ject. The bill there was filed by several judgment creditors, claiming by several and distinct judgments, who sought the aid of a court of equity to render their judgments available against alleged fraudulent acts of the judgment debtor, equally affecting them all. The learned chancellor (KENT) held that the bill was not demurrable for multifariousness, as there was a community of interests in the common objects of the suit. "There is no sound reason," he says, "for requiring the judgment creditors to separate in their suits, when they have one common object in view, which, in fact, governs the whole case. There is no particular matter in litigation peculiar to each plaintiff, and if they were obliged to sue separately, it may be pertinently asked, *cui bono?* Their rights are already established, and the subject in dispute may be said to be joint as between the plaintiffs, on the one hand, and the defendants, on the other, charged with a combination to delay, hinder, and defraud their creditors. If each creditor was to be obliged to file his separate bill, it would be bringing the same subject of fraud into repeated discussion, which would exhaust the fund, and be productive of all the mischief and oppression attending a multiplicity of suits. It appears to me, therefore, that the judgment creditors, in cases of fraud in the original debtor, have a right to unite in one bill, to detect and suppress the fraud and to have the debtor's fund distributed according to the priority of their respective liens, or ratably, as the case may be, equally as well as they may now, in ordinary practice, unite in one bill against the legal representatives of the debtor." And in *Gaines* v. *Chew*, 2 How. 642, the supreme court, after quoting with approbation the remark of Lord COTTENHAM in *Campbell* v. *Mackay*, 7 Sim. 564, that "to lay down any rule, applicable universally, or to say what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossible," proceed to state that "every case must be governed by its own circumstances; and, as those are as diversified as the names of the parties, the court must exercise a sound discretion on the subject. While parties should not be subjected to expense and inconvenience in litigating matters in which they have no interest, multiplicity of suits should be avoided, by uniting in one bill all who have an interest in the principal matter in controversy, though the interests may have arisen under distinct contracts."

"The principal matter in controversy" in the pending case is compelling a trustee to account to his *cestui que trusts* for the moneys and property appertaining to the trust, and, although the interest of the several complainants "may have arisen under distinct contracts," no practical inconvenience can arise, on the accounting, from that fact. The demurrer must be overruled, with costs, and the defendant is allowed 20 days to file his answer.

BALTIMORE & O. R. Co. and another *v.* ADAMS EXPRESS Co.

(*Circuit Court, D. Maryland.* November 20, 1884.)

1. ADAMS EXPRESS COMPANY—CITIZENSHIP—FEDERAL COURT.
   The Adams Express Company is a joint-stock association formed under the laws of New York, which provide that such an association shall have nearly all the essential attributes of a corporation. *Held*, that suit against it should be brought against either the president or treasurer, and that those officers being citizens of New York, it follows that whether the association be treated as a New York corporation, or the officer sued be treated as a *quasi* corporation sole, or as an official person designated by statute to represent the association, in any event the defendant is a citizen of New York, and the federal court has jurisdiction so far as it depends on citizenship.
2. COMMON CARRIERS—ADVANCING "ACCRUED CHARGES."
   If it is shown that advancing "accrued charges" by a receiving to a tendering carrier is an established usage in the express business, and that a carrier grants this facility to certain carriers, and refuses it to another, for the purpose of making a discrimination which is necessarily prejudicial, it would seem that such a discrimination should be held unlawful. But in this case, in view of the adjudications in other circuit courts in cases between the same parties, an injunction requiring the defendant to advance accrued charges was refused.
3. COMMON CARRIER—PREPAYMENT OF EXPRESS CHARGES AND COLLECTING ACCRUED CHARGES.
   Under the circumstances of discrimination shown by the affidavits in this case, *held*, that the defendant should be required to receive express matter tendered to it by complainants for further transportation, and should collect its accrued charges from the consignees, and account for the sums so collected without charge, and should be required to receive from shippers, without exacting prepayment thereon, express matter destined for complainants' lines, provided complainants tender itself ready to pay the charges thereon when transferred to it

In Equity.

Application for a preliminary injunction.

Cowen & Cross, for complainants.

R. Stockett Matthews and *I. Nevitt Steele*, for defendant.

Before BOND and MORRIS, JJ.

