted from liability for the negligence of its agents, and that such contract was legal (pp. 184, 185). *Perkins* v. *The Same* was a case of still more criminal negligence, resulting in death. The law was more fully considered than in the case of Wells. The death of the plaintiff's intestate was caused by the breaking down of a bridge, which the passenger train of cars was crossing, and was the result of gross and criminal negligence in the construction of the bridge. SELDEN, J. (p. 208), affirms the true doctrine that the principle on which a carrier is forbidden to be "safely dishonest," is not confined to carriers, but from its nature must be general in its application; and he says, "the rule has no application to contracts exempting them from liability for the acts of third persons." Judge SMITH, also, in the same case, admits the validity of a contract by which the principal is absolved from the consequences of the negligent acts of his agent, but dissents from the conclusion of the majority of the court, on the ground that the insecure condition of the bridge was culpable negligence on the part of the corporation itself, from the consequences of which they could not, by contract, relieve themselves.

In *Smith* v. *The Central Railroad Co.*, above cited, 24 N. Y. 222, all the judges agree that in reference to the transportation of goods, the carrier may, by contract, absolve himself from liability for the acts of his agent. ALLEN, J. (p. 240), uses the following language: "In this class of cases (*i. e.* carriers of goods) the law of *respondeat superior*, adopted as an equitable and reasonable rule in the absence of any contract, is suspended by the agreement of the parties, the courts only looking to ascertain what, in truth, the parties have agreed as between themselves shall be the rule and measure of damages. Public policy does not interfere with the freedom of the parties to make such contract as their own interests may dictate; and if a party may lawfully procure another to indemnify him against personal loss by insurance against the negligence and fraud of his own agents, *a fortiori*, he may, by the deliberate agreement of a third person, in respect to whom he stands in the relation of insurer for the acts of his servants, under the doctrine of *respondeat superior*, be relieved from responsibility."

In the case of *Bissell* v. *The Same*, 25 N. Y. 442, SELDEN, J.,

says: "In such cases the companies may lawfully be relieved from all responsibility for the negligence or misconduct of their subordinate servants and agents; the question being as yet unsettled, what servants or agents are to be regarded as so directly representing the company that a contract relieving the company from responsibility for their negligence or misconduct may not be lawfully made."

In *Moore* v. *Evans*, 14 Barb. 528, the court make a remark, which seems to be deserving of particular attention. The judge who delivered the opinion says: "I see not why in this age of civilization, public policy demands that this particular class of custodians and insurers of property should be prohibited from making such terms with their employers as shall mutually be agreed upon and assented to."

The English authorities are equally decisive (*Carr* v. *The Lancashire Railway Co.*, 14 Eng. L. & Eq. 340; *Austin* v. *The Manchester Railway Co.*, 5 Id. 329). Nor do these decisions, in respect to the point under consideration, rest on any of the modern Acts of Parliament, the main object of which was to provide a more solemn mode of executing contracts. In *Lessen* v. *Holt*, 1 Stark. 186, a special contract was set up, under which it was claimed that the carriers were exempt from liability. Lord ELLENBOROUGH says: "If a servant of the carriers had, in the most wilful and wanton manner, destroyed the furniture intrusted to them, the principal would not have been liable." And Redfield in his Treatise on Railways, concludes his remarks on the English cases in the following words (sec. 134, pp. 281, 282): "It seems to be supposed by many of the English judges, and some of the late English cases seem to go that length, under their late statutes, that there is no positive objection to recognising the right of a common carrier to stipulate for exemption from all liability, even for gross neglect or positive misfeasance."

Prof. Parsons concludes his examination of the subject in these words (Parsons on Contracts, p. 717, note): "In this country, however, it would seem to be pretty nearly, if not quite settled, that it is incompetent for a carrier, either by notice or express contract, to exempt himself from liability for *his own negligence*." From the manner in which he lays down the exemption, it would not be improper to infer, that he saw nothing against public morality in upholding contracts which exempt express-men from responsibility for the acts of the servants and agents of

steamers and railroads. And to permit such exemption would be stopping far short of the principle of the foregoing authorities.

That there is an essential distinction between the modes of conducting business by express-men, and by ordinary common carriers, is too palpable to admit of dispute. All the precautions which the ingenuity of the present age has been able to devise, have been adopted by the various companies engaged in the express business, for the purpose of securing both safety and despatch. In making an application of the principles of law to the constantly varying emergencies growing out of an enlarged trade and commerce and an increased demand for rapidity of movement and of transportation, it would seem that when express-men make use of the usual means of transportation, which are well known to the community, the law ought not to impose upon them a liability for the consequences of acts which, in the very nature of their business, are entirely beyond their power to prevent. And it would also seem that the proposition sometimes advanced by respectable courts, that the fact that express companies do not use their own steamers, vessels, or railroads, but carry on their business by means of the steamers, vessels, and railroads of others, ordinarily used by the whole world in the course of transit from one point to another, and this fact being well known to their customers, does not affect the relations which they occupy to the business community so as, in anywise, to distinguish the extent of their liability from that of ordinary common carriers, is a proposition which cannot and ought not to be sustained. And to make an application of this doctrine to the facts hereinbefore supposed, if Wells, Fargo & Co. sent the package containing the treasure in the care of its own messenger, and such messenger, in the regular and ordinary mode of transportation, went on board the steam-tug with such package, and such tug was a good and staunch boat and sufficient for the contemplated transportation, and through the negligence and carelessness of the engineer of such tug, without any default or want of prudence on the part of the messenger, an explosion occurred by which the treasure was lost, and the lives of a large number of passengers, including the messenger, were destroyed, it would follow that the company ought not to be held liable for the loss of the treasure, under the contract with its customer. In other words, the company not being liable under the contract as insurers, ought not to be made liable on the ground of the relation of *master and servant or principal and agent.*