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RAILROADS—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—STATUTORY PROVISIONS.—*Coley* v. *North Carolina R. Co.*, 40 S. E. 195. (Supreme Court of North Carolina, December, 1901.) This is a case decided under the North Carolina Employer's Liability Act of January 23, 1897, which provides: (1) That any servant or employe of any railroad company operating in the state shall maintain an action against such company for injury received by the negligence of a fellow-servant, or by any defect in the machinery, ways or appliances of the company. (2) That any contract or agreement, expressed or implied, made by any employe of said company to waive that benefit, shall be null and void.

The plaintiff was a yard conductor and his duties required him to ride on the tender of the shifting engine. Some time previous to the accident the regular switch engine with sloping tender had been taken away and a road engine substituted. On the back of the tender, there was a platform about six inches

wide and about twelve inches above the track. This was a safe place to stand and was provided with a handhold; but it was an uncomfortable place to stand, as the conductor would have to lean around the corner of the tender to signal the engineer. Above this platform there was a tool-chest, which was a safe place to stand and signal the engineer. The way provided for getting up on this box was a step at the side; but there was no grab iron, and the plaintiff had to use either the top of the tender or a drain-pipe. He had used the drain-pipe on one side about three hundred times; but the one on the other side broke on the fourth or fifth time, letting him fall on the track in front of the tender, which was moving backwards. The pipe, if properly constructed, would support one thousand pounds. The plaintiff, when injured, was not getting up at the side, by the step provided, but from the lower platform.

The defendant contended that the plaintiff assumed the risk in continuing to work and not reporting the absence of a handhold as a defect; but the court held that the statute took away the defence of assumption of risk, and as the jury found that the plaintiff was not guilty of contributory negligence, the court said: "We cannot disturb the verdict or reverse the judgment on any view we may have as to the mere right of evidence." Justice Cook (dissenting) contended that the statute does not take away the defence of assumption of risk, and further, that as the plaintiff was not getting up at the side by the way provided; but in a way not contemplated or suggested by the structure of the machine, his injuries did not result from the failure of the defendant to put grab irons on the engine and the trial judge should have so instructed the jury.

The opinion in this case is important: (1) as to the construction put upon the statute; (2) as to how far that construction changes the common law rule.

When this case was before the Supreme Court, in June, 1901, (128 N. C. 534), the court decided that the statute takes away from the employer the plea of assumption of risk. The court said: "It is agreed that assumption of risk is contractural either by express terms, or by implication; and the disputes usually were as to whether the plaintiff contracted by implication or assumption, of dangers not existing at the date of employment. And it would seem by this act that the Legislature intended to put an end to such contentions, by saying in the first section, that he shall have a right of action caused by such defective machinery, and by providing in the second section, that he cannot waive this right by contract expressed or implied." The argument of the court is, that if a servant expressly contracts to waive that right, it is void; and if, after discovering a defect in a machine which makes it dangerous, he continues to work without giving the master notice, that is an implied contract to waive

the right, and is also void by the statute. In support of this construction the court cites Lord Esher's dissenting opinion in *Thomas* v. *Quartermain,* 182 B. D. 685 (1887); and *Smith* v. *Baker,* Appeal Cases, L. R. H. of L., 1891, page 325. Both of which were decided under the Employer's Liability Act of 1880, which contained a section that an employe shall not maintain an action against his master for injury received from defective machinery, unless he gives notice of such defects to the master or some one superior to him, unless the master already knows of the defect. The court says of the latter case: "A majority of the Lords, who put their opinion upon the Employer's Act of 1880, agreed with Lord Esher, that the statute did destroy or do away with the implied assumption of risk . . . and if there could be reason for such a construction upon a statute which did not in terms declare such object, but where the legislative will to that effect had to be found in the negative expressions of the statute, how could we escape such a construction where the legislative intent is manifested in express terms, and in the most emphatic manner?"

