there was in that case no question of the rights of a *bona fide* holder for value. The same is true of the cases of *McLellan* v. *File Works*, 56 Mich. 582, 23 N. W. Rep. 321, where the court held that the plaintiff had notice of facts from which he ought to have inferred the real character of the paper. The case of *Merchants' Nat. Bank* v. *Detroit Knitting & Corset Works*, 68 Mich. 620, 36 N. W. Rep. 696, seems to be based wholly on *McLellan* v. *File Works*, and turned on the question of the general authority of the agent signing the acceptance. The statute and its effect are not considered at all.

The judgment of the circuit court is reversed, with instructions to order a new trial.

POUILIN *v.* CANADIAN PAC. RY. CO.

(Circuit Court of Appeals, Sixth Circuit. October 11, 1892.)

No. 42.

1. CARRIERS—EJECTION OF PASSENGER—DEFECTIVE TICKET.
The face of a railway ticket is conclusive evidence to the conductor of the terms of the contract between the passenger and the company, and the purchaser of a defective ticket, who is ejected from a train, must rely upon his action against the company for the negligent mistake of the ticket agent. *Railway Co.* v. *Bennett*, 50 Fed. Rep. 496, 1 C. C. A. 544, followed.

2. SAME—CONTRIBUTORY NEGLIGENCE.
At the city ticket office of a railroad company a passenger paid the price of a ticket from Detroit to Quebec and return, but, by mistake of the agent, was given a ticket, both parts of which were stamped for passage from Detroit to Quebec. He discovered the mistake when about to take the train, and thereupon consulted a person temporarily in charge of the station office during the absence of the agent. This person said he had no authority to correct the mistake, but thought the matter would be all right. The passenger went to Quebec, and spent several weeks, but on the way home was ejected from the train. *Held*, that he was bound to know that the conductor had a right to refuse the ticket, and therefore, in boarding the train, was guilty of negligence barring a recovery in tort, and rendering his damages merely nominal if his action is on contract. BROWN, J., dissenting on the ground that, under all the circumstances of the case, the question of contributory negligence was one for the jury. *Eddy* v. *Wallace*, 49 Fed. Rep. 801, 1 C. C. A. 435, and *Evans* v. *Railroad Co.*, (Mich.) 50 N. W. Rep. 386, distinguished.

3. SAME.
The fact that one conductor allowed a passenger, who was subsequently ejected by another conductor, to ride on a defective ticket, does not affect the proper standard of due care on the part of the passenger in trying to cure the defect.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

Action on the case by John B. Poulin against the Canadian Pacific Railway Company to recover damages for ejection from a train. The declaration was demurred to on the ground that it should have sounded in contract. Demurrer overruled. 47 Fed. Rep. 858. Jury instructed to find for defendant. Plaintiff brings error. Affirmed.

Statement by TAFT, Circuit Judge:

Plaintiff was a resident of the city of Toledo, Ohio, and the defendant was a railway corporation organized under the laws of the Dominion of Canada. The facts shown by the evidence were as follows: Plaintiff

applied to the ticket agent of defendant in the city ticket office in Detroit for two tickets from Detroit to Quebec and return. The ticket agent received his money and gave him two tickets, made up of two coupons each. After leaving the ticket office, plaintiff went to the station to which the ticket agent had directed him, and while there gave one of the tickets to a friend for whom he had purchased it. In doing so his attention was directed to his own ticket, which led him to think, as he says, that "it was not exactly right," for he saw that though he had asked for a ticket from Detroit to Quebec, and from Quebec to Detroit, the agent had given him a ticket made up of two coupons, each of which purported to entitle him to passage from Detroit to Quebec. He went to the ticket office in the station, and asked the person who was there to exchange the ticket for a proper one. This person replied that the agent who had authority to make the exchange was not in, but that he thought the ticket as it was would be all right, and that conductors would understand the mistake. Plaintiff took the train in a few minutes thereafter, and by giving up the first coupon of his ticket obtained passage to Quebec, where he visited friends for several weeks. Returning, plaintiff offered the remaining coupon of his ticket to the conductor of the train between Quebec and Montreal, who said it was a mistake which he could not understand, but that it was all right, and he punched it. On the train from Montreal to Toronto, however, another conductor declined to take the ticket, on the ground that it was not good, and required plaintiff to pay his fare or leave the train. Plaintiff had not sufficient money to pay his fare, and was obliged to leave the train at a station 20 miles west of Montreal. Returning thence to Montreal, he applied to the main offices of the defendant, where his ticket was exchanged for a correct one, and he then resumed his journey. He suffered considerable inconvenience because of the delay. It appeared that the rules of the company forbade conductors to accept such a ticket for passage from Quebec to Detroit.