MORRIS, J. This bill is filed by the Baltimore & Ohio Railroad Company, a corporation of the state of Maryland, and the Baltimore & Ohio Express Company, a corporation of the state of Ohio, against the Adams Express Company, alleged in the bill to be a corporation under the laws of the state of New York, and a citizen of the state of New York. The bill alleges that the Baltimore & Ohio Railroad Company, with its railroad, and those which it controls by lease or ownership, constitutes one of the through trunk lines of the United States between the east and west, and that by an act of the Maryland legislature of 1882 it is authorized to do an express business such as is done by express companies organized for that purpose. It is alleged on behalf of the Baltimore & Ohio Express Company of Ohio that it is engaged in the express business in the west over the railroad lines

controlled by the Baltimore & Ohio Railroad Company, and, in conjunction with the Baltimore & Ohio Railroad Company, is operating the Baltimore & Ohio Express over the lines between Cincinnati, Baltimore, New York, and elsewhere. It is alleged that the Baltimore & Ohio Railroad Company, in the development and conduct of this express business, has, in connection with the Baltimore & Ohio Express Company of Ohio, expended large sums of money in the purchase of horses, wagons, and other property suitable for that use, and has established offices in St. Louis, Cincinnati, Chicago, Washington, Baltimore, Philadelphia, and New York, and many other cities, and is doing a very large and profitable business in carrying goods, money, valuables, oysters, fruits, and perishable goods. It is alleged that the Adams Express Company, the United States Express Company, the American Express Company, the Southern Express Company, and the Southern & Pacific Express Company, and Wells, Fargo & Co., in connection with complainants, do a large portion of the express business of the country, and that it is the universal custom of said companies to receive from and deliver to each other packages for points beyond their own routes, so that a package for a distant point is transferred from one express company to another as often as required to reach its destination, and that in order to facilitate dispatch, promptness, and simplicity in these transfers there has grown up a custom, which is universal, by which the receiving company pays to the tendering company all charges which have accrued for carriage to the point of tender, known as "*accrued charges*," so that the last company, having advanced all the accrued charges, receives from the consignee and retains the whole amount of charges to the point of destination. It is alleged that experience has proved that this method of doing business is entirely safe, as the advancing company is protected by its lien on the goods and its right of recourse against the company to which the advance is made, and that in fact it very rarely happens that the consignee refuses to accept the package and pay the charges on it. It is alleged that this practice of advancing accrued charges is essential to the quick and simple transfer of express packages from one company's line to another, and that without it the express business as now conducted could not be carried on, and that any company which is denied this facility would not be able to compete in the same business with another company to which it was granted, and would find it impossible to do a general express business, and would lose its customers. It is alleged that the Adams, the United States, and the American Express Companies, with which the complainants have been doing a large business on the basis of said facility, have combined together, and have notified complainants that after the fifteenth of October, 1884, they would not advance charges on express matter transferred to them by complainants. It is alleged that this combined action of said companies is designed to cause and will cause great and irreparable injury to com-

plainants, and will be destructive to their business. It is alleged that the Adams, the United States, and the American Express Companies, although they have notified complainants of their intention to refuse to advance charges to them, will continue to afford to each other the facilities refused to complainants, with the design to further their own business in competition with complainants.

The prayer is for a preliminary injunction restraining the Adams Express Company, the defendant, from refusing to accept parcels tendered it by complainants, and from refusing to pay the advance charges thereon, according to the usage theretofore recognized and observed by said company in its dealings with complainants, and requiring defendant to afford the same business facilities to the same extent to complainants which it affords to other express companies, and for other relief. At this hearing of the motion for a preliminary injunction it is urged by defendant's counsel that the bill is defective in that the Baltimore & Ohio Railroad Company and the Baltimore & Ohio Express Company are joined as complainants without any sufficient allegation of a joint interest in the express business, which, it is alleged, is injured by defendant's action; so that it does not appear but that the injury which complainants allege they apprehend may be a distinct and separate injury to each complainant corporation, and not a joint injury. The objection is, in its nature, a demurrer to the bill. The allegation of the bill is that the Baltimore & Ohio Express Company is engaged in sending express matter over the lines of road connected with the Baltimore & Ohio Railroad Company in the west, and, in conjunction with the Baltimore & Ohio Railroad Company, operates the Baltimore & Ohio Express over the line between Cincinnati, Baltimore, New York, and elsewhere. In our opinion, this allegation may be true and yet consistent with a state of facts which would make the injury to each corporation separate and distinct. The bill, therefore, must be amended either by dismissing one of the complainants, or, if the apprehended injury be in fact a joint injury, by making the allegation to that effect sufficiently explicit.