But it does not seem that this is the accepted interpretation of those cases. The Massachusetts Court, in the case of *O'Malley* v. *The Gas Co.,* 158 Mass. 138 (1893), which was decided under the Employer's Liability Act, which is substantially the same as the English Act, says: "It is also established by an adjudication in this court, and by decisions under a similar statue in England, that it has not taken away the defence that the plaintiff knowing and appreciating the dangers voluntarily assumed the risk." And in support of that proposition, it quotes the two English cases mentioned above. The plaintiff in the case of *Smith* v. *Baker* (*supra*), was employed to drill holes in a rock, close by a crane worked by men in the same employ. Occasionally a stone was swung over the head of the plaintiff without warning. A stone having fallen and injured the plaintiff, he sued the contractor under the Employer's Act. The jury found that the omission to supply special means of warning was a defect in the plant. Lord Halsbury in delivering the opinion of the court, said: "I am of opinion that the application of the maxim *volenti non fit injuria,* is not warranted by these facts. I did not think the plaintiff did consent at all. His attention was fixed upon a drill and while, therefore, he was unable to take precautions himself, a stone was negligently slung over his head, without due precautions against its being permitted to fall." The statute was not called in to decide the case. The judge further says: "A negligent system, or a negligent mode of using perfectly sound machinery may make the employer liable quite apart from any of the provisions of the Employer's Act." Buswell on "Personal Injuries," in commenting on this case, says: "The specific point decided in this

case was that when the dangers arise from an operation in another department of the business from that in which the plaintiff is engaged, and one over which he has no control, the mere fact that he understands the danger, is not conclusive to show that he assumes the risk; and the question of whether he does assume it is one of fact."

Justice Cook in his dissenting opinion in the present case, disagrees with the construction put upon the statute by the majority opinion of the court. He does not think it warranted by the text, or by the remedy intended to be provided by the Legislature which passed it. He says: "The mischief to be remedied was to release a fellow-servant from his responsibility for the negligence of a fellow-servant; and, second, to secure to the employe the right of action for injuries inflicted on account of defects in the machinery. . . . An analysis of the statute shows two propositions: (1) To change the relationship existing between fellow-servants and make them vice-principals as to each other with respect to injuries resulting on account of their negligence, and to prevent them from forfeiting their right of action by contract. (2) To prevent an employe from waiving his right of action for injuries received on account of defects in the machinery, ways or appliances, or, in other words, a right of action accrues to a fellow-servant, and the right to waive either action by an employe is forbidden. . . . These relations being established by statute, the liability of the railroad company as to furnishing safe and suitable machinery, ways and appliances, and the relationship of the employe and his assumption of risks in the performance of his work remain unchanged. . . . Nor do I understand that it is within the purview of the statute either by expression or intendment, to abrogate the doctrine of assumption of risk. From the nature of the employer corporation, it is compelled to operate through, and depend upon its officers and employes. . . . An employe's failure to give notice of defects leads the employer to assume that none exist to the great hazard of its property and service. But, should he continue in the use of such, knowing the defects and failing to give the employer an opportunity of making the remedy, then he does so knowingly and willingly and must be considered to have undertaken to run the risks incident thereto."

This view adopted by Justice Cook is in conformity with the English and American interpretation of the Employer's Liability Act. A number of states have passed the act giving the servant a right of action for injury caused by the negligence of a fellow-servant; but only a few: Massachusetts, Alabama, North Carolina and South Carolina have extended the act to include injuries from defective machinery, and the first two states qualify the employer's liability as in the English Act by providing that the servant assumes the risk when he works on failing to give notice

of a defect, unless the master already knows of the defect. South Carolina, however, provides in Article IX, Section 5, of the constitution that "knowledge, by any employe of a railroad company injured, of the defective or unsafe character or condition of any machinery, ways or appliances, shall be no defence to an action for injury caused thereby except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them." *Bodie* v. *Charleston and W. C. Ry. Co.,* 39 S. E. 715 (Supreme Court, S. C., 1901). This provision leaves no doubt upon the question and it seems that if the North Carolina Legislature intended to enact the same provision by the words "implied contract" in the second section, it should have been more explicit as was the South Carolina Constitution.

Justice Cook's opinion is further supported by the well settled rule that statutes should be interpreted so as to conform, if possible, to the common law rule. In *Cook* v. *Myer,* 73 Ala. 580 (1883), the court in quoting from 1 Kent. 464, says: "It is a recognized rule of statutory construction that a statute in modification or derogation of the common law will not be presumed to alter it, further than is expressly declared. The presumption is that the language and terms of the statute import the alteration or change it was designed to effect and their operation will not be enlarged by construction or intendment." And in *Ryan* v. *Couch,* 66 Ala. 244 (1880), the court says: "We assume it as a safe rule, that even where a statute is equally susceptible of two constructions, one of which is in harmony with a clearly settled principle of the common law, and the other in abrogation of it, the courts will adopt the former and not the latter."