The plaintiff declared in trespass on the case on the negligence of the ticket agent in selling him a wrong ticket, and asked damages for all its consequences to him. The evidence showing the facts as stated, the court directed the jury to return a verdict for the defendant, because the injury which the plaintiff had suffered was the consequence of his contributory negligence. A writ of error was sued out to the judgment entered on the verdict, and the error assigned was to the direction of the court.

Charles T. Wilkins, for plaintiff.

F. H. Canfield, (*Angus McMurchy*, on brief,) for defendant.

Before BROWN, Circuit Justice, and JACKSON and TAFT, Circuit Judges.

TAFT, Circuit Judge, (*after stating the facts.*) Counsel for the defendant contends that under the practice in Michigan, where the common-law form of procedure still obtains, the judgment for defendant should not be disturbed, because the gist of plaintiff's action is breach of contract, whereas he has declared in tort. The objection was raised

on demurrer in the court below, and overruled. The reasons of the learned district judge for this ruling are fully set forth in *Pouilin* v. *Railway Co.*, 47 Fed. Rep. 858. Upon the correctness of the conclusion there reached we do not express an opinion, because we think that, irrespective of the form of action, the court was right in directing a verdict for the defendant on the admitted facts of the case. The contract of carriage between the parties was made by the plaintiff with the city ticket agent of the defendant at Detroit. The terms of that contract were that, in consideration of the fare paid, the defendant company would give to the plaintiff a token or ticket which, upon exhibition to defendant's conductors or other agents in charge of defendant's trains, would secure his safe carriage from Detroit to Quebec and back again. The city ticket agent committed a breach of the contract by delivering a token or ticket purporting to entitle the plaintiff to two passages from Detroit to Quebec. The plaintiff had his right of action for all the damages which would naturally flow from such a breach, in the contemplation of the parties when the contract was made. It is possible that, if trespass also lies at the election of the plaintiff, the measure of damages would be somewhat wider. The question is immaterial here. The plaintiff, before he went aboard the train from which he was ejected, discovered that the agent had made a mistake, and that he had not delivered to him a ticket which on its face entitled him to return from Quebec to Detroit. The law settled by the great weight of authority, and but recently declared in a case in this court, (*Railway Co.* v. *Bennett*, 50 Fed. Rep. 496, 1 C. C. A. 544,) is that the face of the ticket is conclusive evidence to the conductor of the terms of the contract of carriage between the passenger and the company. The reason for this is found in the impossibility of operating railways on any other principle, with a due regard to the convenience and safety of the rest of the traveling public, or the proper security of the company in collecting its fares. The conductor cannot decide from the statement of the passenger what his verbal contract with the ticket agent was, in the absence of the counter evidence of the agent. To do so would take more time than a conductor can spare in the proper and safe discharge of his manifold and important duties, and it would render the company constantly subject to fraud, and consequent loss. The passenger must submit to the inconvenience of either paying his fare or ejection, and rely upon his remedy in damages against the company for the negligent mistake of the ticket agent. There is some conflict among the authorities, but the great weight of them is in favor of the result here stated. *Bradshaw* v. *Railroad*, 135 Mass. 407; *Townsend* v. *Railroad*, 56 N. Y. 295; *Frederick* v. *Railroad Co.*, 37 Mich. 342; *Shelton* v. *Railway Co.*, 29 Ohio St. 214; *Dietrich* v. *Railroad Co.*, 71 Pa. St. 432; *Petrie* v. *Railroad Co.*, 42 N. J. Law, 449; *Railroad Co.* v. *Griffin*, 68 Ill. 499; *Hall* v. *Railway Co.*, 15 Fed. Rep. 57; *Pennington* v. *Railroad Co.*, 62 Md. 95; *Johnson* v. *Same*, 63 Md. 106; Mechem's Hutch. Car. § 580*i*.

In the opinion of the majority of the court, the plaintiff was bound to know the law, and, when he discovered that his ticket on its face did

