Michigan Law Review

Volume 14 | Issue 8

1916

Liability of the Carrier to Passengers for Injuries by Its Servants

Renville Wheat
University of Michigan Law School

THE LIABILITY OF THE CARRIER TO PASSENGERS FOR INJURIES BY ITS SERVANTS.

WITH the unprecedented development of the means of transportation in the early nineteenth century, and the increased use of the corporate form of ownership and control of these means, the inadequacy of the familiar rule of law, *respondeat superior,* as a protection to the travelling public from the torts of the carrier's servants was recognized. The majority of courts applied with the utmost rigor a test which determined the master's liability by considering whether the act complained of was within the scope of the servant's authority. Some few courts said that the liability depended rather upon whether the act was in the course of the employment. In either case the liability depended upon the effect of the arrangement between the master and the servant, and there was little practical advantage in the change of expression. The master's liability was further qualified by the so-called rule of *McManus* v. *Crickett*,[1] which denied any recovery where the servant's act was malicious or wilful. Additional difficulties in the way of a satisfactory rule of liability arose from a belief that a corporation could not be sued in trespass. Consequently, in the middle of the century a new rule was developed in the courts of the United States which was peculiarly well adapted to the ever-increasing number of cases by passengers against railroad companies for injuries from the wilful wrongs of the carriers' employes. It may be advisable at this point to say that this rule has never been applied in any courts but those of the United States. The liability of the carrier to the passenger in all parts of the British Empire is still determined by considerations of the scope of the employe's authority.[2]

The germ of this American doctrine was found in a decision by Mr. Justice STORY on circuit in 1823.[3] The case was a libel in admiralty by three passengers against the master of a ship, alleging gross ill-treatment and misconduct by the master and crew toward the libellants. In awarding the libellants damages to the amount of the defendant's share of the passage money, the court said, "The authority of a master at sea is necessarily summary, and often absolute. For the time he exercises the rights of sovereign control; and obedience to his will and even to his caprices, becames almost indispensable. If he chooses to perform his duties in a harsh, intemperate,

[1] 1 East, 106 (1800).

[2] See Beven on Negligence, Preface, vii; Labatt's Master and Servant, § 2407.

[3] Chamberlain, et al. v. Chandler, 3 Mason (Fed.) 242.

or oppressive manner, he can seldom be resisted by physical or moral force; and therefore in a limited sense, he may be said to hold the lives and personal welfare of all on board in a great measure under his arbitrary discretion. He is nevertheless responsible to the law; and if he is guilty of gross abuse and oppression, I hope it will never be found, that courts of justices are slow in visiting him, in the shape of damages, with an appropriate punishment. In respect to passengers, the case of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere ship room, and personal existence, on board; but for reasonable food, comforts, necessaries, and kindness. It is a stipulation, not for toleration merely, but for respectful treatment, for that decency of demeanor, which constitutes the charm of social life, for that attention, which mitigates evils without reluctance, and that promptitude, which administers aid to distress." This case was approved in KENT'S COMMENTARIES, edition of 1832.[4] It will be noticed that the acts of the master were not such as to render him liable in the absence of the special relation he bore to the libellants. Thus the theory was sanctioned that the contract for transportation created incidental duties which were of legal consequence.

But to hold an absent owner of the ship or vehicle liable was quite a different legal problem. The court of Louisiana was soon called upon to decide the point, and did so by applying the familiar doctrine of *respondeat superior*. In *Keene* v. *Lizardi*[5] a passenger sued the owner of a vessel for injuries resulting from conduct of the master resembling that complained of in *Chamberlain* v. *Chandler*. After citing that case with approval for its definition of the master's duties, the court said, "The exposition just given of the duties of the master, in relation to the passengers, renders it easy to ascertain the extent of the responsibility of the owners for a breach of those duties. The law is clear and perfectly well settled, that owners of vessels are responsible for all acts of the master, while acting within the scope of his duties, even for his torts." If the court meant by "duties" those owed by the master of the ship to the passenger, it would be illogical to hold the owner responsible for injuries resulting from acts within their scope. A cannot be made liable for B's failure to perform a duty owed by B to C. And if the court meant that the master's duties to the owner are to be ascertained by the duties of the master to the passenger, and are in contemplation of law identical, an equally illogical result would follow. The mere

[4] Vol. 3, p. 160, n.
[5] 5 La. 431 (1833).

fact that it is the duty of a servant, as it is of every one else, not to assault a stranger does not make it the duty of the servant to his master not to assault the stranger: nor can the servant's act in assaulting the stranger be said to be within the scope of his employment. Such a theory could not be sustained in ordinary cases, else would all limits on *respondeat superior* be destroyed. If there were any extraordinary consequences arising from the relation of carrier and passenger to justify this reasoning, the court in *Keene* v. *Lizardi* did not refer to them. It would seem too clear for argument that no different results should be reached in actions against carriers unless there are such consequences from the relation between those parties.

The recognition of such extraordinary consequences of the relation would seem to be the logical result of the decision in *Chamberlain* v. *Chandler*. It will be recalled that it was held there that the passenger contracted for good treatment with the master of the ship, who received part of the passage money. If that decision is sound, the existence of a contract embodying similar terms must be implied against the owner, who receives the greater part of the passage money. Upon the recognition of such an undertaking by the carrier himself for the good treatment of the passenger, a sound and rational theory would be established for holding the carrier liable for acts of his servants which are at once breaches of the carrier's undertaking and torts of the servant.

Before any case was decided which relied squarely on such an undertaking by the carrier as a basis for his liability for his servants' wrongful acts, the courts passed upon two situations to which it will be advisable to refer at this point. In 1858 the Court of Appeals of New York decided that it was no defense to an action against a railroad company for breach of its undertaking to carry with reasonable dispatch that the detention of the train was caused by the wilful act of the conductor in abandoning his post and leaving the train.[6] The court, after recognizing that under the rule *respondeat superior* as it was then applied the company could not be made responsible for the injuries resulting from the wilful act of a servant, decided that in the case before them the servant's acts involved an omission or violation of duty by his principal to the person injured, and that the acts were not wrongs by the agents only, with which the principals were not legally connected. The real wrong, said the court, was in not carrying the plaintiff, and this was the wrong of the defendant which was no more excused because the act of the servant causing the wrong was wilful than if it had been merely negligent.

[6] Weed v. Panama R. Co., 17 N. Y. 362, 72 Am. Dec. 474.

