had incurred whatever liability attached for that breach. A verdict and judgment were subsequently directed, under the stipulation, for the plaintiff for the amount he paid for the tickets, which settled the right to recover on the facts, but limited the measure of damages to the price of the tickets. This action of the court assumed that the jury would have found the much-disputed facts in regard to the contract in favor of the plaintiff, and proceeded on the theory that he was entitled to be carried on the expired tickets from Town Creek to Memphis and back, and that the defendant company was guilty of a breach of its contract and liable for refusing to carry him. The case was treated as if the plaintiff had paid the extra fair demanded, as he did the next day, when he purchased new tickets and proceeded on his journey, and then sued for a refusal to carry him on the original contract.

It is now argued that, this being so, the plaintiff was wrongfully ejected, and the case should have gone to the jury under proper instructions as to the measure of damages. If the defendant company were complaining and demanding a new trial, I should not refuse it; for, clearly, the fact whether it made any contract other than that expressed on the limited tickets was much disputed, and the jury might have found the verdict either way, and the action of the court was wrongful as to the defendant company in depriving it of a jury trial on that question. But the stipulation was put upon the defendant to compel it to submit to a verdict on that question against itself, and disembarrass the case of all other considerations, except the one whether the plaintiff was entitled to recover for putting him off the train anything more than the price of the tickets. The proper direction would have been to find for the plaintiff the amount paid for the new tickets and interest, or not, in the discretion of the jury, instead of a direction to find for the defendant company. But I had not then fully made up my mind that the plaintiff was entitled to recover anything *ex contractu*, and sought to reserve that question by the stipulation. The real question in the case is one of the proper measure of damages. When the court directed a verdict for the defendant corporation, with the stipulation above mentioned, it determined that the price of the extra tickets was the proper measure of damages, and, taking the subsequent action of the court under the stipulation into view, the case stands in the attitude of a direction by the court, on all the facts, assuming conclusively in favor of the plaintiff that he had a contract entitling him to carriage, that the

jury should find a verdict for the plaintiff for the price of the extra tickets, and he is entitled to a new trial if under any proper view of the facts or law he could have recovered more.

It is proper to remark that the court laid out of the case all questions of unnecessary force, for, on the plaintiff's own proof, and paying no attention to the conflict as to what was actually done, as appears by defendant's proof, he resisted the conductor, and not only provoked, but invited, force to eject him; no doubt under the mistaken view of the law, as he himself expressed it, that "he had a right to vindicate his constitutional and legal rights as a free American citizen;" that it was his duty to do so; and further, that resistance was necessary to secure his right of action against the company. He admits that much, and I do not doubt he felt that he was building up a more substantial claim for large damages by resistance. It is a common mistake, but where the conductor is acting lawfully, and doing what he has a right to do, the passenger must submit to his authority, and resistance is wholly unlawful. The courts will not, where a passenger is in the wrong, tolerate any nice discriminations about the force necessary to secure submission to the conductor's lawful authority and overcome the resistance, unless it may be where the conductor departs from the exercise of lawful force, and beats, wounds, or maltreats the resisting passenger in the ill-temper of belligerency, and thereby becomes an aggressor on his own personal account. Even here it would be remembered that the conductor is likewise human; while he should do his duty without unnecessary violence, and in the best of temper, a resisting passenger cannot expect the courts to erect delicate scales on which to weigh with exact nicety the force used to overcome his resistance. The conductor is somewhat like the master of a ship. He has police powers and disciplinary control over the train, and the quiet and comfort of the passengers and their safety are under his protection. He should be obeyed by the passengers, and the common notion that force must be invited to secure legal demands against his unlawful exactions is, in my judgment, erroneous and vicious. All the passenger need do is to express his dissent to the demand made upon him, and he need not require force to be exerted to secure his rights, certainly not to increase his damages. I have held in another case that even where the passenger is right and the conductor wrong, it is contributory negligence to resist him by engaging in an unnecessary trial of strength with superior force. Absolute submission may not be a duty where the conduct of the conductor is wrongful, and resistance does not pre-

clude the right to recover all reasonable damages for the wrong done; but unreasonable resistance should be considered in mitigation of damages; resistance should not, at all events, be allowed to aggravate the damages. *Brown* v. *Memphis & C. R. Co.* 7 FED. REP. 51, 65.

