*464] *WILLIAM D. NUTT, EXECUTOR OF ALEXANDER HUNTER, DECEASED, PLAINTIFF IN ERROR, *v.* PHILIP H. MINOR.

Where the marshal of the District of Columbia engaged the services of a clerk for a stipulated sum per annum, and the service continued without any new agreement, and the jury were instructed that they might imply a new agreement to pay the clerk at a different rate, this instruction was erroneous. There was nothing in the evidence from which the jury could imply such new agreement.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington.

The facts are stated in the opinion of the court.

It was argued by *Mr. Bradley* and *Mr. Davis*, for the plaintiff in error, and by *Mr. Lawrence*, with whom was *Mr. Carlisle*, for the defendant in error.

Mr. Justice CATRON delivered the opinion of the court.

Alexander Hunter was appointed marshal of the District of Columbia in 1834, and continued to fill that office by reappointments, until June, 1848, at which time he died. Shortly after he entered on the duties of his office, in 1834, he appointed Daniel Minor his deputy for the county of Alexandria, where a separate court was held and jurisdiction exercised; and for that county Daniel Minor was practically marshal.

Philip H. Minor, the plaintiff below, was the brother of Daniel Minor, who, being desirous to obtain the office of clerk to the marshal for Philip H., applied to Hunter for this purpose, and advised him to employ Philip H. as his clerk, and Hunter agreed to do so; Daniel and Philip came up from Alexandria to Washington, and, in the marshal's room, a conversation took place between Philip H. Minor, Hunter the marshal, and Daniel Minor the deputy. Hunter proposed to give, as salary for the service, two hundred dollars per annum, and that Daniel Minor as deputy for Alexandria county, should give one hundred dollars, making the salary three hundred dollars. Daniel Minor insisted that the salary should be larger; Hunter replied, that he was just in office and did not know what the profits would be, nor what the value of the duties to be discharged by the clerk would be; and that he did not feel justified in giving a larger salary. Daniel Minor then offered, that if Hunter would pay two hundred and fifty

dollars, he would pay one hundred and fifty towards the salary, which was agreed to by Hunter and Daniel Minor on the one part, and by Philip H. Minor on the other.

Daniel Minor, who was the principal witness, testified to the *foregoing facts for the plaintiff below, on the trial; and further deposed, that he took his brother Philip [*465 aside and conversed with him out of the hearing of Hunter, and advised him to take the offer for a year, small as it was; and accordingly Philip H. assented; that nothing was said about a continuance of the agreement after the first year.

Daniel Minor further deposed, that he told his brother Philip, in the foregoing conversation, "that the substance of the matter was an agreement confined to one year, and that the compensation would be afterwards made adequate to the services, and the value of the office; and that this was urged upon Philip as an inducement to agree to the engagement for the year; but that Hunter did not authorize the witness Daniel Minor, to promise Philip H. that he would be engaged after the first year at a higher compensation."

Daniel Minor also deposed, that he suggested to Hunter during the first year's service, that the salary of Philip H. should be increased, but Hunter declined doing so. The agreement was precise: Hunter was to pay 250 dollars, and Daniel Minor 150 dollars, as clerk hire, per annum; nor was the contract limited to one year, so far as Hunter entered into it; it was general, at the rate stipulated, for any length of time that Hunter might remain in office, or that Philip H. Minor might see proper to serve, and Hunter and Daniel Minor see proper to retain him as clerk. It is most obvious that the court and jury held Hunter bound by what Daniel Minor promised in the absence of Hunter, and without his knowledge, and contrary to his consent. There is an entire absence of proof, that Hunter ever assented, by word or act, to raise the salary of Philip H. Minor as clerk; nor does it appear that the latter at any time applied to Hunter in person, and insisted, or even suggested that his salary should be increased, until February, 1847, when the letter offered in evidence was written; on the contrary, he received the salary of 400 dollars, as at first stipulated, for fourteen years, regularly crediting himself with it on the marshal's books, each year.