"The obligation to be performed was that of the master, and delay in performance, from intentional violation of duty by an agent, is the negligence of the master." This case was cited and followed two years later by the Wisconsin Court in a suit brought by a passenger for breach of contract in wrongfully ejecting him from the train.[7] The defense that the expulsion was the wilful act of the conductor was not accepted. From the doctrine of these two cases it must follow that if a contract between the carrier and the passenger for good treatment is established, it will be no defense to an action for breach of it, that the breach was caused by the wilful act of a servant.

The second situation arose in Pennsylvania in 1866. The plaintiff, a female passenger on the defendant's train, was injured by the riotous and disorderly conduct of a mob of fellow passengers, and the action was brought to recover damages for the negligence of the conductor in not preventing the injury.[8] The court held that the allegations and the evidence showed a violation of the defendant's contract to carry the plaintiff safely. "If the conductor did not do all he could to stop the fighting," said the court, "there was negligence. * * * Until at least he has put forth the forces at his disposal, no conductor has a right to abandon the scene of conflict." The precise rule of duty applicable to such a situation was described in a later case as follows: "The defendants were bound to exercise the utmost vigilance and care in maintaining order and guarding the passengers against violence from whatever source arising, which might reasonably be anticipated or naturally be expected to occur in view of all the circumstances, and of the number and character of the persons on board."[9] This duty, said the Supreme Court of Mississippi in 1876, "springs out of the obligation resting upon it to use every power with which it is invested to transport the passenger safely to his destination."[10]

Thus by 1869 it had been definitely decided that a master of a ship receiving part of the passage money impliedly contracted with the passengers for their good treatment,[11] that it is no defense to an action against a carrier for breach of any of his undertakings that the breach was caused by the wilful act of a servant,[12] and that the

[7] Milwaukee & Mississippi R. Co. v. Finney (1860) 10 Wis. 330.

[8] P., Ft. W. & C. Ry. Co. v. Hinds, 53 Pa. St. 512.

[9] Flint v. Norwich & New York Transportation Co. (1868), 6 Blatchf. (Fed.) 158.

[10] N. O., St. L. & C. R. Co. v. Burke, 53 Miss. 200, 24 Am. Rep. 689. This is the best considered case on this point. The doctrine of these cases has not been definitely accepted in England. Pounder v. North Eastern R. Co. [1892] 1 Q. B. 385.

[11] Chamberlain v. Chandler (1823) 3 Mason (Fed.) 242.

[12] Weed v. Panama R. Co. (1858) 17 N. Y. 362, 72 Am. Dec. 474.

carrier was bound to exercise due care to prevent injuries to a passenger from the wrongful acts of fellow passengers.[13] With the law in this situation, the court of Maine in the leading case of *Goddard* v. *The Grand Trunk Railway of Canada,*[14] an action in trespass for injuries resulting from an assault by a brakeman, relied squarely on an implied undertaking of the defendant railroad for the good treatment of its passengers at the hands of its servants. In answer to the defendant's contention that the "master is not responsible as a trespasser, unless by direct or implied authority to the servant, he consents to the unlawful act", the court, speaking through Judge Charles W. WALTON, said, "The fallacy of this argument, when applied to the common carrier of passengers, consists in not discriminating between the obligation which he is under to his passenger, and the duty which he owes a stranger. It may be true that if the carrier's servant willfully and maliciously assaults a stranger, the master will not be liable; but the law is otherwise when he assaults one of his master's passengers. The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and if he entrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger; but he is bound to use all such reasonable precautions as human judgment and foresight are capable of, to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and co-passengers, but *a fortiori,* against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted, through the negligence or the willful misconduct of the carrier's servant, the carrier is necessarily responsible." In a later paragraph the court continued, "It seems to us it would be cause of profound regret if the law were otherwise. The carrier selects his own servants and can discharge them when he pleases and it is but reasonable that he should be responsible for the manner in which they execute their trust. * * * The best security the traveller can have that their servants will be selected with care, is to hold those by whom the

[13] P., Ft. W. & C. Ry. Co. v. Hinds (1866) 53 Pa. St. 512.
[14] 57 Me. 202, 2 Am. Rep. 39 (1869).

selection is made responsible for their conduct."[15] This case has been cited for this proposition in twenty-two courts of last resort in this country, and its holding on this point is the law in practically every state in the Union.

It was followed the next year in a case decided by Mr. Justice CLIFFORD on the Rhode Island Circuit.[16] A passenger was wantonly assaulted by a clerk or purser as a result of a quarrel between them over the fare, and the trial court had directed a verdict for the defendant. After holding that the defendant would be liable on the facts on the theory of the master's liability for acts of his servants within the course of their employment, the court stated that the principles of law applicable to the situation were not only those that grew out of the relation of master and servant, but also those that arose from the master's undertaking as a common carrier of passengers. "Passengers do not contract merely for ship room and transportation from one place to another," the court said, "but they also contract for good treatment and against personal rudeness and every wanton interference with their persons, either by the carrier or his agents employed in the management of the ship or other conveyance, and for the fulfillment of those obligations the carrier is responsible as principal, and the injured party in case the obligation of good treatment is broken, whether by the principal or his employees, may proceed against the carrier as the party bound to make compensation for the breach of the obligation."[17]

---

[15] This sentence suggests Jeremy Bentham's justification of the ordinary liability of the master for his servant's wrongs. "The obligation imposed upon the master acts as a punishment, and diminishes the chances of similar misfortunes." Principles of Penal Law, Vol. I of Works, page 383.

[16] Pendleton v. Kinsley (1870) 3 Cliff. (Fed.) 416.