I fully recognize the feeling of "a free American citizen" in the face of threatened wrong or insult, but the safety of the ship forbids that he should fight with the master, and imperil the ship and the lives and property she carries. Better that he should suffer the wrong than to endanger or discomfort his fellow-passengers. The conductor of a railroad train is not altogether as supreme, perhaps, as the master of a ship; but on analogous principles, that seem to me obvious, it is, I think, the duty of a passenger to avoid resistance beyond mere dissent, and submit to his authority without more than mere protest, unless resistance is necessary to defend himself against impending personal injury. In this case, therefore, it not appearing that the conductor was guilty of any attempted violence in overcoming the resistance of the plaintiff, and that he was as considerate of his age and obstinacy as possible, taking all the plaintiff said to be true, I do not feel authorized on the proof to submit to the jury whether or not the plaintiff's resistance might not have been overcome with something less of force than the conductor used. The plaintiff said he did the best he could to retain his seat in the train by holding on and refusing to leave it.

The same considerations, growing out of the mistaken notion of the plaintiff that he was only vindicating his rights, that to do this he must invite force, and his obstinacy in refusing to pay the additional fare demanded while he had abundance of money with him to do so, convinced me that he was intent on making a case against this railroad company by compelling the conductor to eject him or recognize his tickets, and induced me to withdraw all the circumstances connected with his ejection from the consideration of the jury in aggravation of damages. In my judgment passengers cannot be allowed to build up cases for damages. Admit that the company should have carried this plaintiff notwithstanding the expiration of the limited ticket, and notwithstanding the regulations forbidding the conductor to recognize a ticket after it had expired, and it does not follow that the plaintiff is entitled to recover damages for the injuries, real or imaginary, to his person or his feelings for his *ejection* from the train. He may be entitled to the damages for a breach of the contract, which he has, by the judgment, received; and if, by the delay or refusal to carry him, he had suffered in his

business or been put to expense, these might have been added. But there was no proof of such damages in this case. It was claimed that damages should be awarded for indignity to these old people; for injury to them in their persons and feelings by putting them out in the night under circumstances of discomfort. The conductor should probably have carried these aged people, their daughter and child, to Collierville, some 15 miles further on, where they were willing to stop, and had ample time to adjust their trouble about the tickets. This, in consideration of their extreme age, and the great indulgence due to even the exactions, the whims, and the obduracy sometimes found in extreme old age, and abundantly manifested by this —as the proof shows—very excellent gentleman. All the jury, no doubt, would have advised this, and all the learned counsel, particularly those of the defendant. But this is mere sentimentalism. The conductor was not bound to do it, nor to risk expulsion by doing it, and the conduct of the plaintiff was not of that character to incline him to it. Here was an aged gentleman with an aged wife, their daughter and her child, found upon a train with expired tickets, which the conductor was forbidden to receive. There was a dispute about the obligation of the company to receive them. The fact appeared on their face that the contract of the company had expired, and this was all the conductor knew, or could know of his own knowledge. All else about them he must take from the plaintiff.

The plaintiff's claim rested upon complicated transactions, understandings, inferences, and a contract, if you please, resting in parol, with two or more station agents, more than 100 miles away. How could the conductor act on such a contract? How could he take these expired tickets, and obey the rules of his company prescribed for his guidance? But here was the plaintiff insisting unreasonably that he should. Their negotiations came to the point that by paying less than five dollars the party would be carried to Colliersville, where they had friends and were willing to stop until the trouble could be arranged; and yet this obdurate passenger refused to pay it, with ample funds in hand, and insisted on a forcible ejection of himself and the aged wife, their daughter and her child. If wrongly demanded it could have been recovered back, with costs, and all damages satisfied. Why should he not have taken that course? It is not the case of a man with a clear right and a clean ticket entitled to ride on that trip and train wrongfully ejected, but of one with a disputed right, a ticket void on its face, and which required further attention from the passenger to make it available, as he was informed

then and there by the conductor. Under such circumstances, to insist on the conductor taking his word about what he had been told by the station agents as to the capacity of the ticket to take him along after its plain terms had stamped it with uselessness, rather than pay the fare demanded, was his own folly; and this was the cause of his ejection and his damage, and it was not the proximate or remote result of a breach of the contract.

Here we are met with an argument that this was all for the jury and not the court. I think not. The court determines the measure of damages as a question of law, by fixing the principle by which the jury measures the quantity. Outside of that it is for the court to adjudicate on the facts as found by the jury, and in reaching my conclusions I assume all the plaintiff's case to be just as he himself makes it, and base my judgment solely on his proof. Numerous cases can be cited in opposition to these views, but none of them are from the supreme court, and I prefer to follow those that may be cited to support this judgment. The fact is that this class of cases is not satisfactory as furnishing precedents for any judgment. The facts are so differential, the oscillation and vacillation so great, that any hope of reconciling the conflict is visionary. The most that can be done is to trace out some principle of judgment that meets the general approval. That which I seek to follow here is this: While the law holds carriers to a rigid responsibility to the public, and will enforce it by awarding damages, sometimes more than have been actually sustained, it does not require of them unreasonable acquiescence in every demand made by a customer to waive their ordinary business rules of conduct in favor of his convenience or even in favor of his contract. I tried to illustrate this at the trial by putting the case of a passenger being furnished through accident or mistake with a ticket to another place than that to which he wished to go. He has paid his money and there is a valid contract to carry him to his destination, but it can hardly be that he can require the conductor to stop the train till he can rectify the mistake, or take the ticket on his assurance of the real contract, or to abandon the ticket system and disregard the regulations made for the general public and the carrier's mutual convenience. What is to be done? Clearly, it seems to me, the passenger should pay his fare—if able—and settle the difference with the company by returning the ticket and adjusting the balance. Men do this in ordinary business intercourse in other branches of trade or commerce, and there is no reason why they should not in this.