not secure him carriage from Quebec to Detroit, he was bound to know that the conductor of the defendant would be justified in refusing to recognize it as evidence of his right to such carriage. Could he then incur the risk of expulsion from the train by taking passage with this ticket, and, if expelled, charge his consequent injury and inconvenience to the mistake of the ticket agent? A majority of the court is of opinion that he could not. It matters not whether his action sounds in tort or in contract. If in tort, then the rule is that he cannot recover any damages for an injury growing out of the negligence of the defendant, which, by the use of due care, he might have avoided. If in contract, then it was his duty to use due diligence to reduce the damages from the breach, and failure to do so prevents recovery for any damages which might by due diligence or care have been avoided. Knowing, as the plaintiff did, that his ticket did not purport to give him a right to be carried on defendant's train from Quebec to Detroit, and charged, as he was, with the knowledge that this was conclusive evidence of his contract to the conductor, his conduct in getting upon the train at Quebec with the ticket was negligence as a matter of law, and it was unnecessary to submit the question to the jury. The plaintiff admittedly suffered no injury or inconvenience before he was put off the train west of Montreal. The injury, delay, and other inconvenience, suffered by him from the ejection, he might have avoided by exercising due care. Therefore, if his right of action sounds in tort, as he has laid it, he was entitled to recover no damages. If his right of action was the breach of the contract, as he might have declared it, his damages could only have been nominal.

Much reliance is placed on the fact that plaintiff consulted a person in a ticket office in the station, who told him that he thought the ticket would be all right, and that the conductor would see the mistake. But this person expressly disclaimed any authority to rectify the mistake, by saying that the agent who had such authority was not there. It is said, however, that, without regard to the person's actual authority, this circumstance ought to have been submitted to the jury, as bearing upon the question whether plaintiff acted with ordinary prudence, and counsel cites, as authority to the point, a railway crossing accident case, where it was held proper to submit to the jury, as affecting the question of requisite caution on the part of the plaintiff in approaching the track, the circumstance that he was beckoned to come on by some one who was apparently the gate flagman, although in fact he was not so. *Evans* v. *Railroad Co.*, (Mich.) 50 N. W. Rep. 386. There is no analogy between the case cited and the one at bar. The question of the due care of the plaintiff in the accident case depended, of course, upon the seeming situation as it would appear to any ordinarily prudent man in his position, and, if the man who beckoned had the appearance of a flagman, the plaintiff's conduct was reasonably prudent in acting on that appearance, or, at least, the circumstance as to the pseudo-flagman was one for the jury to consider in deciding the question of plaintiff's care, or his want of it. But in this case plaintiff knew from his express statement that the man

in the station office was not the station ticket agent of the defendant, and had no authority to act in regard to the mistake of the city ticket agent.

This is not a case, it will be observed, where the terms of the ticket, in order to be understood, had to be read in the light of rules of the company not known to the passenger. Here was no representation by the ticket agent selling the ticket as to the effect of ambiguous language or signs on its face, on which the passenger might rely, as in the case of *Murdock* v. *Railroad Co.*, 137 Mass. 293. The language of the ticket was plain, and there was no attempt to vary its meaning by any verbal statement by the ticket agent selling it. If there had been, a case would be presented which might call for the application of different principles. Under such circumstances, the passenger would probably have the right to rely on the representation by the agent that the ticket was all right, as being, in effect, a statement that the rules of the company permitted conductors to receive a ticket, good on its face for passage from one point to another, as good for passage either way between the points. But here the agent's act in selling the ticket was, as plaintiff himself admits, a palpable mistake, which plaintiff, when he discovered it, had no right to rely upon as a deliberate representation that the ticket was good for passage from Quebec to Detroit.

The proper course for the plaintiff to have pursued would have been to visit the city ticket office at Detroit, and have the mistake rectified, or he might before his return have obtained a proper ticket in exchange at the ticket office at Quebec, where he spent several weeks; in either case, holding the company responsible for any damages arising from his delay or inconvenience. The contention of counsel for plaintiff is that, if he had taken this course, the company could have made a complete defense on the ground that plaintiff had been advised by the man in the station ticket office that the ticket was all right, and that the delay was unnecessary. We cannot agree to this. The legal effect of the mistake in the ticket would have been full justification for the delay, and the opinion of a person with no authority to act in the premises would have been a poor shield for the railway company in such an action. The case of *Eddy* v. *Wallace*, 49 Fed. Rep. 801, 803, 1 C. C. A. 435, relied on by counsel in this connection, was where a passenger jumped off a train on the advice of the brakeman, and was injured. It was left to the jury to say whether, in doing so, he acted with proper care. The fact that the brakeman advised him to do so was a circumstance tending to show that, in jumping, he acted with prudence. The difference between that case and this is that there it was within the brakeman's lawful authority to advise passengers when to alight, while here the advice acted on came from one not only without actual authority, but also without assumed authority. The question is not involved in this case of the rights of a passenger who, relying entirely on the ticket agent, does not examine his ticket, and finds the mistake for the first time when the ticket is presented to the conductor. Such a case might present different considerations.