The second objection is to the jurisdiction of the court, and is made by a plea in abatement, in which it is alleged that the Adams Express Company is not a corporation or joint-stock association, but a simple copartnership, the parties interested therein having in 1854 signed written articles still in force, and that 44 of said copartners are residents in and citizens of the state of Maryland. The conceded fact is that the Adams Express Company is a joint-stock association consisting of some 2,500 shareholders, citizens of many different states, organized under the laws of the state of New York, having a president, treasurer, and other officers, and a board of managers, and that its shares are freely dealt in on the stock market. The New York statutes applicable to such an organization may be found in 3 Rev. St. N. Y. 1875, p. 762; 2 Rev. St. N. Y. 1882, (7th Ed.) p. 1543; Code

Civil Proc. § 1919; Const. N. Y. art. 8, § 3. By one section of these statutes it is provided that the associations mentioned therein shall not have the rights or privileges of corporations, except as therein provided; but that they have the essential attributes of corporations has been declared by the courts of New York.

In *Waterbury* v. *Merchants' Union Exp. Co.* 50 Barb. 160, the supreme court said:

"By an examination of these statutes it will be found that joint-stock companies possess the following qualities or attributes of corporations: (1) They can, like corporations, sue and be sued in a single or collective name, to-wit, the name of their president or treasurer. (2) Their property or capital is represented in shares or certificates of stock, differing in no respect from shares or stock certificates of corporations. (3) The death of a member, his insolvency, or the sale or transfer of his interest, is not a dissolution of the company. (4) They have perpetual succession, or what is sometimes called the immortality of corporations. (5) They can take and hold real and personal estate in a collective capacity and in perpetual succession. Corporations have no other attributes except the technical one of a common seal."

The statute provides that such an association may sue and be sued in the name of the president or treasurer for the time being, and provides that the president and treasurer shall not be liable by reason of such suit in his own person or property, but that the suit shall affect only the joint property of the association. It is intimated by the New York court of appeals (60 N. Y. 532) that the officers who have thus by the statute legal succession are constituted a corporation in the nature of a corporation sole. Whether this view is to prevail or not, the officer sued does, by the statute, represent the association for the purpose of suit and judgment. If, as individuals, they represent the company, as a trustee represents his *cestui que trust*, then it is the citizenship of the individual sued which determines the jurisdiction of the court. This view was held by one of the courts of New York in *Bacon* v. *Dinsmore*, 42 How. Pr. 377, in which it was ruled, on the application of the Adams Express Company for removal to another state court, that the citizenship of Mr. Dinsmore, its president, determined the right of removal, and not the citizenship of any of the shareholders whom by statute he represented. In the case of *Fargo* v. *McVicker*, 55 Barb. 437, on a question of removal from a New York state court to a federal court, the New York supreme court allowed the removal, holding that such associations were governed by the same principle as to removals as corporations, and that by the New York statutes the numerous shareholders were embodied, for the purpose of suing and being sued, into a new legal personality of the name used in the action, and that in this respect they were the same as a corporate body. The case of *Adams Exp. Co.* v. *Trego*, 35 Md. 47, in which, alleging that it was a corporation of the state of New York, the Adams Express Company sought to remove a case, because of that alleged fact, to the federal court; and the case of *Rosenfield* v. *Adams Exp. Co.* 21 La.

Ann. 234, in which, in the Louisiana appellate court, it procured a reversal of a judgment against it upon the ground that it was such a corporation, and that its petition for removal to the federal court ought to have been granted; and numerous other cases brought to the attention of the court, in which it has submitted to be sued as a New York corporation,—tend to show that, in the opinion of the experienced counsel by whom it has at various times been represented, it was considered a New York corporation, and has enjoyed the important privileges of one.

Our attention has been called to the able opinion of Judge McKennan in *Dinsmore* v. *Philadelphia & R. R. Co.*, delivered October 25, 1875, but as we find that a different ruling has prevailed in other circuits, we have felt it our duty to adhere to that which seems to us best supported by reasoning, analogy, and convenience. See *Maltz* v. *American Exp. Co.* 1 Flippin, 611; S. C. 3 Cent. Law J. 784; *Fargo* v. *Railroad Co.* 6 Fed. Rep. 787. We think, however, that the complainants, in availing themselves of the New York statute, must pursue its terms, and must amend their bill so that the suit shall be against the president or treasurer, (neither of whom, it is conceded, are citizens of Maryland.) The Maryland statutes have made special provision for such cases by providing (section 36, art. 67, Rev. Code 1878) that process may be served upon any person, firm, partnership association, company, or corporation, transacting the business of a carrier in this state, by service on any officer or agent. We pass, then, to the consideration of the merits of the complainants' application.