The law recognizes that these carriers find it necessary in their business to have their checks and balances in the intercommunication of their agents, and they require in its conduct elaborate systems of rules to prevent loss to them and to the public. Mistakes will occur with railroads as with others, and the same rules should be applied. It seems to me that a passenger, finding himself without a ticket or other evidence of his contract which will be recognized under these regulations, cannot plant himself on his contract right and force the railroad, outside and against the regulations, to a specific performance then and there by compelling the conductor to eject him as a foundation for more damages than he would receive if he should comply with the regulations, and sue for a breach of the contract. There is no other just way to manage these mistakes. Those who would defraud the company might pretend to be the victims of mistakes or the beneficiaries of contracts outside the regulations. We took much time, examined many witnesses, and heard much argument on the issue whether the station agent did or did not make the alleged contract to carry the plaintiff on tickets expired on their face, and I doubt if, in the conflict of proof, the jury could have reached a satisfactory verdict on that issue. How, then, could the conductor have tried it successfully in the brief time allowed him in collecting tickets? It was impossible. He had either to take the plaintiff's word for it or enforce his regulations. The plaintiff's word was, and has been all along, disputed; and, giving him the benefit of all the credence his character and life entitles him to, the fact remains that the conductor had no means of knowing the weight to be attached to his word, and a common impostor could have told the story as well as the best of men.

It is in my judgment the duty of a passenger to see to it, before he takes a train, that his ticket will carry him on that train, and where it is on its face expired he should have it renewed or otherwise made good at the proper place, and by inquiry before taking the train be sure that it is a proper thing for him to take that train. The business could not be done with tickets on any other principle. Admit all that may be demanded by a theory that it is the duty of the carrier to inform its agents of anomalous contracts and the result is the same. They do this by giving the passenger evidences of his contract, called tickets, or sometimes special passes, and it is likewise the duty of the passenger to see that he has these necessary tokens of his right to travel on a train. If there be mutual mistake

and mutual neglect, or even a mistake by the carrier alone, it does not follow that the passenger can demand that all the regulations shall be set aside to cure the mistake, but only that it must be by conference with the proper officers (and the conductor on a moving train is not in a case like this one of these) adjusted, and if this be refused, proper damages may be recovered. But the proper damages are not such as the unfortunate passenger may receive by absolutely insisting on a violation of the ordinary regulations, by subordinate officials for whose guidance the regulations are a necessity, to cover a case clearly outside of them. If the plaintiff had been penniless, I need not say whether the principle would be changed. Perhaps not. But here there was money sufficient to have paid the extra fare, as it was afterwards paid, and the plaintiff's duty was to have paid it that night and sue for a breach of his alleged contract, and not to force an ejection and lay the foundation for larger damages than a suit on the contract would have given him. Suppose he had continuously refused to pay further fare and remained continuously at the place where he was ejected, can it be said he could have recovered for all that delay in reaching his destination? Why, then, should he not pay at once and go on, as to pay later and go on, to avoid contributory negligence? It is argued that petty suits like that suggested by the court would be expensive and useless as a means of compelling great corporations to discharge their contracts, and the lawyers would not take them. Great corporations are no more liable for great damages for small injuries than other people, and the plaintiff, before a justice of the peace at his own home where the witnesses all resided, by an ordinary suit, could have recovered back all the extra fare, if he were entitled to it, with as little expense as in other cases.