[17] Approved and adopted in Bryant v. Rich (1870) 106 Mass. 180, 8 Am. Rep. 311. See also St. Louis, etc. Ry. v. Dowgiallo (1907), 82 Ark. 289, 101 S. W. 412; Columbus & Rome Ry. Co. v. Christian (1895), 97 Ga. 56, 25 S. E. 411; Chicago & Eastern R. Co. v. Flexman (1882), 103 Ill. 546, 42 Am. Rep. 33; Wabash Ry. Co. v. Savage (1886), 110 Ind. 156, 9 N. E. 85; A., T. & S. F. R. Co. v. Henry (1895) 55 Kas. 715, 41 Pac. 952, 29 L. R. A. 465; Sherley v. Billings (1871), 71 Ky. 147, 8 Am. Rep. 451; Johnson v. D., Y., A. A. & J. Ry. (1902), 130 Mich. 453, 90 N. W. 274; St. L. & S. F. R. Co. v. Sanderson (1911), 99 Miss. 148, 54 So. 885; O'Brien v. St. Louis Transit Co. (1904), 185 Mo. 263, 84 S. W. 939, 105 Am. St. Rep. 592; Haver v. Central R. Co. (1898), 62 N. J. Law, 282, 41 Atl. 916, 43 L. R. A. 84, 72 Am. St. Rep. 647; Stewart v. Brooklyn & Crosstown R. Co. (1882), 90 N. Y. 588, 43 Am. Rep. 185; White v. Norfolk & Southern R. Co. (1894), 115 N. C. 631, 20 S. E. 191, 44 Am. St. Rep. 489; Springer Transportation Co. v. Smith (1886), 84 Tenn. 498, 1 S. W. 280; Dillingham v. Anthony (1889), 73 Tex. 47, 11 S. W. 139, 15 Am. St. Rep. 753, 3 L. R. A. 634; Gillingham v. Ohio River R. Co. (1891), 35 W. Va. 588, 14 S. E. 243, 29 Am. St. Rep. 827, 14 L. R. A. 798; Craker v. C. & N. W. Ry. Co. (1875), 36 Wis. 657, 17 Am. Rep. 504. And see Labatt's Master and Servant, Vol. VI, pp. 7304, et seq., also in 40 L. R. A. (N. S.) 999; Elliott on Railroads, § 1638; Hutchinson on Carriers, §§ 1093, et seq.; 4 R. C. L. 1168.

The statement of Mr. Justice CLIFFORD in this case, whether it be regarded as mere *dictum* or as the *ratio decidendi,* indicates a quite prevalent tendency to extend the ordinary conception of *respondeat superior.* This tendency is evidenced less by the change in phraseology from the expression "scope of authority" to "course of employment," than by the genuinely broader application of the rule.[18] The master's liability has been constantly increased during the entire course of our law from the time of the Conquest,[19] but no period produced extensions of greater effect than did the early nineteenth century. It is not, therefore, a matter of surprise that the courts accepted a theory which apparently departed from the recognized forms of vicarious liability as radically as did the novel contractual doctrine of the *Goddard* case. The greater number of actions brought by passengers would be for a wrongful expulsion from a train, or for an assault which was the culmination of a dispute between servant and passenger over the enforcement of the carrier's regulations, and in holding the carrier liable for such acts upon the contractual theory the courts were going no further than they were in the ordinary fields of master and servant law upon the older doctrine of *respondeat superior.*

But when the assault or wrongful act has nothing whatever to do with any service or duty owed by the employe to the carrier, it is only by a very strained application of the tests, "scope of authority" and the broader "course of employment," that a recovery can be predicated upon a purely master and servant theory. Such a result has been reached by declaring that every act of the servant involved which affects the comfort or safety of a passenger is within the scope or course of his employment.[20] The results of such a construction may be of nearly as great practical value as those of the contractual doctrine, yet in each case the result is reached by implications of law, and in the one there is the disadvantage of adopting phraseology which has already acquired a definite and technical legal meaning. Moreover no application of the rule *respondeat superior* can meet all the exigencies of the relation of carrier and passenger, and where a legal theory must be adopted for certain situations it is better to accept it and build upon it from the beginning.

Nevertheless the courts have applied the two theories indiscriminately. The danger of confusing the two theories of liability was

[18] Compare the two leading cases of Foster v. Essex Bank (1821), 17 Mass. 478, 9 Am. Dec. 168, and Philadelphia & Reading R. Co. v. Derby (1852), 14 How. 468.

[19] See the two articles by Mr. John H. Wigmore in 7 Harvard L. Rev., 315, 383.

[20] Sherley v. Billings (1871), 71 Ky. 147, 8 Am. Rep. 451; Central R. Co. v. Peacock (1888), 69 Md. 257, 14 Atl. 709, 9 Am. St. Rep. 425; Coal Belt Electric R. Co. v. Young (1906), 126 Ill. App. 651.

shown in a recent Indiana case which refused to apply the contractual theory when the plaintiff had declared on an assault by the defendant by its servants.[21] A discussion of the cases which have applied the ordinary rule of master and servant in holding the carrier liable for injuries to the passengers would be out of place here.[22] Such cases do not deny the validity of a contractual theory. Only where it is held that the carrier is not liable because the act complained of is beyond the scope of the servant's employment is there any implied rejection of the contract. Three jurisdictions in the United States have accepted this limitation on the ordinary master and servant liability as a defense to an action by a passenger against a carrier. They are Ohio, South Carolina and Pennsylvania.[23] New York early accepted this view,[24] but it has been expressly and decisively overruled.[25] The courts of England and her dependencies, as has been stated, have never accepted the contract theory. In *Little Miami R. Co.* v. *Wetmore,* cited above, the court said that to hold the company responsible on the ground of its contract with the plaintiff as a passenger it would be necessary to maintain that the company undertook to vouch for and warrant the good conduct of the servant towards the plaintiff while the two were transacting their business. The court refused to discuss the tenability of this doctrine because the case was not tried upon that theory in the lower court, and the point had not been argued on appeal. Thus Ohio has never squarely rejected the contract theory, and it might not be presumptuous to predict that her courts will, if called upon, accept the doctrine.[26] The *Berryman* case, cited above from Pennsylvania as denying a recovery where the act was beyond the scope of the servant's authority,

[21] Southern Ry. v. Crone (1912), 51 Ind. App. 300, 99 N. E. 762. Indiana had accepted the contract theory in 1886. Wabash Ry. Co. v. Savage, 110 Ind. 156, 9 N. E. 85.

[22] The following are some of the early decisions of this sort: New Jersey Steamboat Co. v. Brockett (1887), 121 U. S. 637; Evansville & Crawfordsville R. Co. v. Baum (1866), 26 Ind. 70; B. & O. R. Co. v. Blocher (1867), 27 Md. 277; Ramsden v. B. & A. R. R. Co. (1870), 104 Mass. 117, 6 Am. Rep. 200; Brokaw v. N. J. Railroad & Transportation Co. (1867), 32 N. J. Law, 328, 90 Am. Dec. 659; Lynch v. Metropolitan Elevated R. Co. (1882), 90 N. Y. 77, 43 Am. Rep. 141; Passenger R. Co. v. Young (1871), 21 Oh. St. 518, 8 Am. Rep. 78; Pennsylvania R. R. Co. v. Vandiver (1862), 42 Pa. St. 365, 82 Am. Dec. 520.