It is the duty of common carriers to give equal service on equal terms, and upon reasonable compensation, to all who may apply to them, and it is the duty of the courts to enforce these obligations by appropriate remedies. The great utility and almost necessity of the practice of the receiving express company advancing to the tendering company its accrued charges on the package tendered, as the business of express carriage is now conducted over the territory of the United States, is fully shown by complainant's affidavits, and is not denied. It is also shown how smoothly and safely to all parties the business between connecting carriers proceeds under this practice, and how difficult it would be to conduct the business without it. It is to be considered, however, that the defendant is not like a railroad company, which is a *quasi* public corporation, and in some states is declared by statute to be a public highway, and which is held bound to furnish reasonable and customary facilities to its customers. The express company has had no franchise granted to it, and in the absence of statute its liability is to be determined by the rule of the common law. The advancing of accrued charges is not imposed on carriers by the common law, and the right of any one to demand that this facility be accorded to him, if such right exists, must rest on unjustifiable discrimination: he must show that in substantially similar

cases the carrier complained of grants the facility to others in like situation with himself, and refuses it to him, and that this refusal is a discrimination necessarily prejudicial to him.

The affidavits filed by complainants declare that the practice of advancing charges is universal, but respondent's affidavits assert that no such practice prevails between two companies who are competitors for business at the point from which the package starts. In reply it is suggested that although this may be so, it is only so because, by agreement and understanding between the companies complained of, they do not compete with each other, and at points where more than one of them has an office they each solicit business only for points reached by each exclusively, having in fact an understanding with each other as to the territory to be served by each. As complainants must rely upon the fact of discrimination, if for any reason that which is not granted to them is not granted to any other in like situation, then the ground for relief fails; and the exception said to exist to the practice of advancing charges seems to us a reasonable exception.

It would be unreasonable, it seems to us, to require a company which had a through express route, say from St. Louis to York, Pennsylvania, to take a parcel at Baltimore from a company which had competed with it for the business at St. Louis, and could only carry it as far as Baltimore, and to require the receiving company at Baltimore to advance and pay to its competitor its charges. In such a case the competing company would receive its pay for the carriage from St. Louis to Baltimore from the company having the through line, before that company would itself receive its pay for the same service on the parcels which it was carrying itself, destined for York. Its competitor would fare at its hands better than it would fare itself on its through business. We are of opinion, therefore, that, at what are called in Mr. Trego's affidavit "competing points," defendant cannot be required to deal with complainants otherwise than upon the same terms as it deals with others in like situation, and we are not convinced by the affidavits that it does, under such circumstances, advance charges. But looking to the nature of the express business in this country, and the established methods generally pursued in its conduct, which have been made known and explained by the affidavits of the numerous managers of great experience in the business, and some of which are matters of common knowledge, are there any circumstances under which an express company can be required to advance accrued charges to a tendering company. The settled rule is that a carrier cannot unreasonably discriminate against one customer in favor of another; it can make no distinctions which will give one employer an advantage over another. Hutch. Carr. §§ 279–303. *Stock-yard Cases*, 3 FED. REP. 775, and 13 FED. REP. 3; *Hays* v. *Pennsylvania Co.* 12 FED. REP. 309. Under ordinary circumstances the advancing of accrued charges to one customer and the refusal to do so for another, or demanding prepayment from one customer and not

requiring it of another, might well be held not to be an unjustifiable discrimination, but a mere matter of discretion. But is this so in a case in which the distinction is made arbitrarily, and the necessary result is to destroy the business of one customer and build up that of another? Can this possibly be consistent with that obligation of strictest impartiality to which carriers are rigidly held, and the violation of which is condemned by all courts as a disregard of their legal obligations?

It must be conceded that the general rule is that a carrier cannot be compelled to carry without prepayment, and, *a fortiori*, a carrier cannot ordinarily be compelled to advance its own money to its customers; but when, by its encouragement, a system has grown up of which advancing charges is an essential feature, and when it does advance charges for some of its customers and refuses to do so for others, and it is shown that this discrimination is necessarily fatal to the business of those to whom the facility is refused, and it is further shown that the facility imposes no risk or inconvenience upon the carrier granting it, and is an essential facility and established usage of the business, is it going too far to say that in this respect, as in others not more essential, all must be treated alike? We strongly incline to the opinion that this reasonable doctrine must prevail. It seems to us that the evils resulting from such a discrimination, if allowed, are quite as apparent and dangerous as any of those which have been held to be unlawful. In this opinion, however, we differ from at least two others of the circuit courts of the United States in which this same question between the same litigants has very recently been passed upon, and, in this condition of the litigation over this question between these parties, we shall not grant the preliminary injunction with respect to accrued charges, as prayed for. *Baltimore & O. R. Co.* v. *Adams Exp. Co.* 22 FED. REP. 32.

Aside from the question of advancing accrued charges, is there any other relief prayed for which complainants are entitled to have granted on this motion? The affidavits of defendant substantially admit that, aside from the matter of refusing to advance charges, it does, in other respects, propose to discriminate against the complainants.