Some argument has been made that the conductor demanded more fare than under the regulations he should have done. I think the regulations, as explained by the several conductors' books put in proof, and the explanations of the dates when they were in force, and the explanations as to the meaning of the terms "straight fare," "train rates," "conductors' rates," etc., as given by the witnesses, will show that this is not the fact. But I do not go into that, because the principle of this judgment is the same, whether the conductor demanded too much or not. A moving train is no place to wrangle with the conductor about rates. His demand for fare should be complied with, or the passenger peaceably and quietly leave the train

and seek his remedy at law. He cannot compel ejection with force and increase his damages because the conductor asks too much. If he tenders the proper fare and it is refused, the law will compensate him in damages, but he cannot force himself on the conductor in a dispute about rates, any more than in a dispute about tickets. It is not like the class of cases where the passenger is ejected for refusing to comply with unreasonable regulations in the matter of the manner and mode of carrying him, or like violation of the contract. There the public policy which requires carriers to respect the rights of people to accommodation according to contract, to protection to life and limb, etc., authorizes the courts and juries to enforce that policy by damages which are not altogether, perhaps,—at least where there is personal indignity or violence,—measured by the nicest scales of exact injury so much as by the force of example required to compel the carrier to do his duty to the public. *Railroad Co.* v. *Brown*, 17 Wall. 445; *Pennsylvania Co.* v. *Roy*, 101 U. S. 451; *Gallina* v. *Hot Springs R. Co.* 13 FED. REP. 116. These overcharges in rates for transportation can be compensated by the money overpaid and interest, and I do not see that the public policy referred to here requires that in the multitude of business a carrier shall be held never to make mistakes, or always to be exactly right in all disputes about contracts under the penalty of punitive damages. The argument that the case is governed by the strict law of contract which is so urgently pressed by general analogies of a contract to do a thing, and a neglect or refusal to do it, is met by the judgment in favor of the plaintiff for the full amount of the loss he sustained by the breach, and there is a misapplication of these analogies when we overlook the fact that the passenger makes his contract with reference to all the reasonable rules prescribed by the company for the useful conduct of its business, not only for its own convenience and profit, but also for that of the public as well.

A very vigorous protest is made by the argument against the doctrine of contributory negligence, as applicable to a case like this, but it is only at last a controversy about terms. Perhaps it is more technically correct to say that the conduct of the conductor of the train being unobjectionable, the injury complained of was not the direct result of any fault of his or the defendant corporation which he represented, and it is not, therefore, liable to the plaintiff, but it could have been prevented if the plaintiff had chosen to pay the fare demanded, and in that sense it was the result of his own negligence, rather than anything the conductor did.

It is further argued that the conductor put the plaintiff off at an improper place. It was a regular station, and his regulations required him to evict a passenger refusing to pay fare at the next station. There was no hotel at the place, but there were houses of citizens close by, and there was at the station a room, not very elegant to be sure, but all that the railroad could be required to furnish at such a place for waiting passengers. I know of no rule of law which requires a railroad company to furnish recalcitrant passengers with accommodations of any kind when put off the train for refusing to pay fare, or to put them off only at stations having hotels. They might not be allowed to put them off between stations, where they cannot see agents or procure tickets without extraordinary trouble, or in a wilderness or a desert, to suffer by starvation or for want of lodgings, but this station afforded as much as the company could be required to provide in such cases.

On the whole case, it seems to me now, as at the trial, that the plaintiff's suit must be treated as if he had quietly left the train and sued for a breach of his alleged parol contract to be carried at the reduced rate of limited tickets after the limitation had expired, and that inasmuch as he shows no special damage to his business or otherwise, resulting from the delay, his recovery must be limited to the extra fare paid, the other injuries complained of being the cause of his mistaken notions about his right to be carried on the expired tickets, and his resistance to the proper demand of the conductor that he should, in the absence of any evidence of his contract, pay train fare.

As before remarked, there are cases which do not, in the text of the opinions and perhaps as adjudications, justify this judgment, but it finds support in others which seem to me more sound. Remarking that the case of *Louisville R. Co.* v. *Garrett*, 8 Lea, 438, does not, in my judgment, in the least contravene the views here expressed, and that the case of *Walker* v. *Langford*, 1 Sneed, 514, fully sustains them, although that was a contract of a wholly different nature, when it rules that a plaintiff cannot increase his damages for a breach of contract by neglecting, or refusing at his own expense, to do that which would lessen them, I close this opinion with a citation of the principal and most pertinent cases cited on either side, without attempting to review or reconcile them. *Frederick* v. *Marquette R. Co.* 37 Mich. 342; *Chicago R. Co.* v. *Griffin*, 68 Ill. 499; *Pullman Car Co.* v. *Reed*, 75 Ill. 125; *Ill. Cent. R. Co.* v. *Johnson*, 67 Ill. 312; *Cincinnati R. Co.* v. *Cole*, 29 Ohio St. 126; *Townsend* v.