[23] Little Miami R. Co. v. Wetmore (1869), 19 Oh. St. 110, 2 Am. Rep. 373; Redding v. South Carolina Ry. Co. (1871), 3 S. C. 1, 16 Am. Rep. 681; P., A. & M. R. Co. v. Donahue (1871), 70 Pa. St. 119; Greb v. Pennsylvania R. R. Co. (1909), 41 Pa. Super. Ct. 61; Berryman v. Pennsylvania R. R. Co. (1910), 228 Pa. St. 621, 77 Atl. 1011, 30 L. R. A. (N. S.) 1049; Rohrback v. Pennsylvania R. R. Co. (1914), 244 Pa. St. 132, 90 Atl. 557; Win v. Atlantic City R. Co. (1915), 248 Pa. St. 134, 93 Atl. 876.

[24] Isaacs v. Third Avenue R. R. Co. (1871), 47 N. Y. 122, 7 Am. Rep. 418.

[25] Stewart v. Brooklyn & Crosstown R. Co. (1882), 90 N. Y. 588, 43 Am. Rep. 185.

[26] See the language of a Circuit Court in B. & O. Ry. v. Reed (1909), 31 Oh. Cir. Ct. Rep. 521.

may be read with profit by those who question the wisdom of the contract theory.

A single decision in Louisiana stands out against the current of authority in that state in favor of the contract theory. In an action for a wrongful arrest of a passenger by a motorman who was in charge of the car, the court said that the company could not be held responsible, as the act was not done within the scope of the driver's employment.[27] An earlier case was cited which was decided upon a strict master and servant basis and which expressly denied the existence of any contractual relation between the plaintiff and the defendant.[28] The court's holding in regard to the liability for the arrest was mere *dicta*, however, for the issue was not sent to the jury in the trial court, and the appeal was from a judgment for the plaintiff for the insulting conduct of the motorman prior to the arrest. It is, however, a curious fact that the contract theory has been relied upon less in cases of wrongful arrests than in cases of assaults.

Nowhere is the contention that a carrier is not liable for the acts of its servants beyond the scope of their employment met with a better reasoned answer than in a comparatively recent Alabama case, *Birmingham Railway & Electric Co.* v. *Baird*.[29] "It is of no consequence," the court said, "when the wrong is committed by the carrier's own servant, even that servant charged with the duty of conserving the passenger's well-being *en route*, that the act bears no connection or relation with or to the duties of such servant to the carrier and is not committed as an incident to the discharge of any duty; but is entirely violative of all duty and apart and away from the scope of employment as that term is understood in the class of cases first above referred to: The carrier is liable in such cases because the act is violative of the duty it owes through the servant to the passenger and not upon the idea that the act is incident to a duty within the scope of the servant's employment; and it is manifestly immaterial that the act may have been one of private retribution on the part of the servant, actuated by personal malice toward the passenger, and having no attribute of service in it. It is wholly inapt and erroneous to apply the doctrine of scope of employment as ordinarily understood to such an act. Its only relation to the scope of the servant's employment rests upon the disregard and violation of a duty imposed by the employment. This is beyond question, we think, the true doctrine on principle, and while as indicated above,

[27] Lafitte v. N. O., C. & L. R. Co. (1890), 43 La. Ann. 34, 8 So. 701, 12 L. R. A. 337.
[28] Williams v. Pullman Palace Car Co. (1888), 40 La. Ann. 87, 8 Am. St. Rep. 512.
[29] 130 Ala. 334, 30 So. 456, 89 Am. St. Rep. 43, 54 L. R. A. 752 (1901).

there are adjudications against it, the great weight of authority supports it."[30]

The logical result of a contract for good treatment and protection against acts of violence would seem necessarily to be a guarantee of immunity by the carrier from the violent and wrongful acts of its servants. True it is that a carrier of passengers is not an insurer of their safety,[31] but neither is an ordinary employer an insurer of the safety of his fellow beings. Yet every employer guarantees to his fellows that his employes will do them no wrong while acting in the scope or course of their employment. Public policy alone decrees this. The rule *respondeat superior* is not a mere logical necessity. The rule, with the limitation found in the necessity that the act complained of be in the scope of the servant's employment, is the result of a search for justice.[32] If public policy requires the ordinary master to guarantee immunity to the public from certain acts of his servants, a different public policy may well require the carrier to guarantee immunity to the passenger from other and different acts, perhaps from all acts.

It is not true, however, that a carrier is liable to a passenger for the wrongful acts of its servants merely from the fact that they are its servants. The rule of liability that is stated in all the cases contains a limiting phrase of some sort, indicating that the court does not accept unqualifiedly a theory of liability for all the acts of all servants at all times and places. Thus in *Sherley* v. *Billings*,[33] a leading case from Kentucky, it was said that the guarantee was of "immunity from violence at the hands of those whose duty it is to afford this stipulated protection [from known impending danger]." In *Chicago & Eastern R. R. Co.* v. *Flexman*,[34]

[30] In Alabama Great Southern R. Co. v. Pouncey (1913), 7 Ala. App. 548, 61 So. 601, the Court of Appeals of Alabama, an intermediate appellate court, held a complaint insufficient on demurrer because there was no allegation that the servant mentioned in the complaint was acting in the line or scope of his authority. Referring to the Baird case, the court said, "That case does not decide that a carrier is liable for every assault committed on a passenger by one of its employes while the latter is off duty and in no manner engaged in his employer's business, or that in such case the inquiry as to whether the employe was acting within or wholly outside the general scope of his employment is an immaterial one." The court did not cite or comment upon the case of Birmingham Railway & Electric Co. v. Mason, 137 Ala. 342, 34 So. 207, decided by the Supreme Court of the state in 1903, which distinctly held to the contrary, saying, "The second ground stated in the count, on which recovery was sought, was sufficient to show that plaintiff was being carried as a passenger, and it was unnecessary as to it, that there should have been an averment that the assault was committed within the scope of the duty of the servant or employe."

[31] Aston v. Heaven (1797), 2 Esp. (N. P.) 534.

[32] Penas v. Chi. M. & St. P. R. Co. (1910), 112 Minn. 203, 127 N. W. 926, 30 L. R. A. (N. S.) 627; Labatt's Master and Servant, §§ 2245-2251; Mechem on Agency, § 1856.

[33] 71 Ky. 147, 8 Am. Rep. 451 (1871).