Substantial justice seems to have been done in this case, as it is hard to say that the plaintiff was guilty of contributory negligence either in failing to report the defect in the absence of the handhold, or in pulling himself up by the drainpipe; but the court has gone further than was necessary to decide the case. The general rule seems to be that an employe who works at a patently defective machine, when he knows or ought to know of the defect, assumes the risk and cannot recover from injury therefrom. *Texas and P. Ry. Co.* v. *Rogers,* 57 Fed. Rep. 378 (1897); *Powers* v. *New York, L. E. and W. R. R.,* 98 N. Y. 274 (1885); *Carbine* v. *Bennington and Rutland R. R.,* 61 Vt. 348 (1889); *Southern Pacific Co.* v. *Johnson,* 44 U. S. Appeals 1 (1895). But mere knowledge is not sufficient to prevent recovery although appliances be defective or dangerous, if the apprehension of danger is not such as would occur to a reasonable man. *Thorpe* v. *Missouri Pacific R. R.,* 89 Mo. 650 (1886); *Fisk* v. *Ill. Central R. R.,* 96 Iowa, 702 (1896); *Lee* v. *Smart,* 45 Neb. 318 (1895); *Benham* v. *Taylor,* 66 Mo. App. 308

(1896). The whole question in such cases is whether or not the employe has been guilty of contributory negligence in continuing in his employment after he has discovered the existence of the defect." *Lee* v. *Smart* (*supra*); *Benham* v. *Taylor* (*supra*); *Lawless* v. *Connecticut R. R.*, 136 Mass. (1883); *Ford* v. *Fitchburg R. R.*, 110 Mass. 240 (1872).

It seems that the plaintiff could have recovered under the common law rule or under the rule in *Smith* v. *Baker* (*supra*). In *Ford* v. *Fitchburg R. R. Company* (*supra*), the plaintiff, who was an engineer, knew that there was a defect in his boiler, but he continued in his employment and the court held that the defendant was liable for the injury, the defect being due to the negligence of its agents charged with the duty of seeing that its locomotives were kept in proper order. And in *Lawless* v. *Connecticut R. R.* (*supra*), it was held that the fact that a brakeman in the employ of the railroad knew of the existence of a defect in the car on which he was employed, which defect caused the injury, was not decisive against his right of recovery in an action for his injury; the ground of the decision being that the fact of knowledge was not conclusive of the plaintiff's negligence.

But the court went upon the broad ground that the statute does away entirely with the doctrine of assumption of risk, though not of contributory negligence. It says: "As the law now stands, the use of machinery obviously defective will not prevent the plaintiff from a recovery from an injury resulting therefrom, unless the apparent danger is so great that its assumption would amount to a reckless indifference to probable consequences. What is recklessness . . . is a matter of fact for the jury. The danger of the defective machine must be not only apparent, but so great that there are more chances against its safe use than there are in favor of it." The language of the court here is not only broader than the general rule; but it seems that it is broader than is necessary to carry out the construction put upon the statute. To say flatly that the use of machinery "obviously defective" will not prevent a recovery unless the employe is reckless, and to define recklessness to be the use of machinery which the employe knows to be so dangerous that there are more chances against its safe use than there are in favor of it, is to relieve the employe from practically all responsibility. This definition of recklessness the court takes from *Henshaw* v. *Raleigh and A. A. L. R. R.*, 24 S. E. 426 (North Carolina, 1896). But in that case it was not applied to the use of machinery. A passenger got off of a car at a dangerous place in obedience to the orders of the conductor, and the court held that to constitute contributory negligence in the plaintiff, after having been told by the conductor to get off, "the danger must be not only apparent, but great,—more chances against a safe exit than there are in favor of it."