N. Y. Cent. R. R. 56 N. Y. 295; S. C. 4 Hun, 217; *Cox* v. *N. Y. Cent. R. R.* 4 Hun, 176, 182; *English* v. *Delaware & H. Canal Co.* 66 N. Y. 454; S. C. 4 Hun, 683; *O'Brien* v. *N. Y. Cent. R. Co.* 80 N. Y. 236; *Hamilton* v. *Third Ave. R. Co.* 53 N. Y. 25; *Jackson* v. *Second Ave. R. Co.* 47 N. Y. 274; *Jeffersonville R. Co.* v. *Rogers*, 38 Ind. 116; *Pittsburgh, etc., R. Co.* v. *Hennigh*, 39 Ind. 509; *Palmer* v. *Railroad*, 3 Rich. (N. S.) 580; *Maples* v. *N. Y., etc., R. Co.* 38 Conn. 557; *Burnham* v. *Grand Trunk R. R.* 63 Me. 298; Thomp. Carr. 337; Hutch. Carr. §§ 570, 575; 5 South. Law Rev. 770.

Motion overruled.

See S. C. 9 FED. REP. 585; *Gray* v. *Cincinnati South. R. Co.* 11 FED. REP. 683; *Maskos* v. *Amer. Steam-ship Co.* 11 FED. REP. 698; *Brown* v. *Memphis, etc., R. Co.* 7 FED. REP. 51; S. C. 5 FED. REP. 489.

Recent Decisions on the Rights of Passengers.

§ 1. PRELIMINARY. The principal case was reported in 9 Fed. Rep. 585, where the learned judge, in charging the jury, ruled substantially the same question which is again ruled as above, that, although a passenger may have a right to be carried under a special contract, if he be not provided with a ticket which the conductor can recognize, he must pay the fare demanded by the conductor, under a reasonable regulation requiring him to demand fare of persons without tickets, and cannot insist on being expelled by force, as a foundation for a suit for damages for wrongful expulsion. By this conduct he contributes to his injuries, which are the direct result of his own conduct, and not the breach of any special contract he may have for his carriage.(*a*)

A case involving the same facts as the above case was tried in December in the circuit court of Shelby county, Tennessee, before the Hon. JAMES O. PIERCE, who is well known to the profession as a judge of exceptional culture and ability. Mrs. Clendenin was traveling with Mr. and Mrs. Hall, her parents, on the same kind of a ticket, bought at the same time and under the same circumstances, and expiring at the same time. They went to Texas, and, on their return, reached Memphis on the very day their tickets were to expire. The time when they expired was midnight. They got on board a train which left Memphis at 11:59 P. M. The conductor refused to recognize their tickets, claiming that they had expired, and demanded what is known as "conductor's fare" from Memphis to Town Creek. They declined to give this, and offered to pay "agent's fare," which is somewhat less; whereupon the conductor put them off at White's station, which is 10 miles out, where they remained all night, without any place to sleep, and exposed to the weather. Mr. and Mrs. Hall brought the above suit for damages in the United States circuit court claiming $20,000, and recovered the amount of the extra fare which Mr. Hall was obliged to pay in order to reach home. Clendenin and

(*a*) Hall v. Memphis, etc., R. Co. 9 Fed. Rep. 585.

wife, suing in the state court, had better luck; they had a verdict for $2,500. At the trial, Judge PIERCE charged the jury as follows:

"*Gentlemen of the Jury:*

"Two principal questions are presented in this case for your determination.

"*First.* Did the plaintiff, at the time she was ejected from the defendant's train, have a valid contract, then in force, for carriage from Memphis to Town Creek.

"*Second.* If she did not have such a contract, and refused to pay the regular fare therefor, at the defendant's established rates, when demanded by the conductor, in which case she had no right to remain on the train, then did the conductor put her off at any place other than a regular station, or did he in ejecting her use any more force or violence than was necessary?

"It is admitted that when plaintiff's agent, Hall, purchased the ticket in question, nothing was said by him concerning the 30-days' limitation upon the ticket. You are instructed that if this were all, the plaintiff could not claim the right to use the ticket after the 30 days expired; and if she endeavored thereafter to ride on defendant's train upon that ticket alone, and refused to pay the regular fare established by the company's regulations, she was wrong in so doing, and the defendant had the right to eject her from the train.

"The rule on this point would be the same if plaintiff's agent, Hall, purchased the ticket by mistake, and afterwards asked the ticket agent to take it back and give him his money or another ticket, or to exchange tickets, and the ticket agent refused.

"Whatever claim or demand, if any, the plaintiff may have had upon the defendant by reason of such refusal, she had, under the circumstances stated, no right to ride upon defendant's train in defiance of its regulations, and without paying the fare as provided by those regulations.

"The rule would be the same if you find that defendant's ticket agent might have exchanged the ticket in case he desired to, but refused to do so, no matter from what motive.