It is alleged in defendant's affidavits that complainants have refused to stand to any agreement with the other companies in respect to the express rates to be charged the public, and it is alleged that the express business done by complainants is not charged by the Baltimore & Ohio Railroad Company with the usual charges made by railroad companies to express companies, and that thus, having the use of the railroad lines without charge, complainants have reduced their express charges below a fair and reasonable living rate for such service, and that, to protect themselves from this unfair competition, the three express companies mentioned in the bill have found themselves obliged to refuse to facilitate complainant's business. However well founded these alleged grievances may be, they cannot justify de-

fendant's refusal to carry goods tendered by or destined for the complainants upon reasonable and customary terms.

It is stated in the affidavit of Mr. Hoey, the defendant's vice-president, that the three companies mentioned in the bill to prevent the Baltimore & Ohio Express from seducing their clients and customers, have notified it that after the fifteenth of October, 1884, the three companies would not receive from the Baltimore & Ohio Express Company express matter, and pay the charges of the Baltimore & Ohio Express thereon, and that they would not thereafter receive express matter destined to points reached by the Baltimore & Ohio Express exclusively, until the charges of the receiving company were prepaid thereon by the shipper. He states "that said three companies have never refused, nor are they now refusing, to receive from the Baltimore & Ohio Express Company all its express matter, and to convey the same to its destination on their lines, and there to collect the charges from the consignee." Exclusive, then, of the question of advancing accrued charges, there are two classes of cases with regard to which complainants ask relief: that is to say, the cases in which express matter starts from points on the lines of complainants and is tendered to respondents for further carriage, and the cases in which express matter starts at points on the lines of respondent destined for points reached by complainants exclusively.

As to the first class of cases, while we have said that we will not by injunction require defendant to advance charges, we see no reason why defendant should not be required to collect the accrued charges with its own from the consignee, and account for them to complainant. Indeed, that would seem to be the offer contained in the language used by Mr. Hoey, the defendant's vice-president, in his affidavit. This accounting can be done in such manner and at such reasonable times as will impose the least labor and inconvenience on both parties. There can be no hardship in requiring this to be done without charge, as confessedly the ordinary course of business of this defendant, except in dealing with the complainant, is to advance the accrued charge, and make no charge for the ultimate collection.

As to the second class of cases, the affidavits sufficiently show that to require prepayment of defendant's charges from the shippers, who tender packages to respondent destined for points reached by complainants' lines exclusively, would be an oppressive discrimination, highly inconvenient to shippers, and calculated to cripple the business of complainants on their own exclusive lines. And, as to this class of cases, we think it is the duty of defendant to receive such packages without prepayment from shippers, provided complainants agree and are ready to pay respondent's charges upon such packages on their being delivered to them. The defendant cannot be required to part with possession of such packages unless its charges are paid; but if complainants are willing to advance the charges, then defendant is without justification in refusing to accept the packages without

prepayment by the shippers. If the amendments we suggest as necessary are made, we will grant an injunction to the extent and upon the terms indicated in this opinion.

BOND, J., concurred.

PENTLARGE *v.* PENTLARGE.[1]

(*Circuit Court, E. D. New York.* April 7, 1884.)

EQUITY—PRACTICE—PLEADING—ANSWER—EQUITY RULE 39.

Plaintiff filed a bill to procure a determination, under section 4918 of the Revised Statutes, of the question of interference between a patent owned by him and a patent owned by the defendant. Defendant interposed a plea, which was overruled by the court. Thereafter, plaintiff, by leave of the court, filed a supplemental bill. Defendant applied to set up, in an answer to the supplemental bill, the same matter as had been set up in the plea which had been overruled. *Held*, that neither equity rule 39, nor the practice of equity courts outside of the equity rules, would allow of the defendant's being permitted to set up in an answer matter which had already, on the plea, been adjudged not to constitute a defense.

In Equity.

Preston Stevenson, for complainant.

Brodhead, King & Voorhees, for defendants.

BENEDICT, J. This is an application, made by the defendants, for permission to set up in their answer to a supplemental bill matter heretofore set forth by way of defense in a plea to the original bill, which plea has been, upon argument, overruled upon the merits. The action is instituted by virtue of section 4918 of the Revised Statutes, to procure a determination of the question of interference between a patent owned by the plaintiff and a patent owned by the defendants. In defense a plea was interposed wherein was set up an English patent, prior in date to the plaintiff's patent, and, as it is claimed, for the same invention, which patent, if found to be as claimed by the defendants, would show the plaintiff's patent to be void for want of novelty. This plea, having been set down for argument, was overruled upon the ground that in the proceeding authorized by section 4918 it is not permissible for a defendant to attack the plaintiff's patent for want of novelty in the invention. Thereafter the plaintiff, by leave of the court, filed a supplemental bill in which he sets up, and by virtue of section 4918, prays relief against a patent since the commencement of this suit reissued to the defendants, upon a surrender of the defendants' patent described in the original bill, and in place thereof. Now the defendants apply for permission to set up in their answer to the sup-

[1] Reported by R. D. and Wyllys Benedict, of the New York bar.

plemental bill the same matter set up by them in their plea to the original bill.