The statute, however, the court says, does not take away the defence of contributory negligence in the real meaning of the term. It says: "A defective machine carefully handled, or a safe machine carelessly handled may equally result in an accident; but the resulting responsibility would be by no means the same. But this distinction is not generally observed. In *Texas and P. Ry. Co.* v. *Rogers,* 57 Fed. Rep. 381 (1893), the court in quoting from Wood's Ry. Law, paragraph 379, says: "A servant is bound to see patent and obvious defects in appliances furnished him and assumes all patent and obvious risks, as well as those incident to the business, and where he knows, or ought to know, of the defect in the appliance, and continues to work with the same, and receives injury therefrom, he is treated as being guilty of contributory negligence and cannot recover."

It seems that an employe who will continue to use an "obviously defective" machine is guilty of contributory negligence in not reporting it, and the consequence of departing from this established common law rule will tend to encourage carelessness in the employes to the great hazard of the railroad company. Says Justice Cook: "The railroad company necessarily sees through the eyes of its employes and a proper performance of its service and duties is dependent upon their eyes, good sense and good judgment. Whether machinery, ways and appliances are sound or defective depends upon the knowledge and skill of its officers and employes, upon whom there must rest an obligation to make known and have remedied such defects when discovered, as well as to inspect them before and during use for the security of themselves as well as those using them."

The effect of the construction put upon the statute does not very much change the common law rule, but the language used in defining recklessness and making that the test of contributory negligence, indicates a considerable departure; but as contributory negligence is left to the jury, it may be that the practical working out of the statute will not result in as wide a divergence as the language indicates.

J. A. R.

CARRIERS—DUTY TO CARRY SLEEPING CARS—INJURY TO SLEEPING CAR PORTER—CONTRACTS LIMITING LIABILITY FOR NEGLIGENCE—CONTRACTS FOR THE BENEFIT OF THIRD PARTIES. —*Russell* v. *P. C. C. & St. L. R. R. Co.,* 61 N. E. 678 (Supreme Court of Indiana, 1901).—The Supreme Court of Indiana here extends to sleeping car porters the law as previously enunciated in the case of express messengers. [See *R. R.* v. *Keefer,* 146 Ind. 21 (1896); *R. R. Co.* v. *Mahoney,* 148 Ind. 196 (1897.)]

A Pullman car was attached to one of the defendant railroad company's trains. The porter, employed by the Pullman Com-

pany, was injured by the negligence of the railroad employees. The porter sued the railroad company for damages. In bar of such action the defendant company pleaded two agreements. By the terms of the one the Pullman Company was bound to indemnify the railroad for such liability. By the terms of the other the plaintiff porter agreed with the Pullman Company to release any railroad company over whose lines he operated in the employ of the Pullman Company "from all claims for liability of any nature or character on account of personal injury."

To this plea the plaintiff's attorney demurred; the demurrer was overruled; and on appeal from that decision the case came before the Supreme Court of Indiana.

The decision of the lower court was sustained. The conclusion that the above-stated agreements were a complete defence to a claim for damage resulting from negligence, was reached by Dowling, J., by the following interesting steps:

1. The railroad company was under no public duty to receive the porter or the car on which he rode.

2. The railroad company could, therefore, contract specially for a release from all liabilities for negligence as to the porter.

3. The contract of release between the porter and the Pullman Company inures to the benefit of the railroad company referred to therein, and can be taken advantage of by the railroad company in this action.

These several points will be considered in the above order.

1. While the rights and liabilities of sleeping car companies have been the subject of legal decision in various aspects, this particular point has never before been flatly decided. This case holds that there is no duty, as a public carrier, on a railroad company to receive and haul Pullman sleeping cars in the manner in which they do receive and haul them. This same view was negatively recognized, however, in *Pullman Co.* v. *Mo. Pac. R. R. Co.*, 115 U. S. 587 (1885), where it was held that, inasmuch as the Pullman Company had no special contract with the railroad, it could not compel the railroad to carry its cars.

2. In most of the States of the Union, a railroad as a common carrier may not contract against liability for negligence. (See *Fetter on Carriers*, § 398; *R. R. Co.* v. *Lockwood*, 17 Wall. 357 (1873). However, "a common carrier may undoubtedly become a private carrier or baillee for hire where, as a matter of accommodation or special engagement, he undertakes to convey something which it is not his business to convey" (*R. R. Co.* v. *Lockwood, supra*). The law on this point is tersely stated in *Piedmont Mfg. Co.* v. *C. & G. R. R. Co.*, 19 S. C. 365 (1882). "If he may carry or not as he deems best, he is but a private individual, and is invested, like all other private persons, with the right to make his own contracts, and when made, to stand upon them."