"Again, if you find that, after so purchasing the ticket, plaintiff's agent, Hall, in endeavoring to get an exchange of tickets, asked the ticket agent who sold him the ticket whether plaintiff could not ride on the ticket after the 30 days had expired, and that the said ticket agent told Hall she could not do so, or that he did not know, or that he did not assure him she could do so, the rule would be the same as above stated, and plaintiff would have no right to carriage upon that ticket after the 30 days expired.

"If, without the right to do so, she endeavored to ride upon the expired ticket, and the conductor refused to permit her to do so, and demanded her fare, it was her duty either to pay the fare or leave the train. Her fare would be the regular rate, according to the defendant's established regulations; and an offer to pay the difference between such fare and the sum that had been paid, either in whole or in part, for the expired ticket, would not be an offer to pay fare.

"If, however, you find that Hall, the plaintiff's agent, on the same day applied to the ticket agent for an exchange of tickets, and stated that the tick-

ets he had purchased were not what he wanted, and had been purchased by mistake, and the ticket agent told him that the 30-days' limitation would not be enforced by the defendant, but that the ticket in question would serve plaintiff's purpose for longer than 30 days, and assured him that she could use the ticket for carriage after the 30 days expired, and that Hall relied on those representations, and for this reason did not purchase other tickets, and that plaintiff was relying thereon when endeavoring to ride from Memphis to Town Creek at the time she was ejected, then you will inquire and determine from the evidence whether such assurances by the ticket agent were within the actual or apparent scope of his authority.

"In considering these questions you will observe that Hazlewood was the regular ticket agent of the defendant at Town Creek, and you are instructed that Hazlewood's private clerk, Houston, became ticket agent only as he exercised Hazlewood's power in selling tickets, and for such act only, and for the time only when engaged in selling a ticket or tickets, and was not such ticket agent when not so engaged, and his authority in regard to selling any particular ticket or tickets terminated when that ticket or those tickets had been sold and delivered. Daniel's power or agency to sell tickets for Hazlewood was limited in like manner.

"If you find that Houston alone was engaged in selling the tickets in question, and Daniel took no part therein, then Houston, and not Daniel, was the ticket agent in this transaction; and if you find this to be so, then any remark, statement, or assurance made at the time by Daniel as to a waiver by the defendant of the 30-days' limitation would not be the act of the ticket agent, and would not bind the defendant.

"But if you find that, in connection with the sale of the tickets in question, Houston made any statement or assurance concerning the 30-days' limitation, you will then inquire and determine from the evidence whether it was within either the actual or the apparent scope of the ticket agent's authority to give such statement or assurance.

"In considering what was the actual scope of the ticket agent's authority, you will look to all the evidence in the case, including the instruction to agents given by the defendant, the practice as to printing, preparing, and issuing tickets, the form of the tickets and the limitations or stipulations on their face, and the manner in which they were sold by ticket agents.

"If you find that it was not within the actual authority of the agent to waive the limitation to 30 days, expressed on the face of the ticket, then you will determine whether it was within the apparent scope of his authority.

"If you find that it was part of the business of the agent at Town Creek to attend to all the business of the defendant at that place in the way of selling tickets, then you will determine, from the evidence, whether the defendant authorized or allowed such agent to transact the business in such a way as to make it appear that he had authority to waive the limitation to 30 days on the face of these tickets, or whether the defendant held him out to the public as having such authority, or knowingly allowed him to exercise or acquiesced in his exercise of such authority; and, further, whether Hall, the plaintiff's agent, was ignorant of the actual scope of the ticket agent's authority, and relied on the appearances so indicated. In determining this question you will

consider the manner in which the tickets are usually prepared and issued, and put in the hands of agents for sale, so far as appears from the face of the tickets; the manner in which they are sold, and anything else that is known about the matter by the traveling public generally.

"If it was not within the actual scope of the ticket agent's authority to waive the 30-days' limitation, and Hall knew it was not, then he had no right to rely on the ticket agent's waiver of the limitation, and the plaintiff cannot base her contract on it, and cannot claim to ride upon the ticket in question. Or, if you find under the instruction above given that it was not within either the actual or apparent scope of the ticket agent's authority to waive that limitation, then Hall had no right to rely on such a waiver, even if you find that the ticket agent waived, or attempted to waive, that limitation, and that Hall relied on it; for if the act of the ticket agent in making such waiver was not within either the actual or the apparent scope of his authority, it did not bind the defendant, and the contract remained as it appeared to be on the face of the ticket; and if you so find, your verdict on this point will be in favor of the defendant.

"But if the act of the ticket agent in waving the 30-days' limitation was within the scope of his authority, as it appeared to be from the usual and customary way in which he transacted the defendant's business, with the knowledge and approval or acquiescence of the defendant, and if you find that he did waive that limitation, and that Hall relied on such waiver, and the plaintiff undertook to use her ticket accordingly, this was a contract between the parties, and your verdict will be for the plaintiff; and, in considering whether Hall relied on such waiver, you may consider any assurances in regard to the same subject which were previously given by Hazlewood, and which were in like manner within the apparent scope of the ticket agent's authority, if you find from the evidence that any such assurances were given by him.