The circumstance that one of defendant's conductors allowed the ticket to be used for passage from Quebec to Montreal does not aid plaintiff. The conductor simply did not follow the rules of the company, and thus saved the plaintiff the greater inconvenience of having to leave the train before reaching Montreal. Even if the conductor did thereby mislead the plaintiff as to what subsequent conductors would do with the ticket, it was not to the plaintiff's disadvantage. As the conduct of the plaintiff in attempting to ride on a ticket which he knew did not purport to give him a right to do so, was, in our view, negligence, as matter of law, the fact that a conductor was negligent could not affect the proper standard of due care on the part of the passenger. *Dietrich* v. *Railroad Co.*, 71 Pa. St. 432. It follows that there was no error in the charge of the court directing a verdict for the defendant, and that the judgment thereon must be affirmed.

BROWN, Circuit Justice, (*dissenting.*) I fully concur in the opinion of the court, that, as between the plaintiff and the conductor, the ticket must be deemed conclusive evidence of the contract with the company, and therefore that the conductor was justified in ejecting the plaintiff from the car. I am also of the opinion that defendant's agent was guilty of negligence in delivering an improper ticket, and under the Michigan practice I am inclined to think an action upon the case was the proper remedy.

In determining the question whether the plaintiff was guilty of contributory negligence, it is pertinent to consider that he was a teacher of music; had not traveled much; that he purchased his ticket at an uptown office of the company, some considerable distance from the station, and then went to the station to take a particular train, and on arriving there noticed the mistake in the ticket. The train was advertised to leave within a half or three quarters of an hour, and, having no time to go back to the office where he purchased the ticket, he asked a man in charge of the ticket office at the station to exchange the ticket, and was told that the agent was not there, and he could not exchange it, but he thought that it was all right,—they would understand the mistake. The very fact that the company did not have an agent at the station with authority to correct a mistake of this kind is somewhat singular, and probably induced the plaintiff to rely upon the statement of the person he found there, that it was all right. It appears to me immaterial, as bearing upon the negligence of the plaintiff, whether this man was actually an agent of the company or not, though the fact that he was the only person in the ticket office just before the departure of a train would naturally lead to the inference that he was the ticket agent. In judging of the reasonableness of a man's conduct, the information upon which he acted is always pertinent. In the view I have taken of the case, if he had asked any experienced railroad man, whether connected with the company or not, the information he received would have been equally available to him. It is a matter of common knowledge that conductors do sometimes, either through inadvertence or through an imperfect ob-

servance of their own rules by the company, accept tickets which have expired, or take up tickets which are being used in the wrong direction, as was actually done by the conductor from Quebec to Montreal in this case. Such conduct might easily induce a person of ordinary intelligence to suppose that the company waived a strict compliance with the terms of the ticket in this particular. The question of negligence depends, too, not wholly upon what was done in a particular case, but somewhat upon the age, capacity, and experience of the party doing the act. Had the plaintiff been an experienced railroad man, a jury would probably find little difficulty in holding that he must have known his ticket would not have been accepted, and that he should have returned to the office of the company, and had the mistake corrected. On the other hand, had he been an ignorant man, wholly unacquainted with traveling and the usages of railroads, a jury would be quite likely to find that he was not guilty of negligence in acting upon the advice of a man in charge of the office of the company at the station, and I should have been disposed to uphold a verdict in his favor. The question for the court in every such case is whether the evidence of contributory negligence is so clear that intelligent men should not differ in their conclusions. This being the test, it seems to me the question in this case should have been submitted to the jury.

The opinion of the court seems to hold that the plaintiff was bound to know, as a matter of law, that his ticket would not have been accepted. This is practically holding that if the agent who sold the ticket, himself had told the plaintiff that his ticket, though defective, would be accepted, the plaintiff would still be guilty of contributory negligence in acting upon his advice.

It seems to me that this is carrying the maxim concerning ignorance of the law to an unwarranted extent.

UNITED STATES v. CHIN QUONG LOOK.

(District Court, D. Washington, N. D. August 30, 1892.)

CHINESE EXCLUSION ACTS—MERCANTILE DOMICILE.

A Chinaman who formerly resided in the United States, and acquired an interest in a firm long established and doing business here, although he returned to China, and remained over six years, retaining his interest in the firm, and receiving his share of the profits, has a "commercial domicile" in the United States, and cannot be sent back to China under the exclusion act. *Lau Ow Bew* v. *U. S.*, 12 Sup. Ct. Rep. 517, 144 U. S. 47, followed.

At Law. Proceeding to enforce Chinese exclusion act. Appeal from judgment of United States commissioner convicting the defendant of being unlawfully in the United States. Reversed, and defendant discharged.

P. C. Sullivan, Asst. U. S. Atty.

W. H. White and *F. Hartley Jones*, for defendant.