This right of railroads, under certain conditions to contract as private carriers, and when so contracting to exercise a private carrier's right (see *Hutchinson on Carriers,* § 40) to stipulate against liability for negligence, has been recognized by great weight of authority. On this ground, clauses exempting from liability for negligence have been sustained in contracts for the carriage of circus trains by the Federal Courts and the Supreme Courts of Michigan and Massachusetts (*Chicago R. R.* v. *Wallace,* 66 Fed. 506 (1895); *Coup* v. *Wabash R. R.,* 56 Mich. 111 (1885); *Robertson* v. *R. R.,* 156 Mass. 525 (1892). In a suit in Pennsylvania on a "circus train" contract made in New York to be performed in New York, the law of New York was applied and the contract enforced. Mitchell, J., in delivering his opinion said, that the contract even if made in Pennsylvania would be enforceable by the Pennsylvania courts (*Forepaugh* v. *R. R.,* 128 Pa. 217 (1889). When acting as private parties railroads have been allowed to stipulate against liability for negligence resulting in fire. *Hartford Ins. Co.* v. *R. R. Co.,* 70 Fed. 201 (1895). In the cases of contracts for the carriage of express messengers such exemptions have frequently been sustained. *B. & O. R. R.* v. *Voigt,* 176 U. S. 498 (1900); *Blank* v. *R. R.,* 182 Ill. 332 (1899); *R. R.* v. *Mahoney,* 148 Ind. 196 (1897); *R. R.* v. *Keefer,* 146 Ind. 21 (1896); *Hosmer* v. *R. R.,* 156 Mass. 506, (1892); *Bates* v. *R. R.,* 147 Mass. 255 (1888). We find this right of a common carrier to contract as a private carrier when not performing a franchise duty the ground for sustaining exemptions from liability for negligence in *Muldoon* v. *R. R.,* 10 Wash. 311 (1893); *Quimby* v. *R. R.,* 150 Mass. 365 (1890); *Griswold* v. *R. R.,* 53 Conn. 371 (1885); *Rogers* v. *Kennebec S. S. Co.,* 86 Me. 261 (1894); *Kinney* v. *R. R.,* 34 N. J. Law 513 (1869). Some apparent confusion has arisen from the cases where the common carrier is contracting in a private capacity, but fails to exempt itself from liability for negligence. The measure of care, and of liability in such cases has been various. In numerous express messenger cases, where the "exemption clause" was lacking or defective (*Kenney* v. *R. R.,* 125 N. Y. 422 (1891); *Blair* v. *R. R.,* 66 N. Y. 313 (1876); *Brewer* v. *R. R.,* 124 N. Y. 59 (1891); *Kentucky R. R.* v. *Thomas,* 79 Ky. 160 (1880); *Jennings* v. *R. R.,* 15 Ont. App. 477 (1887); *R. R.* v. *Adams,* 6 Texas Civil App. 102 (1894); *Yeomans* v. *Contra Costa Co.,* 44 Cal. 71 (1872), and in a long series of postal clerk cases where there is no "exemption clause" in the contract the test of care and measure of liability was "as that required to a passenger for hire."

In the case of a Pullman porter, however, where there was no release from liability for negligence given to the railroad company, the measure of damage was not "as that required to a passenger for hire" for negligence was not presumed from the

occurrence of the accident. The plaintiff porter was required to prove negligence [*Hughson* v. *R. R.*, 2 App. D. C. 98 (1893)].

In *Jones* v. *R. R.*, 125 Mo. 666 (1894), where, on the other hand, there was a contract exempting the defendant railroad from negligence the railroad company's liability to a Pullman porter was, none the less, held to be "as to a passenger for hire." The conclusion reached by this Missouri judge was reached on analogous contracts and facts by Judge Taft, in the case of an express messenger [*Voigt* v. *R. R.*, 79 Fed. 562 (1897)].

The dissenting opinion in another strictly analogous express messenger case in Illinois [Magruder, J., in *Blank* v. *R. R.*, 182 Ill. 332 (1899)] concurs with Judge Taft's decision. It seems, therefore, that we are warranted in saying that the overruling of *Voigt* v. *R. R.*, 79 Fed. 562, by Shiras, J., in the case of *B. & O. R. R.* v. *Voigt*, 176 U. S. 498 (1900) has thrown the weight of authority with the Indiana court's position as to the validity of a contract exempting a railroad company from liability for negligence to a Pullman porter.