The defendants insist that, by virtue of equity rule 39, they, as matter of right, must be granted the permission sought. I do not understand equity rule 39 to confer upon a defendant an absolute right to set up in his answer matter that upon his plea has been held to be no defense to the action. The defendants doubtless had the right to elect whether to set up the matter in question by plea or by answer; but, having elected to set it up by plea, when this matter was determined, upon the argument of this plea, to be insufficient as a defense, that question became *res adjudicata* in this case, (see *Pentlarge* v. *Pentlarge*, 19 FED. REP. 817;) and rule 39 confers upon the defendants no right, by setting up the same matter in their answer, to compel the court to adjudicate the same question a second time. So it was said in *Hubbell* v. *De Land*, 14 FED. REP. 471, and notwithstanding what is said in *Sharp* v. *Reissner*, 20 Blatchf. 10, S. C. 9 FED. REP. 445, that case is not an authority to the contrary. The defendants also claim permission to set up this matter a second time in an answer by virtue of the practice of courts of equity outside the equity rules. But the cases cited furnish no authority for saying that the ordinary practice of courts of equity entitles the defendants to the relief here moved for. When a plea states matter which may be a defense to the bill, though perhaps not proper for a plea, or informally pleaded, it is usual to allow the plea to stand as an answer, (Mitf. & T. Pl. 391,) and in such a case permission may be given to insert such matter in the answer when the plea has, upon argument, been overruled. But when a plea has been overruled, upon argument, because the matter of the plea constitutes no defense to the action, the defendant, if he answers, must make a new defense. Mitf. & T. Pl. 113. Here the application is to be allowed to insert in an answer matter which has already in this case, upon the defendants' own plea, been adjudged not to constitute a defense. I have not been able to find any authority supporting such an application, and I know of no reason why it should be granted.

KING and others *v.* OHIO & M. RY. CO. and others.

(*Circuit Court, D. Indiana.* December 4, 1884.)

1. CARRIER OF PASSENGERS—OBLIGATIONS OF—INJURY BY FELLOW-PASSENGER.
   A common carrier of passengers for hire is bound to see that no harm comes to a passenger from a fellow-passenger, whose conduct and condition clearly show that he is a dangerous person and likely to injure his fellow-passengers.
2. SAME—DUTY OF EMPLOYES.
   Where the conduct of a passenger is such as to clearly show that he is dangerous, it becomes the duty of the employes of the company in charge of the train to keep him in close custody and disarm him, or remove him from the train.

3. SAME—CHANGE OF EMPLOYES.

In cases of change of men in charge of passenger trains, the new men should be informed of everything known to those retiring which ought reasonably to be deemed important to a proper discharge of the carrier's duty.

Chancery. Intervening petition of Matilda Wingate, administratrix.

Percy Werner and *Harrison, Miller & Elam*, for receiver.

John M. Lausden and *Angus Leek*, for petitioner.

WOODS, J. The claim in this case is for damages on account of the death of Alexander Wingate, who, on the twenty-eighth day of March, 1882, while a passenger in the cars of the defendant, going from St. Louis to Louisville, was shot and killed by one Haynes, a fellow-passenger. Some time after the departure of the train from St. Louis, Haynes, who had been drinking freely, was transferred from a sleeping-car by the conductor and porter of that car to the coach at the rear of the train, in which Wingate was riding, and in which Haynes had been before going into the sleeper. The reasons for this transfer are not explicitly disclosed by any witness, but it is not an unfair inference that Haynes had given such proofs of drunkenness and disorderly conduct as made his removal from the sleeper proper, if not, indeed, necessary. He continued disorderly and troublesome until near Vincennes, when, according to the language of the brakeman, he quieted down. At Vincennes there was a change of conductors and brakeman, and notice given to the new brakeman by the retiring one "that there was a drunk man on the train who had given some trouble, but had quieted down." No other or more specific notice than this of Haynes' conduct between St. Louis and Vincennes was given to those who were to have and did have charge of the train upon the run from Vincennes eastward. In respect to the conduct of Haynes from the time of leaving Vincennes until the train had approached North Vernon, Indiana, when he shot Wingate, and himself jumped from the train and was killed by the fall, or drowned, there is conflict between the testimony of passengers and of the conductor and brakeman. The master has given credence to the testimony of the passengers, and, after rehearsing the evidence in some detail, concludes his report as follows:

"The rule of law upon which the claim for recovery is based in this case is comparatively new. It is this: that a common carrier of passengers for hire is bound to see to it that no harm comes to a passenger from a fellow-passenger, whose conduct and condition clearly show that he is a dangerous person, and is likely to injure his fellow-passengers. There is no doubt in this case that Haynes, who killed Wingate, was, at the time he fired the fatal shot, suffering from a fit of *delirium tremens*. If the employes of the receiver knew this, or should have known it from what they observed in Haynes' conduct prior to the shooting, and knew he had a revolver in his possession, the receiver, in the master's opinion, is liable.

"The master is also of the opinion that the receiver should be charged with notice of the facts that came to the knowledge of his employes, whether upon the east or west division of the road. There is a serious conflict in the evidence as to the extent of the knowledge by the employes of Haynes' condition,

although upon the statements of Burke and Fessenden, the brakeman and conductor west of Vincennes, and the statements of Newton, Kenner, and Smith, the conductor, brakeman, and porter who were on the division east of Vincennes, it is apparent that the employes knew enough to require them, as prudent men, either to take charge of Haynes and guard him securely, or to have him put off from the train, to prevent his injuring passengers. They knew that he had been drinking between St. Louis and Vincennes. They knew that he had been ejected from the sleeping-car for misbehavior, or on account of his drunken condition. They knew that he was frightened, and had the delusion that somebody on the train was seeking to knock him down and rob him of his money. They knew that he had been trying to give his money away to some of the passengers on the train, and that he had asked the conductor to take charge of it for him. They knew that in going about the car he staggered or crawled over the tops of the seats from one place to another. They knew that by his misconduct he had compelled Mr. Collins and his wife and daughter to leave the seats they had been occupying and seek others, to avoid him. They knew that he was afraid to be left alone in the car when the conductor got out at Mitchell to go to the front of the train, and asked to be let go with him, and was pacified by the promise of the conductor that the brakeman would remain with him, the conductor promising to return in a few minutes. They knew that he had a revolver in his possession.

"Mr. Newton, the conductor on the east division, recommended him to take a drink of liquor, seeing his nervous and excited condition. This he certainly would not have done if he thought the man was getting drunk; it was because of his nervous and excited condition, which indicated clearly to his mind that the man was suffering from or on the verge of *delirium tremens*. The conductor and brakeman both speak of the weak, tremulous voice, indicating that he was in a state of childish fear of harm from some one. Coming to the testimony of the passengers, the master cannot disbelieve the statements of Mr. and Mrs. Ousley, and Mr. and Miss Collins, that Haynes repeatedly exhibited and flourished his revolver in the car, in the presence of the brakeman, although the brakeman denies that he saw the revolver at any other time than when the conductor took up Haynes' ticket, some miles east of Vincennes. Mr. and Mrs. Ousley also swear that before the shooting Mr. Ousley warned the conductor, or the brakeman, that Haynes was dangerous, and that unless put off the train or disarmed would kill or injure some one with his pistol. The conductor insists that no remark of that kind was made in his hearing until after the shooting, but the preponderance of the evidence is the other way.

"Upon the whole case, the evidence shows, in the opinion of the master, that the passenger Haynes was not only dangerous, but that his conduct was such as to clearly indicate it in such a way that it became the duty of the employes of the receiver, in charge of the train, to keep him in close custody, and disarm him, or remove him from the train at the first station after they learned of his dangerous condition."

Damages assessed at $5,000.

The criticisms made by counsel upon the testimony of some of the witnesses are not without plausible force, but not of sufficient weight to disturb the master's finding upon any material question of fact; and in respect to the proposition of law, "that the receiver should be charged with notice of the facts that came to the knowledge of his employes, whether upon the east or west division of the road," I am not able to agree with counsel that the master fell into essen-

tial error. I think it must be true, in cases of change of men in charge of passenger trains, like the one made in this instance, that the new men should be informed of everything known to those retiring which ought reasonably to be deemed important to a proper discharge of the carrier's duty. But, while I do not think that the information given in this case by one brakeman to the other was sufficiently full and explicit, I do not deem it necessary so to decide. In my judgment, upon the conduct of the conductor and brakeman who took charge of the train at Vincennes, as shown by their own testimony, the liability of the receiver is put beyond reasonable question. Their testimony shows that the man Haynes was excited, nervous, tremulous, and laboring under the manifestly unfounded delusion of pursuit by enemies, *on the train*, who would rob or kill or harm him in some way, and that in childish but real fear of these things he appealed to the conductor for protection. Whether from excessive drinking or from other cause, it is clear that for the time being the man was insane; and, possessed of a pistol, as he was known to be, the conductor, as a man of common understanding, knowledge, and experience, ought to have apprehended the danger that he might mistake some passenger for his supposed pursuer and shoot him down in imaginary self-defense.