[34] 103 Ill. 546, 42 Am. Rep. 33 (1882).

the court said that the carrier's contract was a guarantee that the passenger should be "protected against personal injury from the agents or servants of the appellant [carrier] in charge of the train." This is a common form of restrictive clause. Another common form was first stated in *Stewart* v. *Brooklyn & Crosstown R. R. Co.*,[35] the leading New York case. "The common carrier," the court said, "undertakes absolutely to protect them [the passengers] against the misconduct of its own servants engaged in executing the contract." The chief significance of these limiting phrases lies in their motive. With the exception of *Alabama Great Southern R. Co.* v. *Pouncey*, commented upon above in connection with the leading case of *Birmingham Railway & Electric Co.* v. *Baird*, and of two cases which apply this third form of limitation, one from New York,[36] and the other from Texas,[37] no case can be found which declares that the acts complained of were beyond the carrier's guarantee.[38] However the courts have framed their statement of the contract, it has been stated in such terms as to include beyond all question the acts before them, and in illustrating the sort of acts to which the guarantee does not extend, they have generally taken the case of a conductor leaving his car to assault a personal enemy whom he sees passing in the street.

That the kind of service rendered to the carrier by the tort-feasor does not affect the carrier's liability is shown by the fact that the carrier has been held responsible for the acts of mates,[39] pursers,[40] stewards,[41], conductors,[42] brakemen,[43] auditors,[44] motormen,[45] baggagemasters,[46] ticket-agents,[47] depot porters,[48] and gate-

[35] 90 N. Y. 588, 43 Am. Rep. 185 (1882).

[36] Mulligan v. N. Y. & R. B. R. Co. (1892), 129 N. Y. 506, 29 N. E. 952, 26 Am. St. Rep. 539, 14 L. R. A. 791.

[37] Houston & Texas Central R. Co. v. Bush (1911), 104 Tex. 26, 133 S. W. 245, 32 L. R. A. (N. S.) 1201.

[38] This statement is made without consideration of those cases which entirely neglect the contract theory.

[39] Sherley v. Billings, (1871), 71 Ky. 147, 8 Am. Rep. 451.

[40] Pendleton v. Kinsley (1870), 3 Cliff. (Fed.) 416.

[41] Bryant v. Rich (1870), 106 Mass. 180, 8 Am. Rep. 311.

[42] Birmingham Railway & Electric Co. v. Baird (1901), 130 Ala. 334, 30 So. 456, 89 Am. St. Rep. 43, 54 L. R. A. 752.

[43] Goddard v. Grand Trunk Ry. (1869), 57 Me. 202, 2 Am. Rep. 39.

[44] Moore v. Louisiana, Arkansas Ry. Co. (1911), 99 Ark. 233, 137 S. W. 826, 34 L. R. A. (N. S.) 299.

[45] Knoxville Traction Co. v. Lane (1899), 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 549.

[46] S., F. & W. Ry. Co. v. Quo (1897), 103 Ga. 125, 29 S. E. 607, 68 Am. St. Rep. 85, 40 L. R. A. 483.

[47] Missouri Pacific Ry. v. Divinney (1903), 66 Kas. 776, 69 Pac. 351, 71 Pac. 855.

[48] Gasway v. A. & W. Ry. Co. (1877), 58 Ga. 216.

keepers.[49] Wherever the tort-feasor is engaged in some sort of service the carrier may be liable. He need not even be employed directly by the carrier, for it has been held and never denied that the carrier's guarantee extends to the acts of the employes of sleeping-car companies. Thus in *Thorpe* v. *N. Y. C. & H. R. R. R. Co.*,[50] the railroad was held liable for the wrongful ejection of a passenger from a Wagner drawing-room car by a porter employed by the Wagner company. The defendant relied upon the absence of any master and servant relation for its defense, but the court said that such defense was not available to it, or that the persons in charge of the drawing-room car were to be regarded and treated, in respect of their dealings with passengers, as the servants of the defendant. "The railroads," the court said later, "should be charged with and responsible for the management of the train, and * * * all persons employed thereon should, as to the passengers, be deemed to be servants of the corporation." Although the court rejected the defendant's contention upon alternative grounds, the case is generally cited for the doctrine of the latter alternative, that the servants of the sleeping-car company are in contemplation of the law the servants of the carrier.[51]

It is to be noted that this decision was announced three years before the contract theory of liability was definitely accepted in New York in the leading case of *Stewart* v. *Brooklyn & Crosstown R. R. Co.*[52] The carrier's liability for the acts of the servants of independent contractors was placed more firmly on a contractual theory in *Barrow S. S. Co.* v. *Kane*,[53] where a passenger on the appellant's boat was assaulted by the employe of a tug line, which carried the appellant's passengers from the docks to the appellant's steamers. The court said of the appellant's undertaking, "His obligation to transport the passenger safely cannot be shifted from himself by delegation to an independent contractor; and it extends to all the

[49] Indianapolis Union Ry. Co. v. Cooper (1893), 6 Ind. App. 202, 33 N. E. 219.

[50] 76 N. Y 402, 32 Am. Rep. 325 (1879).

[51] Dwinelle v. N. Y. C. & H. R. R. R. Co. (1890), 120 N. Y. 117, 24 N. E. 319, 17 Am. St. Rep. 611, 8 L. R. A. 224; Pennsylvania R. Co. v. Roy (1880), 102 U. S. 451; Williams v. Pullman Palace Car Co. (1888), 40 La. Ann. 417, 4 So. 85, 8 Am. St. Rep. 538. In this last case the plaintiff, a passenger in an ordinary coach, entered the Pullman car without a special ticket and with no intention of purchasing one, and was wantonly assaulted by the porter. The passenger recovered from the railroad, the court relying upon the implied undertaking of the carrier for the good treatment of its passengers, notwithstanding the Pullman company had previously been exonerated from liability because the act was beyond the scope of the porter's employment, and because there was no special contractual relation between the passenger and the Pullman Company. Williams v. Pullman Palace Car Co. (1888), 40 La. Ann. 87, 8 Am. St. Rep. 512.

[52] 90 N. Y. 588, 43 Am. Rep. 185 (1882).