'If the plaintiff was on the train upon a ticket unlimited in time either by the express terms of said ticket, or by a valid verbal contract or understanding with the station agent at Town Creek, who sold the ticket, then the railroad is liable for damages, if the conductor ejected her from the train, notwithstanding the fact that a strict construction of the rules laid down by the company for the guidance of the conductor made it his duty towards the company to expel her.

"If you find from the proof and from the charges given that the plaintiff was rightfully on the cars, and that she should not have been put off, then the touching of plaintiff, however gently, in the effort to put her off by the conductor, was an assault upon her, for which the defendants are liable.

"If you should be of opinion that the violence, if you find any, used by the conductor in expelling plaintiff was not greater than he was compelled to use, and for which the company would not be liable if the expulsion had been lawful, yet if you find that the expulsion was unlawful, then any violence or laying-on of hands upon the plaintiff by the conductor was excessive and unwarranted, and constituted an assault upon the plaintiff, for which the defendants are liable.

"If, however, you find under the foregoing instructions that the plaintiff had no valid contract with the defendant for carriage after the 30 days ex-

pired, then the plaintiff had no right to ride on the train without paying the fare required by the regulations, and if she refused to do so the defendant's agents had a right to eject her from the train.

"But this must be done at a regular station, and with the use of no more force or violence than is necessary for the purpose.

"A regular station is one at which the passenger trains on the road, or the majority of them, regularly and customarily stop to put off and take on passengers.

"If you find that defendant's agents put the plaintiff off at such a station, using no more force or violence than was necessary, then your verdict on this point will be for the defendant. If you find that they put her off at some place not a regular station, or if you find that they used more force or violence than was necessary, then, in either case, this was a wrong on the part of defendant, and your verdict on this point will be for the plaintiff.

"But if the plaintiff had no right to ride on the train without paying fare, and refused to pay fare, it was her duty to leave the train when so required by the conductor; and if no more force or violence was used than was made necessary by her own resistance to the demand of the conductor that she leave the train, this was not a wrong on the part of the defendant, and your verdict in this respect will be for the defendant.

"If you find against the plaintiff on all the points stated in the foregoing instructions, then your verdict will be for the defendant.

"But if you find in favor of the plaintiff on any one of those points, then you will proceed to estimate her damages under the following instructions, and you will return the same in your verdict.

"If, under the instructions given, you should find a verdict in favor of the plaintiff, the court instructs you that, in estimating damages to be awarded the plaintiff, you will allow the losses and expenses actually incurred by her, and include compensation for physical suffering and inconvenience, if any, and for mental suffering and any sense of mortification, humiliation, and degradation suffered by the plaintiff by reason of such expulsion in the presence of her family and in the presence of other passengers, and including compensation for pain and inconvenience and expenses experienced while waiting at the place where she was put off, until she could obtain another train; and for any injury to her health by reason of exposure to the weather, under the circumstances, if you find that she was so exposed.

"But if you find from the evidence that plaintiff and her mother and father were evicted at the same time and place from defendant's train because their tickets were all alike upon their face,—expired limited tickets,—and all three refused to pay the fare demanded by the conductor, and you should find for the plaintiff, you can allow no damages in this case because of the eviction of the father and mother of plaintiff, nor because of any hurts or injuries or discomforts sustained by them, nor because of any suffering or misery or mental anxiety of plaintiff at witnessing their expulsion or hurts, injuries or discomforts."

It will be seen, by comparing the foregoing cases, that both of these able judges agree upon the question that the ticket agent of a railway company may

have power to make representations respecting the tickets which he sells, which will bind the company and form a part of the contract between the carrier and the passenger; but they differ upon the question of damages,—Judge HAMMOND holding, as I understand him, that the measure of damages is the unearned passage money; that the passenger cannot insist upon the conductor recognizing an oral engagement, made by a ticket agent of the company, which is in violation of the regulations of the company, and of which the conductor has no knowledge, except through the representations of the passenger, and make his refusal to do so a ground of expulsion in order to recover enhanced damages; and Judge PIERCE holding, as I understand him, that the passenger has a right to stand upon the contract as made; to insist upon its performance, and, if expelled from the carrier's vehicle, to recover the same damages which he would be entitled to recover if expelled at the same time and place, under the same circumstances and in the same manner, for any other wrongful cause.

