

ing and drinking between the charge of the court and the verdict. The origin of this regulation is a little curious. Dr. Gilbert Stuart, in his "Historical Dissertation Concerning the Antiquity of the British Constitution," says "that from the propensity of the older Britons to indulge excessively in eating and drinking has proceeded the restriction upon jurors and jurymen to refrain from meat and drink, and to be even held in custody, until they had agreed upon their verdict." Jurors in our day, perhaps, are not unlike their forefathers; at least the congress thinks so. This rule in modern times has been so far modified that a verdict cannot be impeached on account of the jury eating after they have received the charge, and are sent out, unless it appears that the refreshments were furnished at the expense of the prevailing party. The congress has made no provision for furnishing meals to jurors, except in United States cases; so that in all cases in which the United States is not a party the ancient rule appears indirectly to be favored. Meals were furnished the jury by the plaintiff's counsel after they were sent out, and before verdict, and the plaintiff prevailed in the suit. I should not ordinarily set aside a verdict and grant a new trial for that reason unless it appeared that the defeated party had suffered on that account; but when the jury were sent out in this case it was suggested by the court that no provision was made by law for furnishing meals to the jury, and counsel were asked, if a necessity arose for giving the jury refreshments, whether the parties plaintiff and defendant would share the expense, whereupon the defendants' counsel declined to do so. All trials by jury ought to be effectually guarded against any kind of influences by which a party may derive any possible advantage, and, as counsel for the defeated party declined to share the expense of providing refreshments, and the same were furnished and paid for by the prevailing party, a new trial must be granted under the circumstances, although it does not appear that the verdict was determined thereby.

Verdict set aside, and new trial granted; costs to abide event of same.

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DAVIS v. CHICAGO, ST. P., M. & O. R. Co.

(Circuit Court, D. Minnesota, Third Division. March 30, 1891.)

**CARRIERS OF PASSENGERS—WHEN THE RELATION EXISTS.**

Decensed and other employes of defendant railroad company had borrowed a car and engine for their own purposes, by permission of defendant's yard-master, and in the negligent management thereof plaintiff's intestate was killed. *Held*, that the relation of carrier and passenger did not exist, and plaintiff cannot recover.

At Law. On motion for new trial.

*Williams & Schoonmaker*, for plaintiff.

*J. H. Howe, S. L. Perrin, and C. D. O'Brien*, for defendant.

NELSON, J. I have examined the brief of counsel for plaintiff on the motion made for a new trial. The evidence does not, as claimed by counsel, prove that the plaintiff's intestate sustained the relation of passenger at the time of the injury complained of which resulted in death. The deceased was an employe of the defendant, off duty, and accompanied other employes to whom a car had been loaned for the purpose of attending a meeting about the employes' own business. The car and engine was in charge of Flanagan, who secured the loan of them, or at least the car, for the use of the employes; he being the defendant's yardmaster. Flanagan induced the engineer of a switch-engine to haul down the car; the latter being unwilling at first, as he was going off duty, but finally was persuaded to do so. Flanagan, from the evidence in the case, was negligent in the management of the train; and his negligent act caused the injury to plaintiff; but the defendant was not responsible for his negligence. He was not in the performance of any duty in the line of his employment by the defendant, and was not engaged in furtherance of the company's business. The negligent act complained of was done by Flanagan when the employes on the car were at liberty from their service, and pursuing their own ends exclusively. It is the case of an employer permitting his employes to take his car and engine, and ride for their own pleasure, and negligent management by one of the employes. The defendant, in my opinion, is not liable for damages arising therefrom. I leave out of view other objections to a recovery.

Motion for a new trial denied.

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### BANGOR SAV. BANK v. CITY OF STILLWATER.

(Circuit Court, D. Minnesota, Third Division. March 31, 1891.)

#### ACTION ON CITY CERTIFICATES—DEFENSES.

Where in an action upon a certificate of indebtedness issued by a city, and signed by the mayor and clerk, the answer alleges that it was issued without authority, and delivered to the plaintiff without consideration; that the pretended consideration was under a contract with a company of which the mayor was a member; that the contract was fraudulent and void, and no consideration was ever received by the city, and the issue was in excess of the powers of the city, and in violation of law; that the certificate was not issued in anticipation of the revenue; that before it was issued the city, through its city council and financial committee, had anticipated the revenue to the full extent authorized by law,—it is not demurrable as failing to state a defense.

At Law. On demurrer to answer.

*Sanders & Bowers*, for plaintiff.

*Fayette Marsh*, for defendant.

NELSON, J. Suit is brought by the Bangor Savings Bank upon a certificate of indebtedness issued by the city of Stillwater, a municipal cor-