If we reject Daniel Minor's evidence as incompetent to bind Hunter, so far as he used persuasions in Hunter's absence to induce Philip H. Minor to hope, and probably believe, that Hunter would raise his salary, then the case, as proved by the plaintiff below, rests alone on the special agreement made in 1834; and we think it must be stripped of all these con-

versations between Daniel Minor and his brother, to which Hunter never assented.

Nutt was sued as Hunter's executor, for work and labor, care and diligence, done and performed by Minor in and about the business of Hunter in his lifetime, and at his special instance and request. And also for sundry matters and things
*466] properly *chargeable in an account therewith filed; and on these allegations of a *quantum meruit*, Hunter's estate was charged for 400 dollars per annum, in addition to the 400 dollars annually paid on the special agreement, running through the whole time of Minor's service; and a verdict was had, and a judgment rendered for five thousand and fifty-five dollars and seventy-three cents, against the estate, which was held responsible, regardless of the fact that Daniel Minor was bound to pay one hundred and fifty dollars of the four hundred, from April, 1834, to June, 1847, when Alexandria county was retroceded to Virginia by Congress.

On this state of facts, the court was asked to instruct the jury (among other things) that "if from the whole evidence aforesaid, the jury shall find that in April, 1834, the plaintiff entered into the employment of the deceased to serve him as clerk at a salary of 400 dollars for a single year, and thereafter continued to serve the said Hunter as clerk aforesaid, during the whole time mentioned in said account and declaration, and that no new agreement was made between the said plaintiff and said Hunter, for a compensation different from that which was as aforesaid first agreed upon between them; and if they shall further find that said Hunter in his lifetime fully paid said plaintiff for his said services, at the rate aforesaid, then the plaintiff is not entitled to recover in this action; which instruction the court refused to give as prayed, but did modify the same by inserting the words "express or implied" between the words "agreement" and "was made."

By thus modifying the instruction, the court told the jury, in substance, that they might find on the allegation of a *quantum meruit*, for work and labor done, and for services performed, and hold that an agreement to pay on Hunter's part, might be "implied," because of the performance of the services; and, that a verdict might be found equal to the value of such services, according to the proof, deducting therefrom the amount already paid on the special agreement; and that such agreement did not preclude the plaintiff below from recovering additional compensation, to any amount that the jury should think he was entitled to. That the instruction as given did reject the special agreement, and leave the jury free to imply a new promise arising on the *quantum meruit*, for

labor and services, is manifest; and, therefore, we are of opinion, that the instruction as propounded, ought to have been given without an addition of the words "express or implied," as inserted by the Circuit Court.

The letter, offered in evidence, was a plain attempt on the part of the plaintiff to make evidence for himself. It could only be offered for the purpose of showing that Hunter was thereby notified of Minor's unwillingness to act as clerk after the notice, *unless his compensation was increased, and that he would quit unless there was an increase; or [*467 as evidence to be taken in connection with other subsequent proof, showing that Hunter assented to the propositions contained in the letter. But as Hunter not only refused to sanction the demand set up, but indignantly resisted, and resented it, the letter could be of no value to establish a new promise; nor can it be of any value as notice that additional compensation would be claimed for services rendered thereafter, because the plaintiff, with full knowledge of Hunter's determined rejection of the claim, continued to perform his duties as clerk, and to receive his salary of 400 dollars as usual, and thereby submitted to Hunter's assumption that the salary was governed by the special agreement made in 1834. We are of opinion that this letter should have been objected to as evidence, and the party offering it compelled by the court to state for what purpose it was offered; so that it might have been inspected and passed on by the court, without being read to the jury. As, however, this course was not pursued at the trial by the defendant's counsel, and a general objection made to reading the letter for any purpose, we do not think the court erred in admitting the evidence in the first instance, although it ought certainly to have been rejected and taken from the jury, after the evidence was closed, had a motion been made to this effect, because it was unsustained by other evidence that Hunter assented to the claim made by the letter. But as no motion was made to withdraw this piece of evidence, the court properly left it with the jury.