The proof before Judge PIERCE presented a question not presented in the other case. At the station where the travelers were ejected there were no lights, no station agent, no one to sell tickets, and they tried in vain to procure tickets, so as to proceed on the same train. The conductor who had refused "ticket fare" when tendered, and demanded "conductors' fare," knew when he put them out that there was no agent there to sell tickets. What was, then, his duty towards them, and were they entitled to ride on "ticket fare," as *bona fide* passengers who were not permitted to purchase tickets?

It is not proposed in this note to *review*, much less to criticise, the decision of the learned judge in the principal case, nor the charge of Judge PIERCE above set out. It is thought that the needs of the readers of the FEDERAL REPORTER will be better subserved by reviewing all the decisions of the English and American courts relating to the rights of passengers and carriers of passengers under the various contracts of carriage, which have been rendered during the last two years, or since the publication of any edition of any general work on the subject; referring to prior decisions only so far as necessary to a discussion of the recent cases examined. Such being the purpose of this note, the reader will not expect a connected discussion of any one topic. On the contrary, a great many topics will be touched upon which have not been suggested by anything decided in the principal case. One feature of the principal case has, however, been examined, in the light of some recent decisions, in section 7, *infra*.

I. As to Certain Regulations of Carriers.

§ 2. REASONABLENESS OF CARRIER'S REGULATION—WHETHER A QUESTION OF LAW OR FACT. It has been held by one court that the reasonableness of a regulation of a carrier of passengers is a question of fact for the jury.(*a*) Other courts regard it as a mixed question of law and fact, and say that it is always proper to submit it to the jury under proper instructions.(*b*)

(*a*) State v. Overton, 24 N. J. L. 435, 441; Morris R. Co. v. Ayres, 29 N. J. L. 393.

(*b*) Bass v. Chicago, etc., R. Co. 36 Wis. 450; S. C. Thomp. Car. Pass. 311; Day v. Owen, 5 Mich. 520; Brown v. Memphis, etc., R. Co. 4 Fed. Rep.

Hence, this question cannot be determined on demurrer.(c) But this does not apply to all regulations. There are certain regulations, the reasonableness of which is so obvious that they may be held reasonable as matter of law. Indeed, there are regulations, the reasonableness of which is settled by a line of adjudications. Of this nature may be named the regulation of railway companies requiring passengers to purchase tickets before taking seats in their cars, or, in default of this, to pay extra fare.(d) The reasonableness of such a regulation is found in the fact that, without it, carriers could not protect themselves from being defrauded at will by train agents. So a regulation of a railway company prohibiting persons from riding on its freight trains unless they previously purchase tickets at a station, is held reasonable as matter of law.(e)

§ 3. EXCLUDING PERSONS OF EVIL REPUTE. In a recent decision of the learned and accomplished judge who wrote the opinion in the principal case, this question is considered with reference to the right of a carrier to exclude from his vehicles unchaste women. The learned judge charged the jury that, in determining whether the expulsion was lawful or not, the same principles were to be applied to women as to men; that the social penalties of excluding unchaste women from hotels, theaters, and other public places could not be imported into the law of common carriers; that the carrier is bound to carry the good, the bad, and the indifferent, and has nothing to do with the morals of his passengers, if their behavior be proper while traveling. Neither can he use the character for chastity of his female passengers as a basis for classification, so as to put all chaste women, or women who have the reputation of being chaste, into one car, and all unchaste women, or women who have the reputation of being unchaste, into another car. Such a regulation would be contrary to public policy, and unreasonable. It would put every woman purchasing a railroad ticket on trial before the conductor as her judge, and, in case of mistake, it would lead to breaches of the peace. It would practically exclude all sensible and sensitive women from traveling at all, no matter how virtuous, for fear they might be put into, or occasionally occupy, the wrong car. The police power of the carrier, continued the learned judge, is a sufficient protection to the other passengers, and he can remove all persons, men or women, whose conduct at the time is annoying, or whose reputation for misbehavior and indecent demeanor in public is so notoriously bad that it furnishes a reasonable ground to believe that the person will be offensive or annoying to others traveling in the same car; and this is as far as a carrier has any right to go. He can no more classify women according to their reputation for chastity, or want of it, than he can so grade men. He accordingly charged the jury, in substance, that a female passenger traveling alone is entitled to ride in the ladies' car, notwithstanding an alleged want of chastity, if her behavior is ladylike and proper; and she cannot be compelled to accept a seat in another car offensive to her because of smoking and bad ventilation.(a)

(c) Brown v. Memphis, etc., R. Co. supra.
(d) In Iowa this regulation is allowed by statute. Hoffbauer v. Railroad Co. 52 Iowa, 342.
(e) Lane v. Railroad Co. 69 Tenn. (5 Lea,) 124; infra, § 4.
(a) Brown v. Memphis, etc., R. Co. 5 Fed. Rep 499, 500.