3. When we come to examine how the railroad was exempted by contract we are presented to a phase of the "American Doctrine" as to contracts for the benefit of third parties, which is recognized, but which is of comparatively rare occurrence.

The "American Doctrine" as generally stated is, that, "The third party for whose benefit a contract is made may sue thereon" [American and English Encyclopaedia of Law, Vol. VII, p. 106 (cent. ed.), *Hendrick* v. *Lindsay*, 93 U. S. 143 (1876); *National Bank* v. *Grand Lodge*, 98 U. S. 123 (1878)]. It is also stated that such third party for whose benefit a contract is made, "may recover thereon." [*American Digest* (cent. ed.), Vol. II, Col. 845.] In the case under discussion, the contract between the Pullman Company and the railroad, whereby the railroad was to be indemnified, raised a legal duty to the railroad. The contract between the Pullman Company and the porter made the railroad an express beneficiary. Thus there is present every element to give the railroad a beneficiary's rights under the American Doctrine even where modifications have been introduced[*Vrooman* v. *Turner*, 69 N. Y. 280 (1877); *Durnherr* v. *Raw*, 135 N. Y. 219 (1892)].

Generally, the third party for whose benefit the contract is made "enforces" it by suing on the contract. Here the third party pleads the contract as a defence.

The court allows this defence by the words: "And it (the R. R. Co.) may now claim its advantages as one in whose interests the agreement was executed." They cite *Ransdel* v. *Moore*, 153 Ind. 394 (1899), in which the wording of the third party rule, "where one agrees with another for sufficient consideration to do a thing for the benefit of a third party, such third party may enforce the same," is surely wide enough to include pleading such contract as a defence.

Using such beneficial contract as a defence is permitted in *Jones* v. *R. R.*, 125 Mo. 666 (1894); *R. R. Co.* v. *Voigt*, 176 U. S. 498 (1900), and *Blank* v. *R. R.*, 182 Ill. 332 (1899). In the latter case the court said: "As the defendant's contract with the express company is valid, therefore, the plaintiff's (an express messenger) contract with the express company may be pleaded in bar of his cause of action." There is a very clear exposition of the law on this point in *Saywood* v. *Dexter Herlin & Co.*, 72 Fed. 758 (1896), where Gilbert, J., says: "His right to plead in abatement of this action an agreement in forbearance of suit depends wholly upon the terms of such agreement. He cannot call to his aid covenants made between B. & C. to which he was not party or privy.

4. The ground is here definitely taken that in contracts made in a private capacity, the "exemption clause" need only be broad enough to include by necessary implication exemption in case of negligence. Negligence need not be specifically mentioned.

The language of the contract here held to include negligence was exemption from all claims for liability of any nature or character whatsoever, on account of personal injury or death." *Russell* v. *P. C. C. & St. L.*, 61 N. E. 678 (Ind. 1901).

In *Hosmer* v. *R. R. Co.*, 156 Mass, 506 (1892), the words, "Assume all risks of accident resulting from any cause," were held to include negligence. Words identical with those used in *Russell* v. *P. C. C. & St. L.* (*supra*), were held to include negligence in *Jones* v. *R. R.*, 125 Mo. 666 (1894). "This company shall not be liable under any circumstances for any injury to the person," was held to include injury by negligence in *Ill. Cent. R. R.* v. *Read*, 37 Ill. 486 (1865). *Rogers* v. *S. S. Co.*, 86 Me. 261 (1894), and *R. R. Co.* v. *Mahoney*, 148 Ind. 196 (1897), follow this same rule. England allows contracts exempting from liability for negligence in public or private contracts of carriers. In either case if the language is broad enough to include negligence, negligence is included: *M. S. & L. R. R.* v. *Brown*, 8 App. Cas. 703 (1883).

In New York, however, language sufficiently broad to include negligence does not suffice to raise an exemption from liability for negligence. Negligence must be specifically mentioned: *Blair* v. *R. R.*, 66 N. Y. 314 (1876); *Kenney* v. *R. R.*, 125 N. Y. 425 (1891).

J. A. R.