We order that the judgment of the Circuit Court be reversed, and that the cause be remanded for another trial.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington, and was argued by counsel. On consideration where-

of, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to award a *venire facias de novo.*

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*468] *THE PHILADELPHIA AND READING RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* ELIAS H. DERBY.

Where a suit was brought against a railroad company, by a person who was injured by a collision, it was correct in the court to instruct the jury, that, if the plaintiff was lawfully on the road, at the time of the collision, and the collision and consequent injury to him were caused by the gross negligence of one of the servants of the defendants, then and there employed on the road, he was entitled to recover, notwithstanding the circumstances, that the plaintiff was a stockholder in the company, riding by invitation of the President, paying no fare, and not in the usual passenger cars.[1]

And also, that the fact that the engineer having the control of the colliding locomotive, was forbidden to run on that track at the time, and had acted in disobedience of such orders, was no defence to the action.[2]

A master is liable for the tortious acts of his servant, when done in the course of his employment, although they may be done in disobedience of the master's orders.[3]

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[1] The law imposes on a common carrier of passengers the utmost human care and foresight, and makes him responsible in damages for the slightest neglect. *Johnson* v. *Winona &c. R. R. Co.*, 11 Minn., 296; *Maury* v. *Talmadge*, 2 McLean, 157; *Wheaton* v. *North Beach &c. R. R. Co.*, 36 Cal., 590; *Hall* v. *Steamboat Co.*, 13 Conn., 319; *Derwort* v. *Loomer*, 21 Id., 245; *Frink* v. *Coe*, 4 Greene (Iowa), 555; *Edwards* v. *Lord*, 49 Me., 279; *Brockway* v. *Lascala*, 1 Edm. (N. Y.) Sel. Cas., 135; *Caldwell* v. *Murphy*, 1 Duer (N. Y.), 233; *Weed* v. *Panama R. R. Co.*, 5 Id., 193; *Frink* v. *Potter*, 17 Ill., 406; *Maverick* v. *Eighth Ave. R. R. Co.*, 36 N. Y., 378.

As to the right of a railroad company to limit its common law liability for negligence in respect to injuries to passengers carried on free passes, see *Railway Co.* v. *Stevens*, 5 Otto, 658; *Railroad Co.* v. *Lockwood*, 17 Wall., 357; *Cleveland &c. R. R. Co.* v. *Curran*, 19 Ohio St., 1; *Kinney* v. *Central R. R. Co.*, 5 Vr. (N. J.), 513; *Elliott* v. *Western &c. R. R. Co.*, 58 Ga., 454; *Toledo &c. R'y Co.* v. *Beggs*, 85 Ill., 80; *Graham* v. *Pacific R. R. Co.*, 66 Mo., 536; *Lemon* v. *Chanslor*, 68 Mo., 340.

In New York a carrier of passengers may, by positive stipulation, relieve himself to a limited degree from the consequences of his own negligence or that of his servants. But, to accomplish this object, the contract must be clear and specific in its terms, and plainly covering such a case. *Smith* v. *New York &c. R. R. Co.*, 29 Barb. (N. Y.), 132. S. P. *Bissell* v. *New York &c. R. R. Co.*, 25 N. Y., 442. That this rule will not, in that State, be considered as overthrown or affected by the decision in *Lockwood* v. *Railroad Co.*, *supra*, see *Mynard* v. *Syracuse &c. R. R. Co.*, 71 N. Y., 180.

[2] CITED. *Bacon* v. *Robertson*, 18 How., 486; *Philadelphia &c. R. R. Co.* v. *Quigley*, 21 Id., 210.

[3] DISTINGUISHED. *Savings Bank* v. *Ward*, 10 Otto, 203. S. P. *Railroad Co.* v. *Hanning*, 15 Wall., 649; *Cohen* v. *Dry Dock &c. R. R. Co.*, 69 N. Y., 170; *Mott* v. *Consumers' Ice Co.*, 73 Id., 543, 547; *Pendleton* v. *Kinsley*, 3 Cliff., 416. See, also, the following