

TRAVELLING BY RAIL.

But where it has been agreed that, in consideration of a free pass, the passenger shall travel at his own risk, such agreement will be held good, and will be taken to exclude all liability on the part of the company for any negligence—even though gross or wilful,—for which they would otherwise have been liable. Of course, it would be different were an action brought for an independent wrong, such as an assault or false imprisonment: nor does such agreement take away any liability that might be incurred as to criminal proceedings: *McCawley v. Furness R. W.*, L. R. 8 Q. B. 57.

So long ago as the days of Sir James Mansfield, it was held in *Christie v. Griggs*, 2 Camp. 79, that there is a difference between a contract to carry goods and a contract to carry passengers. In the former case the carrier is liable for his freight in every event, but he does not warrant the safety of his passengers. His undertaking as to them goes no further than this, that as far as human care and foresight can go, he will provide for their safe conveyance. So if the breaking of a coach is purely accidental, the plaintiff will have no remedy for the misfortune he has encountered. The contract made by a general carrier of passengers is to take due care (including in that term the use of skill and foresight), to carry his living freight safely: and it does not amount to a warranty that the carriage in which he travels shall be in all respects perfect for its purpose, *i.e.*, free from all defects likely to cause peril, although those defects were such that no skill, care or foresight could have detected their existence: *Readhead v. Midland R. W.*, L. R. 4 Q. B. 379 (Ex. Ch.) also L. R. 2 Q. B. 412, and the cases therein cited. An obligation to use all due and proper care is founded on reasons obvious to all, but to impose on the carrier the burden of a warranty that everything he necessarily uses is absolutely free from de-

fects likely to cause peril, when from the nature of things, defects must exist which no skill can detect, and the effects of which no care or foresight can avert, would be to compel a man by implication of law and not by his own will, to promise the performance of an impossible thing, and would be directly opposed to the maxims of law, "*Lex non cogit ad impossibilia*," "*Nemo tenetur ad impossibilia*." "*Due care*," however, undoubtedly means, (having reference to the nature of the contract to carry,) a high degree of care, and casts on carriers the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order. But the duty to take due and proper care, however widely construed, however rigorously enforced, will not, as the plaintiff Readhead sought to do, subject a railway company to the plain injustice of being compelled by law to make reparation for a disaster arising from a latent defect in the machinery which they are obliged to use, which no human skill or care could have prevented or detected. In this case, the accident was caused by the breaking of the tire of one of the wheels of the carriage, owing to a latent defect in it, which was not attributable to any fault on the part of the manufacturers, nor was it discoverable previously to the breaking. *Grice v. Chester & Holyhead R. W.*, 2 Ex. 251, shows that when a competent person is employed to make the tire of a wheel, for instance, and employs proper materials for the work, the company will not be liable for any damage arising from a defect in the tire which it was impossible to detect, and so prevent the accident. In the Court of Appeal of the State of New York, however, it was held that a warranty was annexed to the contract to carry made by railway companies, *Alden v. New York Central R. W.*, 12 Smith 102: but the American cases on this