[53] 88 Fed, 197, 31 C. C. A. 452 (1898).

agencies employed, and includes the duty of protecting the passenger from any injury caused by the act of any subordinate or third person engaged in any part of the service required by the contract of transportation."[54]

From the very nature of the railroad business an instance would be rare when an employe would be found on board a train and "off duty," as that expression is commonly understood.[55] The nearest we can approach such a situation on a railroad is the case where the employe is not at the time of the act engaged in any active duty incident to his employment. In several such cases the railroad has been held liable to the injured passenger. Thus in *Missouri Pacific Ry. Co.* v. *Divinney*,[56] the court held that the carrier was bound to protect the passenger from an assault made by a ticket agent even though the jury had returned a special finding that at the time of the assault the agent was not engaged in the performance of any duty imposed upon him by virtue of his employment. In an unusual case that arose in Missouri, the railroad was held liable for the wanton act of a switch brakeman whose sole duties were to assist in the shifting and switching of freight cars in the depot yards, but who was riding between stations in the caboose of a mixed freight and passenger train.[57] Certainly he was as much "off duty" as could be imagined, yet the court, mindful of the loose sense in which the term "scope of employment" is used in carrier-passenger cases, sustained a verdict for a passenger which was based on the *respondeat superior* theory.

Situations where an employe would be off duty and still so placed by the carrier that he might move about among the passengers would not be so uncommon on shipboard. Thus a first cabin passenger upon an Alaskan steamer was assaulted by a steerage waiter who was not in his proper place, but was in the first-class smoking room.[58] The court held that the carrier owed the passenger a duty of absolute protection from the assaults of its servants, and the carrier could not plead as a defense that the servant acted outside the scope of his

[54] It has also been held that a railroad is liable to its passenger for the act of a servant of another railroad which uses its tracks or station. Illinois Central R. Co. v. Barron (1866), 5 Wall. 90. But see Stoddard v. N. Y., N. H. & H. R. Co. (1902), 181 Mass. 422, 63 N. E. 927.

[55] In Clancy v. Barker (1904), 71 Neb. 83, 98 N. W. 440, 69 L. R. A. 642, such a situation arose in a hotel, and the court held the proprietor liable. The point principally discussed was the applicability to an innkeeper of the carrier's liability, which was assumed to cover the case. This applicability was denied in Clancy v. Barker (1904), 131 Fed. 161, 66 C. C. A. 469, 69 L. R. A. 653.

[56] 69 Pac. 351, 66 Kas. 776, 71 Pac. 855 (1903).

[57] Ephland v. Missouri Pacific R. Co. (1897), 137 Mo. 187, 37 S. W. 820, 38 S. W. 926, 59 Am. St. Rep. 498.

[58] Marks v. Alaska S. S. Co. (1912), 71 Wash. 167, 127 Pac. 1101.

employment. A similar case happened upon a transatlantic liner when a day porter forced his way at night into the plaintiff's cabin and there committed an assault upon her.[59] A judgment for the plaintiff was affirmed, the court holding that an instruction was more than sufficiently favorable to the defendant which expressly charged that the defendant was not an absolute insurer against assaults of this sort, and which pointed out the difference between an assault by an employe when carrying out the orders of his employer and a wanton one, committed when off duty.

The best discussion of the carrier's liability for acts of this sort is in a New York case which held the carrier responsible for a wilful assault by a Pullman porter upon a passenger after the porter had placed the passenger's baggage aboard a connecting train, and while the porter was returning to his own car.[60] In answer to the defendant's objection that the porter had performed all the duties which he, as servant of the defendant, owed to the plaintiff, the court said, "It signifies but little or nothing whether the servant had or had not completed the temporary or particular service he was performing or had completed the performance of it when the blow was struck. That blow was given by a servant of the defendant while the defendant was performing its contract to carry safely and to protect the person of the plaintiff, and was a violation of such contract."

The situation when the servant whose acts are complained of is not employed to assist in the performance of the plaintiff's contract of transportation is less uncommon, and has already developed a difference of opinion in the courts which have passed upon the question. The first case occurred in New York in 1892, and was an action for an arrest procured at the instance of the ticket agent while the plaintiff was waiting at the defendant's station.[61] The court held (EARL and FINCH, JJ., dissenting), that the defendant was not liable. After holding that there could be no recovery as for an act within the scope of the agent's employment, the court refused to apply the contractual theory because of the insufficiency of the plaintiff's showing. It did not appear, the court said, that the ticket agent had any control over the plaintiff or had charge of the station premises, nor was it shown that he was engaged in the transportation of the plaintiff. The dissenting judges relied upon the contractual

[59] Compagnie Generale Transatlantique v. Rivers (1914), 211 Fed. 294.

[60] Dwinelle v. N. Y. C. & H. R. R. R. Co. (1890), 120 N. Y. 117, 24 N. E. 319, 17 Am. St. Rep. 611, 8 L. R. A. 224.

[61] Mulligan v. N. Y. & R. B. R. Co., 129 N. Y. 506, 29 N. E. 952, 26 Am. St. Rep. 539, 14 L. R. A. 791.

theory as announced in *Stewart* v. *B. & C. T. R. R. Co.*[62] Later in the same year a carrier was held liable for an arrest procured at a station by a ticket agent on the ground that the act was within the scope of the agent's authority.[63] The authority of the *Mulligan* case as a limitation on the carrier's contract, is therefore, of doubtful value.

The second of these three cases was *Hayne* v. *Union Street Ry. Co.*,[64] decided in Massachusetts in 1905. The plaintiff, a passenger on one of the defendant's cars, was injured by a dead hen which was thrown in sport at the motorman of the car by the motorman of another car operated by the defendant. After holding that for such acts committed by the motorman of the car in which the passenger was riding the carrier is liable as an insurer, Chief Justice KNOWLTON, speaking for the court, said, "We are of opinion that the liability of the defendant is the same as if the conductor who threw the hen had been in charge of the plaintiff's car. The rule of liability in such cases is made absolute. * * * If one of the reasons for the liability is that the servant, through his relation to his master, owes a duty to protect the passenger from injuries by others, and *a fortiori* from injuries by himself, this duty, so far as it relates to the last branch of the obligation, is not confined to servants the nature of whose service requires them to give personal attention to the passenger in reference to possible injuries from others, but it includes those employed in the general business of transportation, and involves a duty to refrain from doing injury to any of the master's passengers, whether in the special charge of the servant or not. It would be too strict and narrow a rule to hold that this liability of the master extends only to injuries by servants especially charged with the duty of protecting passengers from injury."

The third case was decided in Texas in 1911,[65] and the court came to exactly the opposite conclusion from that reached by the Supreme Court of Massachusetts in the *Hayne* case. The injury here was inflicted by the baggagemaster at a way station, who saw the plaintiff seated in a train which had come into the station, and who climbed aboard and viciously assaulted the plaintiff. The court referred to the *Hayne* case, but declined to agree that the liability extended to those servants of the carrier who had no duties to perform

[62] 90 N. Y. 588, 43 Am. Rep. 185 (1882).