That it was in the lawful power of the conductor, under the circumstances, to have arrested, disarmed, restrained, or removed from the train this man goes without saying. By the common law, and especially by the statutes of this state, ample powers in these respects are conferred upon conductors and other railroad employes. *Vinton* v. *Middlesex R. Co.* 11 Allen, 304; *Railroad Co.* v. *Anthony*, 43 Ind. 183; *Railroad Co.* v. *Van Houten*, 48 Ind. 90; *Railroad Co.* v. *Vandyne*, 57 Ind. 576; *Railroad Co.* v. *Griffin*, 68 Ill. 506; Ind. Rev. St. 1881, §§ 1702, 2091, 3922–3924. By these statutes it is provided that "the conductors of all trains carrying passengers within this state shall be invested with police powers while on duty on their respective trains, may arrest and detain any person found violating any law of this state," and, "when any passenger shall be guilty of disorderly conduct, * * * the conductor is hereby authorized to stop his train at any place where such offense has been committed, and eject such passenger from the train, using only such force as may be necessary to accomplish such removal, and may command the assistance of the employes of the railroad company." "Whoever is found in a public place in a state of intoxication," and "whoever draws, or threatens to use, any pistol, * * * shall be deemed guilty of a misdemeanor." These powers, whether conferred by statute or deduced from the principles of law, are given for the safety of those who travel by railroad, and any failure in a proper case to exercise them, contributing to the injury of a passenger, is a breach of the carrier's contract, for which damages may be allowed. This conclusion is strongly supported by decisions made in analogous cases, cited in ar-

gument, of which see the following: *Railroad Co.* v. *Hinds*, 53 Pa. St. 512; S. C. 7 Amer. Law Reg. (N. S.) 14; *Railroad Co.* v. *Pillow*, 76 Pa. St. 510; S. C. 18 Amer. Rep. 424; *Flint* v. *Transportation Co.* 34 Conn. 554; S. C. 6 Blatchf. 158; *Railroad Co.* v. *Burke*, 53 Miss. 200; S. C. 24 Amer. Rep. 689; *Britton* v. *Railroad Co.* 88 N. C. 536; S. C. 43 Amer. Rep. 749; *Railroad Co.* v. *Flexman*, 103 Ill. 546; *Stewart* v. *Railroad Co.* 90 N. Y. 588; S. C. 43 Amer. Rep. 185.

Exceptions overruled, and judgment upon the report.

GLENN, Substituted Trustee, *v.* SOULE.[1]

SAME *v.* LABATT.[1]

SAME *v.* GLENNY.[1]

SAME *v.* COYLE.[1]

(*Circuit Court, E. D. Louisiana.* November 29, 1884.)

1. TRUSTEE—RIGHT TO SUE IN A FOREIGN JURISDICTION.
   A substituted trustee, under a deed of trust, appointed by a court, has title under the deed, and can maintain an action in any jurisdiction where it might be deemed necessary to protect his right, notwithstanding that the court so appointing him also gave him the powers of a receiver, required a bond, and ordered him to account; that cannot be considered as impairing his title under the deed of trust or assignment. *Holmes* v. *Sherwood*, 3 McCrary, 405; S. C. 16 FED. REP. 725.
2. ASSESSMENT FOR UNPAID CAPITAL STOCK.
   A chancery court has the authority to make a call necessary under the terms of subscription to charge the subscribers to the capital stock of a corporation with liability for the amounts of unpaid subscriptions. *Scovill* v. *Thayer*, 105 U. S. 155.
3. SAME—ACTION AT LAW.
   In such a case an action at law will lie, and in an action at law for such unpaid subscription such call or assessment is necessary.
4. SAME—PRESCRIPTION.
   Prescription did not begin to run until the call was made, for until then the unpaid subscription was not exigible.

On Exceptions.

The plaintiff sues, as substituted trustee under the appointment of the chancery court of the city of Richmond, Virginia, to execute the trusts of a certain deed of trust made by the National Express & Transportation Company, a body politic and corporate under the laws of Virginia, which court also gave him the powers of receiver of said company, required a bond, and ordered him to account, to recover assessments made against the defendants, stockholders of said com-

[1] Reported by Joseph P. Hornor, Esq., of the New Orleans bar.