[63] Palmer v. Manhattan Ry. Co. (1892), 133 N. Y. 261, 30 N. E. 1001, 28 Am. St. Rep. 632, 16 L. R. A. 136.

[64] 189 Mass. 551, 76 N. E. 219, 109 Am. St. Rep. 655, 3 L. R. A. (N. S.) 605.

[65] Houston & Texas Centrai R. R. Co. v. Bush (1911), 104 Tex. 26, 133 S. W. 245, 32 L. R. A. (N. S.) 1201, reversing 123 S. W. 201.

in the execution of the passenger's contract of transportation. It said that in all other cases the servant for whose acts the carrier was held liable had been employed about the particular premises or conveyance used in performing the obligations of the carrier to the particular passenger, or had been charged with rendering some one or more of the services the aggregate of which was to constitute the execution of the contract of carriage. The court said in part, "Since the contract of carriage includes the obligation to carry safely, the carrier breaks it if he makes the carriage unsafe by assaulting the passenger. The same result follows from like acts of one who stands in the carrier's place, charged with the performance of his duty, and thus, and not otherwise, servants in whose care the carrier has left the passenger may commit a breach of the contract. Certainly it will not be contended that a stranger to a contract can break it. Can it be said with greater force that a servant, or agent, who has no part either in the making or the carrying of it out, can break it? If not, how is the conduct of an employe to constitute a breach of the obligation assumed by the employer except upon the theory of authority delegated by the latter, and how can the delegation be sufficient unless it charge the employe with the duty which forbids the act? There is such a delegation to all those to whom the carrier has entrusted the execution, in whole or in part, of his contract with the passenger, because either an omission or an act of theirs which is inconsistent with his obligations is a breach thereof."

The decision in the Texas case was reached by an argument of sheer logic. It does not, however, seem entirely sound logic. The contract of the carrier is for more than mere transportation, and includes an obligation for good treatment. This auxiliary contract may, upon a perfectly logical basis, be performed by persons who have nothing whatever to do with the contract of actual transportation. If the baggagemaster at a way station is charged with the rendering of any service in the auxiliary contract for good treatment, for the breach of which the plaintiff is suing, the logic of the decision itself would require that a breach of such contract by him should be a breach by the carrier. The two cases in which it was held that the carriers were liable for the acts of sleeping car employes, committed upon persons whose contracts called for no services whatever from the sleeping car companies, are in point.[66]

[66] Thorpe v. N. Y. C. & H. R. R. R. Co. (1879), 76 N. Y. 402, 32 Am. Rep. 325; Williams v. Pullman Palace Car Co. (1888), 40 La. Ann. 417, 4 So. 85, 8 Am. St. Rep. 538.

Wherever the court's own logic would lead us, we cannot regard the decision in this case as a satisfactory holding that the act complained of is not such an act as the carrier warrants against, because of the entirely erroneous method by which the decision is reached. The Massachusetts court measured and defined the implied contract by its conception of the public policy which had formed the contract. It may have erred in the result it reached, but the error, if any, was not in its method of attack. A duty implied by law should be measured by those considerations which have caused the duty to be so implied. Therefore the extent of the carrier's liability can be determined only by examining those causes which have produced the liability in its rough and unhewn state.

The policy of our law has always been to encourage trade and travel, and the free intercourse of the people among themselves. Persons must not be deterred from going upon journeys for fear of harm befalling them. Thus the railroad must use the highest degree of care in the management of the dangerous instrumentalities which it employs. And the public is not to distrust the carrier's employes. In the ordinary walks of life one can select one's companions and one's business associates. Not so when one travels, for often there is but one way to go, and the law will hear no argument that one need not travel. It is against these strange persons that the law undertakes to protect the public by imposing extraordinary duties upon the carrier. Thus the carrier must protect the passenger from the wrongful acts of fellow passengers and strangers which might, by the exercise of reasonable care, have been anticipated and prevented. But the passenger must also meet and deal with the ticket-agent, the baggage-master, the conductor and the brakeman, and for their conduct the carrier is liable as an insurer, not because their acts are its acts, but because it has placed them where their every act affects the personal comfort and personal safety of its passengers. Upon principle the guarantee should extend to all such persons with whom the carrier has surrounded the passenger, to all those whom the carrier has voluntarily permitted, for reasons satisfactory to himself, to occupy a place which would naturally and ordinarily allow them to come into personal contact with the particular passenger.

The language used in several recent Arkansas cases accords with this conclusion. It had been held in *St. Louis, I. M. & S. Ry. Co.* v. *Dowgiallo,*[67] that the carrier's guarantee extended to the acts of a

[67] 82 Ark. 289, 101 S. W. 412 (1907).

brakeman, "whose duty it is to go through the train, with opportunities to come into personal contact with passengers." This doctrine was expressed in more general terms in *Moore* v. *Louisiana & Arkansas Ry Co.*,[68] which was an action brought for a wrongful arrest by the auditor on a train. The court said, "The carrier is so responsible for such conduct upon the part of any servant, whether in charge of the train or not, the performance of whose duties relate to the comfort or safety of the passengers and furnish opportunity or require him to come in personal contact with them." And in *St. Louis, I. M. & S. Ry. Co.* v. *Tukey*,[69] an action for an arrest by a brakeman, it was said, "The railroad is an insurer of the safety of the passengers against intentional ill treatment from its servants and agents, whose duties relate to the comfort and safety of its passengers and require them to come in contact with the passengers." This language cannot be regarded as mere *dicta* and unnecessary in the decisions of the cases, for it expresses the only sound basis upon which the extraordinary liability can be predicated.

There is a peculiar type of case which must be examined and distinguished if this position is to be sustained. It has repeatedly been held that where the servant committing the wrong is also a municipal or state police officer, the carrier is liable only if the act is done as its servant.[70] The situation is not without difficulty, and the solution seems sound on principle. Certainly a carrier is not bound to protect its passengers from acts of known officers of the law.[71] It may rightfully assume that such acts are fully authorized and warranted. The railroad is not to be the twentieth century sanctuary.[72] Likewise if the law imposes special police duties upon the carrier's servants, the carrier should not guarantee that the performance of those duties will cause no injury to the passengers. The public has clothed these servants with extraordinary powers, and the public, not the carrier, should answer for the consequences. On the other hand, the carrier should not be relieved from liability for all the acts of such servants. If the wrong is committed by one who is

[68] 99 Ark. 233, 137 S. W. 826, 34 L. R. A. (N. S.) 299 (1911).

[69] — Ark. —, 175 S. W. 403 (1915).

[70] Foster v. Grand Rapids Ry. Co. (1905), 140 Mich. 689, 104 N. W. 380; McKain v. B. & O. R. Co. (1909), 65 W. Va. 233, 64 S. E. 18, 131 Am. St. Rep. 964, 17 Ann. Cas. 634, 23 L. R. A. (N. S.) 289. The question is generally one of fact for the jury. Tolchester Beach Co. v. Scharnagle (1907), 105 Md. 199, 65 Atl. 916; Layne v. C. & O. Ry. Co. (1910), 66 W. Va. 607, 67 S. E. 1103.

[71] N., C. & St. L. Ry. Co. v. Crosby (1913), 183 Ala. 237, 62 So. 889; Mayfield v. St. Louis, etc. Ry. Co. (1910), 97 Ark. 24, 133 S. W. 168, 32 L. R. A. (N. S.) 525; B. & W. R. Co. v. Ponder (1903), 117 Ga. 63, 43 S. E. 430, 97 Am. St. Rep. 152, 60 L. R. A. 713.

[72] Owens v. W. & W. R. R. Co. (1900), 126 N. C. 139, 35 S. E. 259, 78 Am. St. Rep. 642.

acting as a servant and because he is a servant, the carrier should be liable, but otherwise it should not. Since railroad employes are quite generally given police powers of some sort, the fact that the point is raised in relatively so few of the cases would indicate that the existence of the authority is ordinarily negligible.

This discussion should not properly close without a suggestion as to the applicability of this contractual liability to other public service companies. The doctrine has largely grown up in cases involving the relation of carrier and passenger, but if the same principles are found elsewhere we should not hesitate to carry the doctrine into these analogous fields. In *Clancy* v. *Barker*,[73] an innkeeper case, the court declined to apply the carrier's contractual liability because the instruments used in the innkeeper's service were not as dangerous and did not require the same surrender of control of the patron's person to the servants in charge as those used in the business of transportation. This argument does not touch the real principle underlying the carrier's contract which we have tried to bring out, and completely disregards the numerous cases where the liability as insurer has been imposed upon the carrier for acts done in and about the station premises.[74] The language used by the Court of Appeals of Georgia with regard to a telegraph company recognizes the true ground of the liability: "They are under obligations to extend their facilities to all persons, on equal terms. * * * From this principle, universally recognized, springs the corollary that all such persons, natural and artificial, shall afford to such members of the public as have occasion to transact with them business of the nature they have been holding themselves out as being accustomed to do safe and decent access to the places opened up for the transaction of the business in question. * * * A member of the public is not to

[73] 131 Fed. 161, 66 C. C. A. 469, 69 L. R. A. 653 (1904).

[74] McGeehee v. McCarley (1899), 91 Fed. 462 (1900), 103 Fed. 55; Southern Ry. v. Hanby (1913), 183 Ala. 255, 62 So. 871; Huddleston v. St. Louis, etc. Ry. Co. (1909), 90 Ark. 378, 119 S. W. 280; St. Louis, etc. Ry. Co. v. Shaw (1910), 94 Ark. 15, 125 S. W. 654; Gasway v. A. & W. R. Co. (1877), 58 Ga. 216; Indianapolis Union Ry. Co. v. Cooper (1893), 6 Ind. App. 202, 33 N. E. 219; Missouri Pacific Ry. Co. v. Divinney (1902), 69 Pac. 351, 66 Kas. 776, 71 Pac. 855; P., B. & W. R. Co. v. Green (1909), 110 Md. 32; Kuhlen v. Boston & Northern St. Ry. (1907), 193 Mass. 341, 7 L. R. A. (N. S.) 729; Shaw v. C. & G. T. R. Co. (1900), 123 Mich. 629; Bledsoe v. Receivers of St. L. & S. F. R. Co. (1914), 186 Mo. App. 460, 171 S. W. 622; Exton v. Central R. Co. (1899), 62 N. J. Law, 7, 42 Atl. 486, 56 L. R. A. 508; Kennedy v. Pennsylvania R. R. Co. (1907), 32 Pa. Super. Ct. 623; Neville v. Southern Ry. Co. (1912), 126 Tenn. 96, 146 S. W. 846, 40 L. R. A. (N. S.) 995; Houston & Texas Central R. Co. v. Phillio (1902), 96 Tex. 18, 69 S. W. 994, 97 Am. St. Rep. 868, 59 L. R. A. 392; Krantz v. Rio Grande Western Ry. Co. (1895), 12 Utah, 104, 41 Pac. 717, 30 L. R. A. 297; Layne v. C. & O. Ry. Co. (1910), 66 W. Va. 607, 67 S. E. 1103; Fick v. C. & N. W. Ry. Co. (1887), 68 Wis. 469, 32 N. W. 527, 60 Am. Rep. 878.

be deterred from transacting or offering to transact the business which the law compels the telegraph company to accept impartially from every person by reason of the fact that he cannot enter the public office without being subjected to insult or personal affront."[75]

RENVILLE WHEAT.

University of Michigan Law School.

[75] Dunn v. W. U. Tel. Co. (1907), 2 Ga. App. 845, 59 S. E. 189. See also Clancy v. Barker (1904), 71 Neb. 83, 98 N. W. 440, 69 L. R. A. 642; DeWolf v. Ford (1908), 193 N. Y. 397, 86 N. E. 527; Reichberger v. American Express Co. (1896), 73 Miss. 161, 18 So. 922, 55 Am. St. Rep. 522, 31 L. R. A. 390; Pullman Palace Car Co. v. Lawrence (1897), 74 Miss. 782, 22 So. 53; Gassenheimer v. Western Ry. of Alabama (1912), 175 Ala. 319, 57 So. 718, 40 L. R. A. (N. S.) 998; Nesbitt v. C., R. I. & P. R. Co. (1913), 163 Ia. 39, 143 N. W. 1114; Daniel v. Petersburg R. Co. (1895), 117 N. C. 592, 23 S. E. 327, 4 L. R. A. (N. S.) 485; contra, Bowen v. Illinois Central R. Co. (1905), 136 Fed. 306, 69 C. C. A. 444, 70 L. R. A. 915.